



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1027 OF 2006

Anil Raghunath Vishwakarma
presently undergoing
sentence at Kolhapur Prison
versus

..Appellant.

1. The State of Maharashtra
2. Sr. Inspector of Police
Vakola Police Station, Mumbai

..Respondent.

.....
Mr. Apporv V. Singh for the Appellant.
Mr. F.R. Shaikh, Addl. P.P. for the Respondent.

.....
CORAM : P.V. HARDAS AND
A.S. GADKARI, JJ.

9 January 2014.

ORAL JUDGMENT (PER P.V. HARDAS, J.) :

The Appellant who stands convicted for offences punishable under Section 498A of the Indian Penal Code and under Section 302 of the Indian Penal Code and sentenced to rigorous imprisonment for three years and to pay fine of Rs.10,000/-, in default of which to undergo further rigorous imprisonment for four months and imprisonment for lie and to pay fine of Rs.20,000/-, in default of which to undergo rigorous imprisonment for eight months, with a direction that the substantive sentences shall run concurrently, by the Additional Sessions Judge, Greater Bombay, by judgment dated 16 September 2006, in Sessions Case No.1348 of 1999, by this Appeal, questions the correctness of his conviction and sentence.

2. Facts in brief as are necessary for the decision of this Appeal may briefly be stated thus :

P.W. 10 A.P.I. Gokulsingh Patil who on 16 January 1998 was attached to the Vakola Police Station, received a message from Fauzia Hospital at about 11.00 p.m. about admission of one lady with burns. P.W. 10 A.P.I. Patil along with police staff rushed to the hospital and enquired about the condition of the

injured to give her statement. The Medical Officer orally informed P.W. 10 A.P.I. Patil that the injured was not in a fit condition to give her statement. Accordingly P.W. 10 A.P.I. proceeded to the scene of the incident and drew the scene of the incident panchanama in the presence of witnesses at Exhibit 35. From the scene of the incident, he seized one plastic kerosene can, broken pieces of bangles, partly burnt blouse, cigarette lighter and one match box. While drawing the scene of the incident panchanama P.W. 1 Pradyumna, the father of deceased Sushma lodged his report on the basis of which an offence vide Crime No.31 of 1998 came to be registered under Section 498A of the Indian Penal Code. P.W. 10 A.P.I. Patil went to the hospital again on 17 January 1998 in the morning and enquired from the Medical Officer the condition of injured Sushma. The Medical Officer opined that Sushma was in a fit condition to give her statement. Accordingly, the Medical Officer had endorsed on a paper. P.W. 10 A.P.I. accordingly recorded the statement of injured Sushma. The said statement was read over to Sushma and Sushma admitted the correctness of the statement. In the said statement at Exhibit 28, Sushma had admitted that on account of quarrel between Sushma and the Appellant, Sushma had poured kerosene and set herself ablaze thereby sustaining burn injuries. P.W.10 A.P.I. Patil thereafter sent a message to the Special Executive Officer for recording the statement of Sushma. The Appellant thereafter came to be arrested on 17 January 1998.

3. On 19 January 1998 P.W.1 Pradyumna produced a letter addressed by the deceased which was seized under seizure memo at Exhibit 21. On 21 January 1998 P.W. 10 A.P.I. Patil seized one Onida television set from the house of the accused under seizure memo at Exhibit 36. On 23 January 1998 a message was received from the hospital that Sushma had desired to make a third statement. Accordingly the third statement of Sushma was recorded. On 31 January 1998 Sushma succumb to her injuries and the dead body was referred for postmortem examination. On 2 April 1998 accused Nos.2 and 3, parents of the Appellant, were arrested. Further to the completion of investigation, a charge-sheet was filed against the accused.

4. The dying declaration at Exhibit 26 was recorded by P.W. 6 Uttam Ubale who on 16 January 1998 was working as the Special Executive Officer. He was

informed on 16 January 1998 about admission of one lady with burns. On reaching the hospital it transpired that injured Sushma was not in a fit condition to give her statement. P.W. 6 Uttam Ubale thereafter again went to the hospital on 17 January 1998 on being informed that the injured had regain consciousness. On reaching the hospital, P.W.6 Uttam Ubale questioned Sushma regarding the injuries sustained by her. In response to the said query, Sushma had informed him that in a fit of rage she had poured kerosene and set herself ablaze. Her husband who was in the room on the ground floor, on hearing her cries rushed to the place where Sushma was burning and extinguished the flames. The aforesaid statement was read over to Sushma and thereafter signature of Sushma was obtained on the said dying declaration which is at Exhibit 26.

