

CASE NO.:

Appeal (crl.) 663 of 2001

Appeal (crl.) 867 of 2001

PETITIONER:

Dhanraj and others, Smt. Venubai Kelnako Raut

RESPONDENT:

State of Maharashtra

DATE OF JUDGMENT: 16/09/2002

BENCH:

R. C. Lahoti & Brijesh Kumar.

JUDGMENT:

J U D G M E N T

BRIJESH KUMAR, J.

The criminal appeals mentioned above arise out of the judgment and order passed by the High Court of Maharashtra in Criminal Appeal No.49 of 1995, upholding the conviction of the appellants under Section 302 read with Section 34 IPC and the sentence of imprisonment for life thereunder and a fine of Rs.100/- each, in default of payment whereof, further rigorous imprisonment for a period of one month. We have before us in all four appellants since Laxmibai has not preferred any appeal against her conviction and the sixth accused who was also charge-sheeted namely, Ramesh continues to be absconding.

Appellants Dhanraj, Subhash and Sukhdeo are brothers being sons of Kisana Raut. The absconding accused Ramesh is younger brother of Kisana Raut. The appellant Venubai is mother of Kisana and Ramesh. Laxmibai is wife of Kisana. The deceased Sindhubai was the wife of absconding accused Ramesh.

The prosecution story is that accused persons had not been happy with the deceased Sindhubai. She was the second wife of Ramesh. They were married about three years prior to the incident but she did not bear any child to Ramesh. According to the statement of the deceased to the police, the accused persons wanted her to be turned out of the house and Ramesh had started developing relations with Sunanda sister of Laxmi. They planned to drive out the deceased from the house so that Ramesh could marry Sunanda. It is said that on 12.3.1992 a quarrel took place in the house. The husband, the sister-in-law Laxmi, her sons and Venubai wanted the deceased to leave the house but she did not. She was also given beating. On the date of incident, namely, 17.3.1992 at about 8.30 A.M. again a quarrel took place amongst the persons indicated above and the deceased in which Venubai is said to have beaten her with a bamboo stick. Thereafter Dhanraj, Subhash and Sukhdeo caught hold of Sindhubai and Laxmibai and Venubai brought two bottles of kerosene oil and sprinkled the same on the body of Sindhubai and Ramesh lighted a match stick and threw it upon Sindhubai who caught fire. PW-1 Umesh, brother of the deceased who was present in the house poured some water on Sindhubai. Thereafter he rushed to inform his parents. Sindhubai fell down in the Courtyard. She, however, went to the Primary Health Centre, Warud all alone by herself by a Jeep upto Sunoli Naka and then by a Rikshaw. No one from her in-laws or husband accompanied her. The Medical Officer of the Primary

Health Centre, Warud examined her and informed the police. She also informed the police to arrange for recording of the dying declaration of the deceased. On the information received from PHC Warud, PW-9 Sheshrao, P.S.I. also came to the hospital and recorded her statement. He obtained the thumb impression of Sindhubai on the statement which is marked as Ex.55. On the basis of the said statement he registered a case under Section 307/34 IPC as Crime No.76/92. Naib Tehsildar also came to the PHC and recorded statement of the deceased. The doctor thereafter referred her to the General Hospital, Amravati. Sindhubai however died in the hospital on 22.3.1992 whereupon the case was converted to one under Section 302 IPC.

PW-7, Nana Sahib, Naib Tehsildar recorded the dying declaration of Sindhubai at the PHC, Warud. Before recording her statement he had enquired from the doctor whether she was in a position to give statement to which the doctor responded in the affirmative. He therefore proceeded to record her statement narrating the whole story as to how the incident had occurred. The statement recorded by Naib Tehsildar is Ex.52. It is also signed by the doctor. PW8 Dr. Anita was on duty as Medical Officer in Primary Health Centre, Warud at the relevant time. She examined Sindhubai and gave her some treatment. She also stated in her cross-examination that Naib Tehsildar had enquired from her as to whether the victim was in a position to give her statement to which she had responded in affirmative. She had also performed post mortem examination on the dead body of the deceased. The prosecution has also examined PW-1, Umesh, PW-2, Mangla and PW-5, Kamla as eye witnesses of the incident. PW-6 is the father of the deceased who arrived at the hospital on getting the information of the incident. PW-9 is Shesh Rao, the Investigating Officer.

So far the injuries received by the deceased are concerned, it is said that she had 60% second degree burn injuries. She survived for five days and died on 22.3.1992.

