

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.89 OF 2018

The State of Maharashtra
Through Police Station Officer,
Police Station Nilanga, Dist. Latur

.. Applicant

Versus

Ganesh Kerba Mehtre
Age: 21 years, Occu.: Driver,
R/o. Shiur, Tq. Nilanga,
Dist. Latur.

.. Respondent

...
Mr. A. V. Deshmukh, APP for the applicant – State.
...

**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 30th March, 2023.

ORDER :- (Per Smt. Vibha Kankanwadi, J.)

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure for seeking leave to file criminal appeal challenging the judgment and order dated 06.01.2018 passed by the learned Additional Sessions Judge, Nilanga Dist. Latur in Sessions Case No.31 of 2011, thereby acquitting the respondent/ original accused from the offence punishable under Sections 306, 376, 452, 506 of Indian Penal Code.

2. Heard learned APP Mr. A. V. Deshmukh for the applicant – State. With the help of learned APP, we have gone through the material, which was before the learned Trial Judge.

3. The prosecution story in short is that prosecutrix deceased was a 23 years old married lady. She was married about two years prior to 16.08.2011 i.e. the date of FIR. She had no issue, however, since about a year, she was not residing with her husband and she had filed proceedings for getting maintenance from her husband. She was residing with her parents. Her parents had gone for work on 15.08.2011 and she was alone in the house. After witnessing that she is alone, the accused, who was also the resident of same village, came to the house of deceased – prosecutrix around 8.00 p.m. He forcibly entered the house and then by showing knife and dragging her in the middle room, committed rape on the prosecutrix. He gave threats to kill if prosecutrix would disclose the incident to anybody. Thereafter, the father of the prosecutrix came around 9.00 p.m. and later on the mother also came. She disclosed the incident to the parents. She states that she could not bear the incident and, therefore, around 6.00 a.m. of 18.06.2011, she poured kerosene upon herself and ablaze. Her brother extinguished the fire by pouring water. However, she had received severe burn injuries. She was taken to hospital. While she was under treatment, her dying declaration was

recorded by the police officer on duty at the hospital and on the basis of the same, offence under Section 376, 506 of Indian Penal Code vide Crime No.102 of 2011 came to be registered on the next date i.e. 17.08.2011. Thereafter on the same day i.e. 16.08.2011, her second dying declaration was also recorded by the Executive Magistrate. Prosecutrix expired on 25.08.2011 and thereafter the dead body was sent for the postmortem. The probable cause of death has been given as “septicemia due to burns”. Thereafter offence under Section 452 and 306 of Indian Penal Code came to be added.

4. After the completion of the investigation, charge-sheet was filed. Prosecution has examined in all nine witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Trial Judge has acquitted the accused from all the charges. Hence, present application.

5. Learned APP submits that the learned Trial Judge has not appreciated the evidence properly. The dying declarations (Exhibit-36 and Exhibit-45) of the prosecutrix have been duly proved by examining P.W.3 – then ASI Narayan Ranzunjare and P.W.4 Naib Tahsildar Vilas Jogdand. No doubt, the medical officer, who had given the endorsements on Exhibit-36 and Exhibit-45 regarding the fitness of the deceased prosecutrix, has not been examined, but it

was not fatal. Those witnesses, who had recorded the dying declarations, had ensured that deceased was in a fit state to give statement before they had recorded the dying declaration. Both the dying declarations are consistent with each other. As the prosecutrix was ravished, she could not bear the same and she had committed suicide. Before her death she has given the said dying declarations, which are perfectly admissible under Section 32(1) of the Indian Evidence Act, as the circumstances stated in those statements have led to the death, as the accused had committed rape on the deceased. It can be said that he had abetted commission of suicide by the deceased. He had committed rape by forcibly entering in the house of prosecutrix and then he had given threat to kill her while leaving. Therefore, ingredients of all the Sections under, which the charge was framed, were proved beyond reasonable doubt. The learned Trial Judge has taken hypertechnical approach and discarded the dying declarations. The evidence needs to be re-appreciated and, therefore, leave deserves to be granted.

