

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL APPEAL NO. 100 OF 2013

Ganesh Atmarram Waghmare
Age – 23 years, Occ. - Labour,
Residing at Vyankat Nagar Zopadpatti
Akaluji, Taluka – Malshiras,
District – Solapur

... Appellant
(Orig. Accused)

V/s.

The State of Maharashtra

... Respondent

Mr. Jay S. Patil and Mr. V.V. Purwant for the Appellant

Ms. M.M. Deshmukh, APP for the Respondent - State

***CORAM : NITIN JAMDAR &
C.V. BHADANG, JJ.***

DATE : 2 AUGUST 2021

Judgment (Per Nitin Jamdar, J.) :-

The learned Sessions Judge, Solapur, by judgment and order dated 6 December 2012, convicted the Appellant for offences punishable under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life. The Appellant has

approached this Court by way of Criminal Appeal challenging the conviction and sentence.

2. Prosecution cases, in short, is thus: Deceased Rohini was married to one Pappu Ashok Bhosale, resident of Karmala. She had a daughter and a son out of wedlock. Rohini's husband was heavily addicted to liquor and under the influence of drink, he used to beat her. Rohini left the house and went to her grandmother Mandabai Shankar Gaikwad in Vyankat Nagar, at Akaluj, leaving her children behind. The accused Ganesh Waghmare was residing in the neighbourhood of Rohini's grandmother. Rohini and the accused developed a relationship and she started residing with the accused. The mother of the complainant - Mirabai Pandurang Borkar came to Akaluj from Baramati. Rohini went to the house of her grandmother to meet her mother. Rohini's mother asked her to accompany her to Baramati to return to her husband at Karmala. When the accused learnt about it, he warned Rohini not to go back to her husband. On 3 March 2011 at about 12.00 hours, the accused went to the house of the grandmother and started abusing and beating Rohini. Mother and grandmother went to call the neighbours for intervention. The accused poured kerosene on Rohini from a plastic can and set her on fire, and when Rohini started screaming, the accused ran away. The mother, grandmother and brother of the Rohini poured water on her and extinguished the fire. They

admitted her to Sub District Hospital at Akaluj for medical treatment. On receipt of information, police visited the Sub District Hospital and chalked out the FIR of the complainant. An offence u/s. 307, 323, 504, 506 of the Indian Penal Code came to be registered against the accused on the basis of FIR.

3. The Complainant succumbed to her burn injuries while undergoing medical treatment on 14 March 2011. The police converted the offence u/s.307 of IPC into Sec.302 of IPC along with other charges. During the investigation, Rohini gave a dying declaration that the accused poured kerosene on her and set her on fire. The accused was arrested. Chargesheet was filed against the accused. Sessions Court framed charge against the accused under u/s. 302, 323, 504, 506 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried. His defence was that of total denial and false implication.

4. The learned Sessions Judge, after going through the evidence and considering arguments, concluded that the prosecution proved that the Appellant on 3 March 2011 had murdered Rohini by setting her on fire, thereby committing an offence under Section 302 of the Indian Penal Code. The learned Sessions Judge acquitted the Appellant for the offence punishable under Section 323, 504 and 506 of the Indian Penal Code. By the judgment and order dated 6

December 2012, the learned Sessions Judge sentenced the Appellant to undergo imprisonment for life and pay a fine of Rs.5,000/- in default rigorous imprisonment for one year.

