

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

CRIMINAL APPEAL NO. 275 OF 2014

- 1] Dhruvadabai Shankar Koli,
age 49 years, occ. Household,
R/o Tavkheda, Tq. Shindkheda,
District Dhule,
- 2] Shankar Dajbhau Koli,
age 57 years, occ. Agriculture,
R/o Tavkheda, Tq. Shindkheda,
District Dhule,
- 3] Sarlabai Arjun Koli,
age 29 years, occ. Household,
R/o Fes, Tq. Shahada, Dist. Nandurbar,
- 4] Sunanda Ashok Koli,
age 33 years, occ. household,
R/o Degao, Tq. Shindkheda,
District Dhule,
- 5] Guddi Bapu Koli,
age 22 years, occ. Household,
R/o Bamkheda, Tq. Shahada,
District Nandurbar

...Appellants
[Original Accused 1 to 5]

VERSUS

- 1] The State of Maharashtra,
- 2] Suresh Paulad Koli,
age 50 years, occ. Agriculture,
R/o Shevale, Tq. Shindkheda,
District Dhule

...Respondents

.....
Shri Joydeep Chatterjee, advocate for appellants
Shri S.D.Ghayal, A.P.P. for respondent/State
.....

CORAM : A.V.NIRGUDE & INDIRA K.JAIN, JJ.

DATED : 8th February, 2016

ORAL JUDGMENT [Per A.V.Nirgude, J.]

1] The appeal challenges judgment and order, dated 30.4.2014, passed by the learned Additional Sessions Judge, Dhule, in Sessions Case No. 29 of 2013, in which the appellants were convicted for offence punishable under Section 302 r/w 34 of the Indian Penal Code and were sentenced to suffer life imprisonment and to pay fine with a default clause.

2] The facts that are relevant for the purpose of deciding this appeal are as under.

3] The victim of this murder case was one Bharati wife of Dattu. On 4.12.2012 at about mid day Dattu, husband of Bharati, brought her with 98% burn injuries to Dondaicha Government Hospital. The doctors then shifted Bharati to Civil Hospital, Dhule, where she reached at about 2.45 p.m.

4] Report of the admission of this patient to this Hospital was sent to Dhule City Police Station. Apparently, the report did not mention that the victim was subjected to assault. The report indicated that victim sustained burn injuries while she was cooking on earthen stove. The report also informed the police that victim had sustained 98 per cent burn injuries.

5] Pursuant to this report, the Station Officer , Dhule City Police Station sent two requisitions during the day of 4.12.2012. The first requisition was sent to the Executive Magistrate PW 1-Kailas requesting him to record dying declaration of the victim. The second requisition was an order sent to Police Head Constable PW 7-Khairnar. Both PWs 1 and 7 recorded dying declarations of victim Bharati at 4.00 p.m. onwards. Both these witnesses deposed that they recorded dying declarations as per the victim's version. Both these witnesses stated that the victim informed them that she was set on fire by the appellants/accused.

6] In addition to this, PW 3-Suresh, who happened to be father of victim Bharati, also deposed that on receiving information regarding mishap, he rushed to the Hospital at 1.30 p.m. He asked his daughter as to how she had sustained injuries and that she named the appellants being the culprits.

7] The prosecution case thus mainly depended on PW 1-Kailas Executive Magistrate, PW 7-PHC Khairnar and PW 3-Suresh. The other witnesses are not quite important, and therefore, we will not discuss the evidence which they recorded.

8] There are two documents that have come on record which were used as defence material. They are Exh.30 requisition for dying declaration sent to PW 1-Kailas and Exh.51 direction to PW 7-PHC Khairnar for recording the dying declaration. Both these documents are contemporaneous. Both these documents were written by the Station Officer, whose name appears to be PHC M.M.Kazi. Unfortunately, the writer of these two documents was not examined as

prosecution witness, but the contents thereof would clearly indicate that the Station Officer who was sitting at Police Station received information from the Hospital that the victim was admitted to Hospital in an injured condition and that there was no history of assault. The documents clearly indicate that patient sustained injuries due to accident. This would clearly establish that when the patient was brought to Hospital, the Medical Officer was informed that she sustained injuries in an accident. There is clear mention in these two documents that the victim sustained injuries while she was cooking on earthen stove. The recording of these two documents was admittedly prior in time. Both PW 1-Kailas and PW 7-Khairnar were aware that they were likely to record dying declaration of a victim of an accident. Both of them, however, stated that the victim did not support the theory of accident, but probably for the first time she stated them that she was subjected to assault. Both were asked during cross-examination as to why they did not ask the victim, about the previous history recorded about the incident was of accident. PW 1-Kailas admitted that he did ask the

victim as to whether she sustained injury in an accident and he hastened to add that the answer he received was in negative. The dying declaration, however, does not indicate that a question of that nature was asked and an answer was received.