6. At the outset, we would like to say that we are considering the matter for the purpose of admission/whether case is made out for grant of leave or not. While considering such applications, it has to be borne in mind that the original accused has undergone the trial and a competent Court, after assessment of evidence, would have

acquitted such accused. Therefore, whether there was material to upset the said findings is required to be considered here.

7. P.W.1 is the mother and P.W.2 is the brother of the prosecutrix. Both of them have not come to the house immediately after the incident and, therefore, whatever they have deposed about committing rape by the accused on the prosecutrix was on the basis of the information given by the prosecutrix to them. We would like to consider the testimony at a later point of time, but when the FIR has been registered on the basis of the dying declaration, it is required to be seen as to whether both the dying declarations were trustworthy and could have been relied by the trial Court or not. In order to prove both the dying declarations, the writers i.e. P.W.3 ASI Narayan and P.W.4 Naib Tahsildar Vilas Jogdand have been examined. The medical officer who has given endorsement on both the dying declarations has not been examined by the prosecution for the reasons best known to it. Even if for the sake of arguments, if we consider those endorsements, then endorsement is given on Exhibit-36 in the margin and it states that “time of statement 11.55 a.m. to 12.30 p.m. I have fully examined the case of burn. I noticed that she is fully conscious and oriented to time, place and person. She is in a state of compos mentis. Hence, certified.” That means, it has not happened that initially he had examined the patient and find that she is in a fit

state, then the dying declaration was recorded, again he examined and found that she was in such fit state throughout the statement. However, as regards the dying declaration Exhibit-45 is concerned, it is to be noted that it is a printed proforma. The concerned doctor has only filled in the blanks. It is at the beginning and then at the end of the statement. Such fill in the blanks are not permitted, especially the part showing that the person whose statement is to be recorded is found to be competent to give statement. It has to be in handwriting of the medical officer. We are aware of the fact that a dying declaration, wherein there is no endorsement of the medical officer about the fitness of the maker, can also be considered as stated in ***Rambai vs. State of Chhattisgarh, (2002) 8 SCC 83***, wherein it has been observed that:-

“6. So far as the position of law in regard to the admissibility of the dying declaration which is not certified by the doctor, the same is now settled by a Constitution Bench judgment of this Court reported in *Laxman v. State of Maharashtra, (2002) 6 SCC 710* wherein overruling the judgment of this Court in *Laxmi vs. Om Prakash, (2001) 6 SCC 118* it is held that a dying declaration which does not contain a certificate of the doctor cannot be rejected on that sole ground so long as the person recording the dying was aware of the fact as of the condition of the declarant to make such dying declaration. If the person recording such dying declaration is satisfied that the declarant is in a

fit mental condition to make the dying declaration then such dying declaration will not be invalid solely on the ground that the same is not certified by the doctor as to the condition of the declarant to make the dying declaration.”

8. The testimony of P.W.3 Narayan and P.W.4 Vilas Jogdand is then required to be considered as to whether they had ensured that the prosecutrix was in a fit state to give the statement. The testimony of both these witnesses does not show that they had asked some preliminary questions to ascertain the fitness of the prosecutrix, but both of them have stated that they had asked certain questions to her and then she told about the incident. If the maker is giving details about her name, address, status etc., then that can be considered as sufficient indication about the fitness of the maker. However, it would depend upon situation in each case. Here, if we consider the postmortem report, it says that prosecutrix had sustained 86% burns. There was also a surgical sutured wound on medial aspect of both the lower legs above medial malleolus for venesection. Under such circumstance, what kind of treatment was given immediately after the admission of prosecutrix was also important. Dr. Sujit Hatte, who had given the said endorsements, as aforesaid, has not been examined. In ***Shanmugam @ Kulandaivelu vs State Of Tamil Nadu, [(2002) 10 SCC 4]***, the Hon'ble Supreme Court has held that