5. We have heard the learned Counsel for the Appellant - Accused and the learned APP for the Respondent-State.

6. The prosecution has examined nine witnesses. The Appellant examine one witness in defence. The prosecution examined PW-1 Ganesh Bhimrao Jagtap, who acted as a panch for the spot panchnama at Exhibit-15. PW-2 Dayanand Shrimant Kamble, who acted as panch witness for the spot panchnama, was examined. PW-3 Shobha Haridas Kirte, a neighbour of deceased Rohini. PW-4 Mandabai Shankar Gaikwad, the grandmother of deceased Rohini and PW-5 Meera Pandurang Borkar, mother of deceased Rohini, were examined. As regards the incident PW-6 Vilas Shrimant More, Nayab Tahsildar was examined as he recorded the dying declaration of the deceased. PW-7 Dr Ramesh Sidramappa Ukarande, Medical Officer, examined the deceased before she made a declaration. PW-8 Rajesh Hanmand Pawar recorded the statement of the deceased in the hospital. PW-9 Murlidhar Ramrao Khokle investigated the crime and recorded the statements of the witnesses. The defence examined DW-1 Uddhav S. Bhosale, to whom the deceased was stated to have given a statement.

7. The deceased Rohini was admitted to the District Hospital at Akaluj on 3 March 2011. She was suffering from burn injuries.

8. The defence has admitted the post-mortem report Exhibit-65 and the inquest panchnama Exhibit-70. Thus, deceased Rohini succumbed to burn injuries is established.

9. Regarding the spot panchanama, the learned Counsel for the Appellant submitted that the witnesses to the spot panchnama PW-1 and PW-2 are not supporting the prosecution and have been declared hostile. The learned Counsel submitted that their evidence cannot be relied upon. The learned Counsel further submitted that PW-3, a neighbour of the deceased, PW-4 and PW-5, mother and grandmother of the deceased are not supporting the prosecution.

10. As regards the PW-1 and 2 are concerned, these two panch witnesses have become hostile and not supporting the prosecution. PW-3 Shobha Kirte deposed that the incident had not taken place in her presence, and when she returned from work, she learnt that Rohini had set herself on fire, and this witness has declared hostile. PW-4 Mandabai Gaikwad, the grandmother, deposed that while Rohini was cooking in the kitchen on a stove, her saree caught fire because of the bursting of the stove, and she suffered severe burn injuries. PW-5 Meera Borkar, the mother of the

deceased, deposed identically, and both were declared hostile. Their evidence, therefore, does not support the prosecution. However, the photographs of the spot on the body of deceased are on record. The photographs show that the deceased was seriously burnt. The spot panchnama showed that a plastic can was lying with very little kerosene in it and the cap was open. If there was a blast of the cooking stove the other articles in the room would have been blacked, but that is not indicated. Therefore, there is a serious doubt as regard the defence version that Rohini caught fire because the cooking stove burst. The injuries on the body of the deceased and the surrounding articles do not indicate the position, in fact it shows that kerosene from a plastic can was used.

11. The learned APP submitted that even though the evidence of the panch witness and PW-3,4 and 5 is not supporting the prosecution, the conviction can be founded on two dying declarations given by the deceased as there could be various reasons why they turned hostile. It is the contention of the learned Counsel for the Appellant that there are several discrepancies in the dying declaration stated to be given by the deceased, and the deceased had given a declaration to DW-1 Police Officer on 4 March 2011 wherein she had stated that she caught fire because of the bursting of the stove. The learned Counsel for the Appellant submitted that in view of these contradictory dying declarations, the conviction, in this case,

cannot be founded on the other two dying declarations as they all need to be discarded more particularly when the eyewitnesses are not supporting the prosecution.

12. Position of law is settled that the dying declaration can be the basis for recording conviction if the court is satisfied that the dying declaration is true and voluntarily. Therefore, we will consider the implications of the declaration made by the deceased Rohini to PW-6 Vilas More which is endorsed by the Medical Officer at Exhibit 34 found. The statement was made before PW-8 Police Officer Rajesh Pawar, and thirdly, the statement which, according to the Appellant, was made before the defence witness DW-1 Uddhav Bhosale.

13. First, we will consider the statement which, according to the defence, was made before DW-1 Uddhav Bhosale. He deposed as follows. On 4 March 2011, he was attached to the Mandrup Police Station. He was deputed on hospital duty. A woman named Rohini Bhosale was admitted to Civil Hospital, Solapur. After getting information of her admittance, he went to the burn ward and recorded the statement of Rohini Bhosale, which was marked as Exhibit-74. He stated that Rohini told him that on 3 March 2011, she caught fire because the stove she was cooking had burst, and her mother had admitted her to Akaluj Rural Hospital and, after that to

Civil Hospital, Solapur. He stated that Rohini was mentally and physically fit while giving a statement.