5. The dying declaration at Exhibit 24 was recorded by P.W. 11 P.S.I. Dhanashree Karmarkar. P.W. 11 P.S.I. Karmarkar states that on 23 January 1998 she was attached to Vakola Police Station and had received a message that Sushma who had been admitted in the Fauzia Hospital was shifted to Bal Hanuman Nursing Home and she desired to make a statement. P.W.11 P.S.I. Karmarkar accordingly called the S.E.O. and along with him proceeded to the Bal Hanuman Nursing Home. She therefore requested the Medical Officer to ascertain if Sushma was in a fit condition to give her statement. On the Medical Officer opining that Sushma was in a fit condition to give her statement, P.W. 11 P.S.I. Karmarkar commenced the recording of the statement. In the statement of Sushma at Exhibit 24, Sushma had stated that the Appellant had taken her to the Mezzanine floor and had poured kerosene on her from a kerosene can and set her ablaze by a cigarette lighter. The said statement was read over to Sushma and Sushma admitted the correctness of the statement and accordingly signature of Sushma was obtained. The said dying declaration of Sushma is at Exhibit 24.

6. The dying declaration of Sushma at Exhibit 18 was recorded by P.W. 3 Dr. Ashok Patel who on 23 January 1998 was working as the Special Executive Officer. P.W. 3 Dr. Patel deposed that he was requested by the Vakola Police Station for recording the dying declaration of injured Sushma. He had accordingly gone to the Hospital i.e. Bal Hanuman Hospital at Borivali. He

ascertained that Sushma was in a fit condition to give her statement and accordingly recorded her dying declaration at Exhibit 18. Sushma had stated that the Appellant had poured kerosene on her and set her ablaze. The said statement was recorded in English and the signature of Sushma was obtained on the dying declaration.

7. Postmortem on the dead body of deceased Sushma was conducted by P.W. 9 Dr. Vitthal Vihurkar. According to P.W. 9 Dr. Vihurkar, Sushma had sustained 67% superficial to deep burns. According to him the cause of death was due to 67% burns. The postmortem report is at Exhibit 31.

8. On committal of the case to the Court of Sessions, the Trial Court had framed a charge against the accused for offences punishable under Section 498A, 302 read with 34 of the Indian Penal Code. The accused denied his guilt and claimed to be tried. The prosecution in support of its case examined 11 witnesses, while the accused in his defence examined one witness. The Trial Court upon appreciation of the evidence convicted and sentenced the Appellant as afore stated while acquitting original accused Nos.2 and 3.

9. In order to effectively deal with the submissions advanced before us by counsel appearing on behalf of the Appellant and the learned Additional Public Prosecutor, it would be useful to refer to the evidence of the prosecution witnesses.

10. The evidence of P.W. 1 Pradyumna, father of deceased Sushma reveals that Sushma was married to the Appellant somewhere in March 1992. Initially Sushma was treated well, but thereafter the accused started harassing Sushma. The Appellant was suspicious about fidelity and character of Sushma and used to constantly quarrel with Sushma. On one occasion the Appellant had even slapped Sushma in the presence of P.W. 1 Pradyumna. On account of the ill treatment which was given to Sushma by the Appellant, P.W. 1 Pradyumna had lodged a report against the Appellant in the Malad Police Station. The Appellant had tendered his apology and expressed regret for his behaviour and ultimately the dispute was settled. Sushma began to reside with the Appellant once again. Sushma was still ill treated and had sent a letter to P.W. 1 Pradyumna at Exhibit

14 complaining of ill treatment at the hands of the Appellant. The Appellant had suspected the character of Sushma and used to accordingly ill treat and assault her. According to P.W. 1 Pradyumna on 16 January 1998 at about 10.30 p.m. he had received a message that Sushma had sustained burns and accordingly had gone to the house of Sushma and thereafter to the Fauzia Hospital at Vakola. He had noted Sushma lying in unconscious. He had accordingly lodged his report at Exhibit 15. On the next day, he had questioned Sushma as to how she had sustained burns and Sushma had disclosed that in a fit of rage she had poured kerosene and set herself ablaze. On 23 January 1998 thereafter Sushma had disclosed to the Special Executive Officer that the Appellant had poured kerosene and had set her ablaze. According to Sushma she had initially disclosed that she had committed suicide as her daughter was in the custody of accused No.1 at that time.

11. In cross examination, it has been elicited that he obtained the custody of the child of Sushma at 8 p.m. on 17 January 1998. Thus, when the dying declarations at Exhibits 26 and 28 came to be recorded, the daughter of Sushma was in the custody of P.W. 1 Pradyumna and was not in the custody of the accused.

12. In respect of the dying declaration recorded by P.W. 3 at Exhibit 18, we find that the dying declaration has been recorded in English. P.W. 3 Dr. Ashok Patel does not state that Sushma had deposed before him in English. The prosecution has also not brought on record if Sushma could fluently speak English. Apart from that we find that P.W. 3 Dr. Patel has not deposed that the dying declaration was read over to Sushma and Sushma had admitted the contents to have been correctly recorded. Such an endorsement is also not to be found on the dying declaration at Exhibit 18. P.W. 3 Dr. Patel in fact in the cross examination has admitted that one police inspector and the parents of Sushma were present by her side when the dying declaration was recorded. In view of above infirmity, according to us, no reliance can be placed on the said dying declaration at Exhibit 18. In this behalf a reference may usefully be made to the judgment of a Division bench of this Court in **Abdul Riyaz Abdul Bashir v. State of Maharashtra**¹. The Division bench of this Court by relying on the

¹ 2012 ALL MR (Cri) 2188.

judgment of the Supreme Court in **Shaikh Bakshu v. State of Maharashtra**² has held that unless there was evidence that the dying declaration had been read over to the deponent and the deponent had admitted the contents to have been correctly recorded, no reliance could be placed on the dying declaration. In the light of the infirmities pointed out by us above, according to us, no reliance can be placed on the dying declaration at Exhibit 18.

13. We thus find that the two written dying declarations at Exhibits 26 and 28 which had been recorded immediately on Sushma regaining consciousness refer to the attempt of Sushma to commit suicide. In these dying declarations, in no uncertain terms Sushma has admitted that in a fit of rage, Sushma had poured kerosene and had set herself ablaze. Even the earliest version of Sushma to her father P.W. 1 Pradyumna is to the effect that in a fit of rage she had poured kerosene and had set herself ablaze. Thereafter i.e. after nearly six days of the said dying declarations, the dying declaration at Exhibit 24 came to be recorded by P.W. 11 P.S.I. Karmarkar to the effect that the Appellant had poured kerosene and had set Sushma ablaze. We have already held that the dying declaration at Exhibit 18 has to be left out of consideration in the light of the infirmities pointed out by us.

14. In cases resting on multiplicity of dying declarations, the prosecution has to prove each and every dying declaration. The dying declarations have to be consistent in material aspects with each other. Consistency is expected in regard to (i) the prelude to the incident; (ii) the incident itself; (iii) the number of accused; and (v) the overact contributed to each accused. In the present case, we find that the dying declarations at Exhibits 26 and 28 refer to Sushma committing suicide while the dying declaration at Exhibit 24 refers to the Appellant pouring kerosene on Sushma and setting her ablaze. In the light of the aforesaid discrepant dying declarations, according to us, no reliance can be placed on the dying declaration at Exhibit 24.

15. Sushma claims that she had orally informed her father that she had committed suicide as her daughter was in the custody of the Appellant. P.W. 1 Pradyumna has admitted that he had obtained the custody of the daughter of

² (2008) 1 SCC (Cri) 679.

Sushma at 8.00 p.m. on 17th i.e. on the next day of the incident. Subsequent to that the dying declarations at Exhibits 26 and 28 came to be recorded. The reason given by Sushma for making a false declaration appears to us to be a figment of her imagination. The custody of her daughter had already been obtained prior to the recording of the dying declarations at Exhibits 26 and 28. If that be the case and if Sushma admits that she had made a false declaration, there is no guarantee about the truthfulness of what she states in Exhibit 24. In that background therefore according to us, the Appellant would be entitled to be given the benefit of doubt.

16. In respect of the offence punishable under Section 498A of the Indian Penal Code, we find that the prosecution has adduced strong and reliable evidence which proves the offence against the Appellant beyond reasonable doubts. The Appellant had admitted his guilt when the report was lodged against him and thereafter promised to treat Sushma well. Even thereafter the Appellant continued to ill treat Sushma. Therefore according to us, the offence under Section 498A of the Indian Penal Code has been established beyond reasonable doubt and the conviction and sentence in that behalf needs no interference.

17. We thus partly allow the Appeal. We quash and set aside the conviction and sentence of the Appellant for offence punishable under Section 302 of the Indian Penal Code and acquit the Appellant in respect of the said offence. Fine, if paid, by the Appellant for offence punishable under Section 302 of the Indian Penal Code shall be refunded to him. We maintain the conviction and sentence of the Appellant for offence punishable under Section 498A of the Indian Penal Code. Since the Appellant has already undergone the said sentence, we direct that the Appellant shall be released forthwith, if not required in any other case.

The Appeal is thus, partly allowed as indicated above.

(P. V. Hardas, J.)

(A.S. Gadkari, J.)