Out of the three witnesses PW 1 Umesh is younger brother of the deceased Sindhubai, he had been staying at her sister's house on the fateful day, his parents reside about 6 kilometers away. He narrated the incident in detail stating that in the morning at about 8.30 A.M. appellant Venubai was quarrelling with his sister Sindhubai. Thereafter appellants Dhanraj, Subhash and Sukhdev, who all reside around the house of the deceased, arrived and caught hold of Sindhubai, Laxmibai and Venubai poured kerosene oil upon his sister and Ramesh, the brother-in-law, lighted the match stick and threw it on the Sindhubai who caught fire. The next eye-witness PW 2 Mangla has also narrated the incident as it took place in the morning of 17.3.92 supporting the statement of Umesh. He resides at a distance of 50 ft. from the house of Sindhubai. He was then a student of 8th standard. He has also stated that prior to the incident Ramesh was in Jail for 6 to 7 months and during that period Sindhubai had been residing with her parents. In the cross examination he has also stated that at the time he reached near the house of Sindhubai she was lying in the Verandah. He denied the suggestion that he has deposed due to dispute between Kisana, Ramesh and others and the father of the witness. The next witness is PW 5 Smt. Kamla. She is a neighbour of Sindhubai. She supported the prosecution version. In her cross examination she has stated that Ramesh was always saying to Sindhubai to leave the house and he also used to beat and abuse her. She also stated that when she reached near the house of Sindhubai, she was lying in the Verandah. She has denied the suggestion that she had not seen the incident and was making a false statement at the instance of one Bahua Rao, it is

however, not indicated that as to why the witness would be deposing under Bahuarao's influence. The main criticism of the learned counsel for the appellant against PW-1 Umesh is that it is not natural that he would be staying with his sister. He is a child witness and has stated that he was told by his parents whatever he had to depose in the court. We don't find it unnatural that he could be staying with his sister prior to the date of incident. From the evidence on record it comes out that Ramesh the husband of Sindhubai and members of his family had been unhappy with her and they had been quarrelling with her. Prior to incident, Ramesh was staying at the house of parents of the deceased after he was got released from jail by her father. In such circumstances there would be nothing unnatural if the parents sent PW 1 Umesh also to be there with their daughter at her in-law's house. So far as the other criticism, that his father had told him whatever he had to depose in the court, it is to be noted that the witness has stated that he was interrogated by the police and his statement was recorded on the date of incident itself and that he was alone in the house since his parents had gone to Amravati Hospital. In case any different statement was given by the witness in Court it could very well be brought to the notice of the witness and he could be confronted with his previous statement. As indicated above he was alone at the house and his parents had gone to the Amravati Hospital. There is nothing to indicate that his parents had told him as to what was to be stated by him before his interrogation by the police. It is quite possible that at the time the proceedings took place in the Sessions Court, the parents in their anxiety may have said something to the witness but that would not affect his credibility since his previous statement recorded during investigation on the date of incident itself was available to confront him. Nothing has been brought in his cross examination that being aged about 12 years there was any infirmity in his understanding of the facts perceived and his ability to narrate the same correctly. As a matter of fact nothing such has been indicated to us on this behalf in the evidence. This observation shall also hold good in so far as the statement of PW 2 is concerned, since he was then studying in 8th standard. As a matter of fact a student of 8th standard, these days acquires sufficient understanding to perceive the facts and to narrate the same.

Yet another criticism which has been vigorously made against the evidence of PW 2 and 5 is that according to their statements when they arrived near the house of Sindhubai they found her lying in Verandah. The arguments advanced on the basis of the said statements of the witnesses is that they had not seen the main incident but when arrived they had seen her lying in the Verandah, whereas, the incident must have taken place earlier. In this connection it is to be noted that PW 2 has stated that his house is about 50 ft. away from the house of Sindhubai. It cannot be said that the witness could not see the incident from a distance of fifty paces. It is difficult to comprehend as to what was meant by the question put to the witnesses as to when they had reached near the house of the deceased as they were not far away. They may have actually gone near the house of the deceased seeing the incident and may have seen her falling in the Verandah while a little away from her house. It does not mean that they did not see the incident from the place where even they were stationed when the incident took place. We therefore find no ground to discard the testimony of the three eye witnesses examined in the case nor on the ground that other persons who may have collected at the spot were not examined by the prosecution as it is not always possible. May be, it would have been better if some more persons who may have collected at the spot at the time of

incident had been examined but their non examination will not as such erode the credibility of the testimony of the witnesses examined namely PW 2 and 5 and PW-1 Umesh the brother of the deceased who was present in the house itself. Everyone who collects at the time of such incident is not always readily available to depose in the Court.