14. We have examined the statement at Exhibit 74 and the deposition of DW-1 Uddhav Bhosale. DW-1 Uddhav Bhosale admitted that the Civil Hospital comes under the jurisdiction of Sadar Bazar Police Station. He is not attached to that Police Station. He also admitted that the officer of the Sadar Bazar Police Station did not give him any order in writing to record the statement of Rohini. He did not make any entry of recording the statement in the station diary of the Sadar Bazar Police Station. He did not mention the timing of the recording of the statement. He did not know the name of the medical officer on duty. More pertinently, he admitted that the mother of Rohini and two relatives were at her bedside when he recorded the statement. These admissions make the deposition of DW-1 unworthy of any credence. The hospital did not fall within the jurisdiction of the Police Station he was attached to. There is no order given to him to record the statement. Further, on the earlier date that is on 3 March 2011, Rohini had already given a statement implicating the Appellant before the Nayab Tahasildar and the Police. The investigation had thus already begun. Furthermore, because the mother of the deceased and the other relatives, by turning hostile were supporting the accused, their presence near Rohini was stated to have given her statement, make

this declaration entirely doubtful as given at all.

15. Thus, we turn to the declaration relied upon by the prosecution before PW-6 Vilas More and PW-8 Rajesh Pawar and the evidence of PW-7 Dr. Ramesh Ukarande, Medical Officer.

16. PW-7 Dr. Ramesh Ukarande, Medical Officer, stated that from June 2005, he was attached to sub-District Hospital, Akaluj. On 3 March 2011, he was on duty in the hospital. Rohini Bhosale, on that day, was admitted to their hospital for burn injuries. The Police Officer of Akaluj Police Station came into the hospital and expressed his intention to record the statement of Rohini. The Police Officer requested him to examine Rohini to ascertain her physical and mental fitness to give a statement. He examined Rohini and found her to be physically and mentally fit to give a statement. He put his endorsement on the left corner top of a blank sheet at Exhibit-40. He put the date and timing of putting his signature beneath his signature. After that Police Officer recorded the statement of Rohini. The Police Officer obtained a thumb impression of Rohini on the statement. He put his signature on the statement. Again PW-7 Medical Officer examined Rohini and found her mentally and physically fit throughout the statement. Again he put his second endorsement on the bottom of the statement of Rohini. He stated that except he and the police officer,

none else was present at the bedside of Rohini at the time of recording the statement of Rohini. The police officer started recording the statement of Rohini and finished at 3.30 p.m.

17. PW-7 Medical Officer further deposed that on the same day later at 3.45 p.m., an official from the Tahsil office, Malshiras, had come to the hospital to record the dying declaration of Rohini. On his request PW-7 examined Rohini and found her mentally and physically fit git statement. Thereafter, the official of the Tahsil office recorded the dying declaration of Rohini. The officer obtained a thumb impression of Rohini on the dying declaration and made his signature thereon. Again, he examined Rohini and found her physically and mentally fit throughout the statement. He deposed that at the time of recording the dying declaration of Rohini, except the Medical Officer and the Officer of Tahsil Office, none else was present at the bedside of Rohini.

18. PW-7 Medical Officer had treated Rohini on 3 March 2011. Rohini had given a history of homicidal burn by the Appellant at 12 p.m. on 3 March 2011. Thereafter, he had referred the patient to Solapur Civil Hospital for further medical treatment. Accordingly, he had prepared a medico-legal certificate of Rohini on 3 March 2011. On 5 May 2011, he issued a medico-legal certificate of Rohini Bhosale to the police on request.