mere fact that the doctor had not been examined do not affect the evidentiary value to be attached to the dying declaration. Therefore, even if we consider that both the dying declarations were proved, it would clearly show that immediately after the parents had arrived at 9.00 p.m., the prosecutrix had disclosed about the incident to them. Both the dying declarations as well as the testimony of the mother of the prosecutrix as well as the brother of the prosecutrix, are silent as to what exactly the course of action was taken by them. No doubt, the mother says that father had gone to search accused, but father has not been examined. It is not clear as to whether he met accused or not. Neither the father nor the brother, who is sufficiently grown, have explained as to why they had not immediately taken the prosecutrix to police station. No doubt, the family of a victim of rape would be reluctant to go to police to lodge the report immediately, but it is not a universal fact. What prevented the family members of the prosecutrix from taking her to police station, has not been explained. Even the mother as well as the brother of the prosecutrix have not stated as to how they had reacted to the information given by the prosecutrix and how they supported her. The mother rather says that they had their dinner and they slept. This indicates that it was like any other day they had done their routine. There has to be a support from the family to rape victim so that she can fight out for

the self esteem. If the family members themselves are not supporting, then it becomes hard for the woman to raise voice against such heinous acts.

9. Both the dying declarations say that the prosecutrix could not withstand the incident and, therefore, she ablaze herself at 6.00 a.m.. That means after 8.00 p.m. after the incident, till 6.00 p.m. the accused has not contacted her in any manner. The scope and ambit of Section 107 of Indian Penal Code and its co-relation with Section 306 has been explained by catena of judgments by the Hon'ble Supreme Court as well as various High Courts. In ***S. S. Chheena Vs. Vijay Kumar Mahajan, (2010) 12 SCC 190***, the Hon'ble Supreme Court observed that :-

“25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.”

10. Further, the Hon'ble Supreme Court recently in ***Mariano Anto Bruna Vs. Inspector of Police, [2022 SCC Online SC 1387]***, observed that in order to convict an accused under Section 306 of Indian Penal Code, the state of mind to commit a particular crime must be visible with regard to determining the culpability. Further note has been taken on the decision in ***Ude Singh & Ors. Vs. State of Haryana, (2019) 17 SCC 301***, wherein it has been observed that :-

“16.1 For the purpose of finding out if a person has abetted commission of suicide by another, the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above-referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. The question of *mens rea* on the part of the accused in such cases would be examined with reference to the actual acts and deeds of

the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased.”

11. Thus, after taking note of the legal requirement in respect of offence under Section 306 of Indian Penal Code, here in the present case, we do not find that the accused had played any active role. No doubt, the act of rape would certainly amount to tarnishing a self esteem of a lady, but again the question would come that even if we accept that the rape was committed, whether the accused had anticipated or had the intention that the prosecutrix in this case should commit suicide, would be a question. There is no positive evidence in this respect.

12. Now, coming back to the allegations in respect of offence of rape, here, in this case, except two dying declarations, there is no evidence. The testimony of mother and brother of deceased is silent on the point, as to what was the history that was given when the

prosecutrix was admitted to hospital. If that history would have been given in that way, the medical officers would have examined the prosecutrix from that angle. Treating doctor has not been examined in this case. Even after recording of dying declarations wherein the prosecutrix had alleged about the rape, whether the medical examination was done from that angle and whether the investigating officer had given instructions to the medical officer to have the examination of the prosecutrix from that angle, has not been clarified by them. As aforesaid, prosecutrix died after about 10 days of treatment. The postmortem report does not suggest the case of rape. Thus, from both the angles, if we consider the facts, then in spite of having chance to get the medical evidence, there was no attempt by the investigating agency and, therefore, keeping aside the technical aspect about proof of dying declaration, accused cannot be held guilty of committing offence under Section 376 of Indian Penal Code or even under Sections 452 and 506 of Indian Penal Code. In the matter wherein the prosecutrix is alive her sole testimony can be believed, if it is inspiring confidence to convict an accused for the offence punishable under Section 376 of Indian Penal Code. Taking into consideration all these aspects though the learned Trial Judge has given some different reasons, but the conclusion is correct, under such circumstance, no case is made out to disturb or interfere with

the said findings. No case is made out for grant of leave. Application stands rejected.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm