

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

CRIMINAL APPEAL NO. 412 OF 2012

Vithal Kondiba Padghane,
age 39 years, occ. Labour,
R/o Koli, Tq. Hadgaon,
District Nanded

...Appellant

VERSUS

The State of Maharashtra,
through Police Station Hadgaon,
Tq. Hadgaon, Dist. Nanded

...Respondent

.....
Shri G.G.Kadam, advocate for applicant
Shri A.S.Shinde, A.P.P. for respondent/State
.....

CORAM : A.B.CHAUDHARI & INDIRA K.JAIN, JJ.
DATED : 6th OCTOBER, 2015

JUDGMENT : [Per Indira K.Jain, J.]

This appeal is preferred by the original accused against the judgment and order, dated 11.6.2012, passed by the learned Sessions Judge, Nanded, in Sessions Case No. 160 of 2011. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of the Indian Penal Code and sentenced him to imprisonment for life.

2] For the sake of convenience, we shall refer the appellant in his original status as accused as he was referred before the trial court.

3] The gist of the prosecution case is as under : -

(i) Incident took place on 5.8.2011 between 7.30 p.m. and 8.00 p.m. in the house of accused, situated at Koli, Taluka Hadgaon, District Nanded. Accused was married to Punyarathabai before 19 years of the incident. The couple was blessed with one daughter and two sons. Sons were residing at the house of father of Punyarathabai at village Shivni (Bk.), Taluka Kalamnuri, District Hingoli. Accused, his wife Punyarathabai and daughter were residing together. They were the labourers.

(ii) According to prosecution accused was suspecting infidelity of his wife and on that count he used to illtreat, abuse and threaten to kill her.

(iii) On 5.8.2011 in the evening, accused scolded and beat his wife as she did not serve the cooked vegetable to the son of his brother. Thereafter deceased went to sleep. At about 8.00 p.m. accused

poured kerosene on her person and set her on fire. He fled away on setting his wife ablaze. After some time he came back, wrapped the quilt on the person of his wife and tried to extinguish fire. While extinguishing fire accused sustained burns on his palm. His wife sustained 86 per cent burns.

(iv) Uttam Kadam, maternal uncle of Punyarathabai was residing in the same village. He was informed about the incident. Punyarathabai was initially taken to PHC, Hadgaon and then referred to the Government Hospital, Nanded.

(v) PW7 ASI Sayed Shafiuddin was attached to police chowki at Government Hospital, Nanded. An intimation of admission of burn patient was given to police chowki. PW7 ASI Shafiuddin wrote a letter to Special Judicial Magistrate for recording statement of the patient. Then he himself recorded statement of Punyarathabai between 2.45 a.m. and 3.00 a.m. Before recording the statement, PW7 ASI Shafiuddin inquired from the doctor whether patient was fit to give her statement. After doctor certified her dying declaration was reduced to writing.

(vi) On 6.8.2011 Police Constable Yadav carried the statement to Hadgaon police station. On the basis of statement of Punyarathabai recorded by PW7 ASI Shafiuddin, Crime No. 65 of 2011 came to be registered under Sections 307 and 504 of the Indian Penal Code against the accused.

(vii) PSI Venkatesh Ranvirkar took over the investigation. He visited the spot and recorded spot panchanama. A can containing kerosene, match box and one empty liquor bottle were seized from the spot.

(viii) Accused was arrested on 7.9.2011. As he sustained burns, he was under medical treatment. Map of scene of offence was drawn by Taluka Magistrate. On 10.8.2011 Punyarathabai succumbed to burn injuries at 17.45 hours.

(ix) Inquest panchanama was drawn. The dead body was sent for postmortem. Offence under Section 302 of the Indian Penal Code was substituted for the offence under Section 307 of the Indian Penal Code. During investigation, number of witnesses were examined.

(x) On completion of investigation, charge sheet was filed before the court of Judicial Magistrate, First

Class, Hadgaon, who in turn committed the case for trial to the Court of Sessions.

4] On committal of the case, trial court framed charge against the accused at Exh.5. He pleaded not guilty to the charge and claimed to be tried. Accused submitted written defence vide Exh.33. It is stated by the accused that deceased was hot tempered lady. She was receiving convulsions. Once in heat of anger she threw hot khichadi on the person of their daughter Sujata. They were labourers. As two sons were residing with his father-in-law, deceased was disturbed and she committed suicide in heat of anger by pouring kerosene.

5] To bring home guilt of the accused, prosecution examined in all nine witnesses. After going through the evidence adduced by the prosecution, learned Judge convicted and sentenced the appellant as stated in para 1 above. Hence, this appeal.

6] We have heard the learned counsel for the parties. After giving our anxious consideration to the facts and circumstances of the case, submissions made on behalf of the learned counsel for the appellant and the learned A.P.P. for the State, reasoning recorded by the trial court and evidence on record, for the below mentioned

reasons, we are of the opinion that prosecution could not prove the guilt of accused beyond reasonable doubt and accused ought to have been acquitted.

7] Prosecution case is mainly based on one written dying declaration recorded by PW7 ASI Shafiuddin, two oral dying declarations to PW 4 Shrirang Kerba Paikrao and PW 6 Balaji Shrirang Paikrao, father and brother of the deceased, respectively.

8] Needless to state that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny keeping in view the fact that statement has been made in the absence of accused who had no opportunity of testing the veracity of the statement by cross-examination. It is the settled law that once the court comes to a conclusion that dying declaration was the truthful version as to the circumstances of death and the assailant of victim, no further corroboration is required to such a dying declaration.

9] Keeping in view the settled law on appreciation of evidence relating to dying declaration, we now advert to the evidence of star witness PW 7 ASI Shafiuddin.

10] As mentioned above, on 5.8.2011, this police officer PW7 ASI Shafiuddin, was on duty at Civil Hospital, Nanded. It is stated by PW 7 ASI Shafiuddin that after 12 mid night, Punyarathabai was brought to the hospital. He informed D.M.O. that he had to record the statement of patient. Doctor examined the patient and informed PW 7 ASI Shafiuddin that she was fit and he can record her statement. Accordingly, doctor gave an endorsement. It is further stated by PW 7 ASI Shafiuddin that then he put some preliminary questions to the patient and satisfied himself that she was conscious. Then PW 7 ASI Shafiuddin recorded statement of the injured as per her narration. After writing was concluded, statement was read over to her. She admitted its correctness and affixed her right hand thumb impression on the same. The dying declaration is proved by PW 7 ASI Shafiuddin at Exh.25.

11] To corroborate the evidence of PW 7 ASI Shafiuddin, prosecution has placed reliance on the evidence of PW 9 Dr. Surekha Pawar. She supported the testimony of PW 7 ASI Shafiuddin and stated that patient was conscious and oriented. She also states that dying declaration (Exh.25) was recorded in her presence as per the say of patient.

12] True, there are no material contradictions and omissions in the evidence of PW 7 ASI Shafiuddin and PW 9 Dr. Surekha Pawar, still the question crops up whether dying declaration (Exh.25) can be said to be beyond the pale of controversy and above suspicion. On careful scrutiny of dying declaration (Exh.25), it can be seen that, two mobile numbers are written at the bottom of dying declaration. Below one mobile number, name Vitthal appears and below another mobile, name Babu Bhau appears. Investigating officer PW 8 PSI Ranvirkar has admitted in unequivocal terms in his cross-examination that in view of writing of such mobile numbers on Exh.25 he felt that dying declaration was a suspicious document. No explanation whatsoever is tendered either by the investigating officer PW 8 PSI Ranvirkar or by PW 7 ASI Shafiuddin to clarify as to how said mobile numbers with names appeared at the bottom of dying declaration.

13] Another significant factor, which casts a serious doubt on the reliability of Exh.25 is the suppression of dying declaration recorded by the Special Judicial Magistrate. It is categorically stated by PW 7 ASI Shafiuddin and PW 8 PSI Ranvirkar that letter was written to Special Judicial Magistrate to record dying declaration.

Material admissions elicited in the cross-examination of investigating officer are clearly indicative of the fact that investigating officer did not bother to collect the vital piece of evidence i.e. dying declaration recorded by the Special Judicial Magistrate. He even did not inquire regarding the name of Special Judicial Magistrate who had recorded the dying declaration. It was a serious lapse on the part of investigating officer. Prosecution cannot be allowed to play hide and seek, when life of an individual is in question being involved in an offence under Section 302 of the Indian Penal Code. The suppression of dying declaration recorded by the Special Judicial Magistrate gives rise to a strong suspicion about the truthfulness of dying declaration recorded by PW 7 ASI Shafiuddin. We thus disagree with the finding recorded by the Trial Court and find it risky to affirm the conviction of accused on the basis of dying declaration Exh. 25.

14] So far as oral dying declarations are concerned, prosecution examined PW 4 Shrirang Paikrao, father and PW 6 Balaji Paikrao, brother of the deceased. It is stated by PW 4 Shrirang that on receiving information that his daughter sustained burns, they reached the Government Hospital, Nanded on 6.8.2011 at around 12 in the noon. He stated that Punyarathabai was alive

and she had burn injuries. So he inquired from her and she stated that some quarrel had taken place between herself and her husband and her husband beat her by means of stick on her shoulder and hand. She also stated that her husband poured kerosene on her person and set her on fire. After this disclosure, she was not in a position to talk.

15] PW 6 Balaji also had been to the hospital on receiving information. Deceased told him that cooked vegetable was not served to the children of his sister-in-law and so accused beat her. She stated that at about 8.30 p.m. while she was sleeping, accused poured kerosene on her person and set her on fire using match stick. He then closed the door. He again opened the door and tried to put off the fire by using quilt.

16] Relying upon the testimony of father and brother of Punyarathabai, it was vehemently contended on behalf of the State that there is no reason to disbelieve the consistent evidence of PW 4 Shrirang and PW 6 Balaji. Learned A.P.P. submitted that there are no major contradictions or omissions in the evidence of these two important witnesses and the trial court has rightly placed reliance on

their testimonies.

17] Per contra, learned counsel for the appellant strenuously submitted that both the witnesses are highly interested witnesses, being father and brother of the deceased and as their statements under Section 161 of the Code of Criminal Procedure were recorded after inordinate delay, which has not been explained by the prosecution, the trial court committed an error of law in relying upon their evidence to base a conviction.

18] With the assistance of the learned counsel for the parties, we have perused the evidence of the material witnesses and also the police papers. It can be seen from the police papers that statements of PW 4 Shrirang and PW 6 Balaji came to be recorded on 3.9.2011. Incident, as mentioned above, occurred on 5.8.2011. The investigating officer was put on guard in the cross-examination to explain delay by putting a suggestion that as death was suicidal he delayed the recording of statements. Except bare denial, investigating officer did not bother to explain an inordinate delay of around 28 days. It is not the case of prosecution that the witnesses were not available. On the contrary, evidence of PW 4 Shrirang and

PW 6 Balaji clearly indicates that they were very much available on the next day of incident i.e. on 6.8.2011. This unexplained inordinate delay creates doubt about the reliability of evidence of both the star witnesses on oral dying declarations.

19] There is one more reason to doubt the dying declarations and that pertains to the conduct and behaviour of the deceased. It is admitted by PW 4 Shrirang in cross-examination that his daughter was hot tempered. He also admitted that once due to tension she did bite her tongue. He also admits that he and his wife were trying to pacify their daughter not to enrage on flimsy grounds.

20] If evidence of PW 3 Sakhubai, close relative of the deceased is carefully looked into, it can be seen that deceased was hot tempered. On small reasons she used to loose her temper and receive convulsions. It is stated by PW 3 Sakhubai that before three years deceased took bite to her own tongue and in anger she was beating her elder daughter. She stated that, she heard that once in heat of anger deceased threw hot khichadi on the person of her daughter.

21] The above facts elicited in cross-examination of important prosecution witnesses show demeanour of the deceased. In this background and considering the long standing matrimonial tie between the couple having three children, it is doubtful that the accused would set his wife on fire as stated by the prosecution witnesses PW 4 Shrirang and PW 6 Balaji.

22] Thus, in the totality of the facts and circumstances, we are of the considered opinion that prosecution case suffers from glaring infirmities creating mass of doubts and none of the dying declarations, written or oral, can be relied upon as true and voluntary statement of the deceased. If dying declarations are disbelieved in entirety, conclusion must follow that prosecution has miserably failed to prove guilt of the accused beyond reasonable doubt.

23] In this premise, we find that conviction and sentence of the appellant is unsustainable in law. Accordingly we pass the following order.

ORDER

- (i) Criminal Appeal No. 412 of 2012 is allowed.

(ii) The judgment and order, dated 11.6.2012, passed by the learned Sessions Judge, Nanded, in Sessions Case No. 160 of 2011 convicting the appellant/accused-Vithal Kondiba Padghane, for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life is set aside.

(iii) Appellant-Vithal Kondiba Padghane is acquitted of the charge under Section 302 of the Indian Penal Code.

(iv) Appellant- Vithal Kondiba Padghane is released forthwith, if not required in any other offence.

(v) Fine, if paid, be refunded to the appellant.

[INDIRA K.JAIN, J.]

[A.B.CHAUDHARI, J.]