19. PW-6 Vilas More at the relevant time was attached to Tahsildar Office, Malshiras as Nayab Tahsildar. On 3 March 2011, Tahsildar, Malshiras, directed him to visit the Rural Hospital, Akaluj, to record the declaration of Rohini. He deposed that accordingly at 4.00 p.m., he went to Rural Hospital, Akaluj and contacted the Medical Officer on duty. He requested the Medical Officer to examine Rohini Bhosale to ascertain her physical and mental fitness to give a statement. Medical Officer examined Rohini Bhosale and found that she was mentally and physically fit to give a statement. Medical Officer placed his endorsement on the top of a blank sheet of paper below which he signed. He put the seal beneath his endorsement. Thereafter, he asked the patient the name, age, occupation and place of residence. He recorded her name, age, occupation and place of residence in the question and answer form. Thereafter, he recorded the dying declaration of Rohini Bhosale. Rohini disclosed that the accused, on 3 March 2011 at about 12.00 hrs, came to her grandmother's house and prevented her from leaving Akaluj along with her mother and poured kerosene on her from a plastic can and set her on fire. Thereafter he escaped from the house of her grandmother. After recording the dying declaration of Rohini Bhosale, he obtained her thumb impression on her dying declaration. He attested the thumb impression and signed on the declaration. Again he requested the Medical Officer to examine

Rohini who found her physically and mentally fit and placed second endorsement and seal and the date and time to that effect at the bottom of the dying declaration at Exhibit 34. He also deposed that he and the Medical Officer only were near Rohini while recording her declaration. He submitted the declaration of Rohini before Tahsildar, Malshiras. Tahsildar subsequently handed over the declaration to the investigation officer.

20. The declaration is at Exhibit 34 stated that she was staying with the accused with whom she had an illicit relationship. She used to quarrel with the accused. On 3 March 2011, she had come to her grandmother's place where at around twelve noon, she and the accused started quarrelling. That time her mother and grandmother went to call the neighbour to intervene in the quarrel. Then the accused poured kerosene on her and set her on fire. Then her brother came and poured water on her and admitted her to the hospital.

21. As regard this evidence is concerned, the learned Counsel for the Appellant submitted that the thumb impression does not disclose whether it is of the left or right hand, and this fact goes to the root and reflects on the credibility of the dying declaration. The learned APP submitted that this is not a factor of much relevance.

22. We have perused the evidence of PW-6, PW-7 and the Declarations. The evidence is consistent. The argument that it is not stated whether the thumb impression is of the left or right hand, it cannot be considered as a crucial factor. The declaration is intrinsically consistent, and there is a thumb impression of the deceased. The cross-examination has brought out nothing to hold that the deceased was not mentally or physically fit. The same is the position is regarding the argument that there is a correction in the time recorded by the Medical Officer when he put his endorsement. From this, it cannot be concluded that the dying declaration itself is concocted. PW-6 Police Officer and PW-7 Medical Officer have deposed that they had asked all the relatives to leave while the declaration was being recorded.

23. PW-8 Rajesh Pawar, Police Naik, when he recorded the First Information Report in the hospital, he approached PW-7 Dr. Ramesh Ukarande, who examined the deceased Rohini and certified regarding her mental and physical fitness. In the FIR Exhibit 49 also the deceased Rohini has stated the same version.

24. Thus, deceased Rohini was physically and mentally fit when she gave the dying declaration implicating the accused. The evidence of PW-6,7,8 and 9 is consistent and will have to be accepted. Nothing has been brought out in the cross-examination of

PW-8 Rajesh Pawar, Police Naik. Therefore, these two dying declarations have been corroborated by the evidence of PW-7, PW-8 and PW-6. The helpless situation of Rohini was taken note by the learned Sessions Judge. She had left the family and was living at the mercy of her grandmother. Considering her condition, the dying declaration reflected the true state of affairs.

25. As a result, the conviction and sentence recorded by the learned Additional Sessions Judge, Malshiras, against the accused in Sessions Case No. 19 of 2011 is confirmed. The Appeal is dismissed.

C.V. BHADANG, J.

NITIN JAMDAR, J.

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