Learned counsel for the appellant has then urged that the dying declaration recorded by the police and the Magistrate cannot be relied upon on the ground that no medical certificate was appended about the condition of the deceased and her mental fitness to make the statement. In this connection it is to be noted that the police on arrival at the PHC recorded the statement of Sindhubai on the basis of which FIR and a criminal case was registered. Sindhubai died 5 days after her dying declaration was recorded by PW 7 Nanasaheb Naib Tahsildar, but certainly there is no certificate appended to the statement recorded by him containing the opinion of the doctor that she was in a fit mental state to give statement. It is unfortunate that we don't find anything on the record to indicate the general condition of the patient at the time she went to the PHC Warud or taken to Amravati Hospital. It is however important to note that she had gone to the PHC all alone, first by jeep, for some distance, which she had stopped and later by a Rickshaw to cover the remaining distance. It is nobody's case to the contrary that anyone may have taken her to the PHC. This itself speaks of her general condition. She must have been fit enough to go alone in the manner indicated above. We feel that in certain cases in peculiar facts and circumstances of their own, it may be possible and not against the rule of prudence to draw legitimate inference regarding mental condition of a person making a dying declaration as we find in the present case. Such circumstances can at least be used as supporting evidence about the mental condition along with other evidence available on record. The medical report prepared by PW 8 Dr. Anita and the post mortem report later says that she had 60 per cent burns and most of the area covered by burns was the legs and thighs of the deceased. There were some patches on chest, face and skull. These were second degree burns. It is nowhere indicated that her condition may have been serious or grave, and it has come in the statement of PW 7 Nana Sahib as well as PW 8 Dr. Anita that before recording the statement he had inquired about the condition of the injured and the Doctor had informed him that she was in a position to give the statement. The police had also recorded her statement soon after she arrived at the P H C on the basis of which FIR and criminal case was registered.

Learned counsel for the appellant has referred to a decision reported in 1952 AIR SC 159 - Kashmira Singh Vs. State of Madhya Pradesh indicating that in India there is tendency on the part of the witnesses to rope in innocent people. He then refers to a decision reported in 1994 (Supp.) 2 SCC 539 Maniram Vs. State of M.P., it was also a case of bride burning by pouring kerosene oil. The case rested entirely on two dying declarations, the first dying declaration recorded by the Sub-Inspector in the nature of FIR and other one also recorded by the Sub-Inspector with an endorsement of the Tehsildar that the declarant was conscious. It was held that conviction could not be sustained on such dying declaration which did not inspire confidence and did not have the certificate of Doctor about the mental fitness of the declarant. On facts we find the case was entirely different, the present case is not solely resting on the dying declaration nor that the statement was not recorded by the Tehsildar, but only endorsed by him. It is though true that certificate of the doctor is not appended but the

statement of the doctor and the Magistrate is there on the record to indicate that the declarant was in fit state of mind to give the statement. The other case referred to is reported in 1999 (7) SCC 691 Paparambaka Rosamma and Ors. Vs. State of A.P. It is also a case of death by burning. The burns were to the extent of 90 per cent, the case solely rested upon the dying declaration as such it has been held that it is necessary that the doctor certifies about the mental fitness of the declarant to give the statement. The learned counsel for the State has referred to a decision of this Court reported in 1999 (9) SCC 562 Koli Chunilal Savji and Anr. Vs. State of Gujarat where it has been held that doctor's endorsement as to the mental fitness of the deceased to make the declaration is only a rule of prudence. The ultimate test is truthful and voluntary nature of the declaration. It was further observed, on facts that the Executive Magistrate was a disinterested witness and a responsible officer and there was nothing to suspect that he had any animus against the accused or that he was interested in the matter in any manner.

Learned counsel for the State Shri Arun Pednekar refers to a decision of the Constitution Bench decided on 27.8.2002 itself on a reference made in view of divergent observations made in two decisions of this Court by Three Judge Benches in the case of Paparambaka Rosamma (supra) and Koli Chunilal Savji (supra). The Constitution Bench in its decision in Criminal Appeal No.608 of 2001 Laxman versus State of Maharashtra has set the controversy at rest while holding as follows:

"For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh 1999 (7) SCC 695 to the effect that ".in the absence of a medical certificate that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit statement of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the question he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind where-after he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh 1999 (7) SCC 695 must be held to be not correctly decided and we affirm the law laid down by this Court in Koli Chunilal Savji & Anr vs. State of Gujarat 1999 (9) SCC 562 case."

However as indicated earlier the case in hand does not solely rest upon dying declaration; the eye-witness account is also available. We have already considered the statement of eye-witnesses and we find that the trial court and the High Court committed no error in relying upon their statements.

Learned counsel for the appellant has, however, submitted that name of Venubai is not mentioned in the dying declaration recorded by the Magistrate. In her dying declaration while

mentioning about the incident said to have taken place on 12.3.1992 Sindhubai has stated about her mother-in-law (Venubai) along with others having beat and poured kerosene oil on her but in regard to the incident in question which took place on 17.3.1992, the role of pouring the kerosene oil is assigned only to Lakshmi and there is no mention of the name of Venubai nor any role is assigned to her. In our view this entitles Venubai of benefit of doubt.

In the result the Criminal Appeal No. 663 of 2001 preferred on behalf of Dhanraj, Subhash and Sukhdeo has no merit and it is accordingly dismissed. The Criminal Appeal No. 867 of 2001 is allowed and the appellant Smt. Venubai Kelnako Raut is given benefit of doubt and she is acquitted of all the charges. She shall be released forthwith unless wanted in any other case.

JUDIS