9] On perusal of dying declarations, it appears to us that details of the incident were not recorded at all. A sketchy account of the incident was jotted down. We get an impression from this document Exh.29 that PW 1-Kailas had undergone a motion of recording a dying declaration. For him probably this was one of the numerous dying declarations he had recorded. A printed questionnaire was used for recording dying declaration. Providing such printed questionnaire for recording dying declaration was certainly counter productive. It prevented the recorder of the dying declaration asking different, additional and rather more probing questions to the victim.

10] Recording of dying declaration is an important part of investigation. It ought to have been done more solemnly and

carefully. When we perused Exh.29 dying declaration, we found that it is cryptically recorded, not even 100 words are utilized. We might assume that the dying declaration recorded by PW 1-Kailas was an essential formality and not part of probing investigation. PW 7-PHC Khairnar, however, was rather more careful while recording dying declaration of the victim. However, as said above, he too did not consider it necessary to clarify the doubt created by documents Exhs. 30 and 51 as to how this was incident of accident and not of an assault. PW 7-Khairnar is a Police Head Constable and is aware that there was history of accident to this incident and yet he made no attempt to bring on record as to why the earlier history was erroneous. This could have been taken from the victim's mouth by asking appropriate questions to her.

11] PW 3-Suresh is not an eye witness. He reached the spot after the incident was over. He did not bring the victim to Hospital. He reached Hospital only after he received information about the incident. As said above, he is the witness

who deposed about oral dying declaration of the victim. He too did not explain as to why the history of the incident was given earlier as that of accident. It appears to us that he has an axe to grind. We also suspect that it is this witness, who, for the first time, started alleging that it was a case of assault and not of an accident. These are admitted facts that this witness and his wife and other relatives of victim were in the Hospital from 2.00 p.m. They were present in the Hospital when dying declarations were recorded between 4.00 p.m. to 4.45 p.m. They admittedly had talk with the victim before the dying declarations were recorded. It is, therefore, possible that this witness tutored the victim.

12] When an incident of this nature occurs at a remote village and when victim alleges assault, it is for the prosecution to remove all doubts into history of incident. In other words, the prosecution must bring on record as to who all were present in and around the place of incident prior to the incident, who all gathered around the victim after she sustained injuries, who

brought her to Hospital using what vehicle, who was the driver of the vehicle, who accompanied the victim to the Hospital, what did the victim say to these companions before she was hospitalized, what did the victim say to the Medical Officer when she was admitted to Hospital and what other information regarding cause of injury is gathered by police at the time of admitting the victim. The police also should then examine the scene of incident to find out as to whether the position supported the prosecution case or otherwise.

13] In this case, the investigating officer has recorded scene of offence panchanama (Exh.31). The details of this panchanama do not indicate that the victim was first caught, overpowered, assaulted and then subjected to pouring of kerosene on her person, etc. Marks of violence are totally absent in this panchanama.

14] The other relevant circumstance for the prosecution case was the victim's husband's deposition. Admittedly, it was

he who brought her to Hospital. He is not an accused and yet his deposition was not recorded. The prosecution in this case apparently made purposeful attempt not to bring on record circumstances that could have been helpful to the defence of the accused. In absence of relevant circumstances the prosecution tried to depend only on the dying declarations. We are not inclined to place reliance on the dying declarations mainly because the prosecution has purposely avoided to bring on record other circumstances and facts that had occurred before recording of the dying declarations. The circumstances discussed above would clearly indicate that the theory of assault was invented rather belatedly, and therefore, the same should be rejected.

15] In the result, following order is passed.

ORDER

[i] Criminal Appeal No. 275 of 2014 is allowed.

[ii] The judgment and order dated 30.4.2014, passed by the learned Additional Sessions Judge, Dhule, in Sessions Case No. 29 of 2013 convicting the appellants/accused for offence punishable under Section

302 r/w 34 of the Indian Penal Code is set aside.

[iii] The accused/appellant Nos. 1 to 5 are held not guilty of charge for the offences punishable under Section 302 r/w 34 of the Indian Penal Code and are acquitted of the said charge and they shall be released forthwith, if they are not wanted in any case.

[iv] Bail bonds of appellants/accused stand cancelled.

[v] Fine amount, if any, shall be refunded to them.

[INDIRA K.JAIN, J.]

[A.V.NIRGUDE, J.]

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