

Krushna Vs. State of Maharashtra

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Court : Mumbai

Decided On : Apr-22-1988

Reported in : I(1990)DMC403

Judge : M.S. Ratnaparkhi, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 306

Appeal No. : Criminal Appeal No. 229 of 1985

Appellant : Krushna

Respondent : State of Maharashtra

Advocate for Def. : Habibuddin Ahmad, Additional P.P.

Advocate for Pet/Ap. : M.M. Vaidya, Adv.

Disposition : Appeal allowed

Judgement :

M.S. Ratnaparkhi, J.

1. The accused-appellant is challenging the order of conviction and sentence imposed upon him by the Additional Sessions Judge, Amravati on 26-7-1985 in Sessions Trial No. 109 of 1984, convicting him for the offence punishable under Section 306 of the Indian Penal Code and sentencing him to suffer rigorous

imprisonment for five years, fine of Rs. 100/- or in default further rigorous imprisonment for one month.

2. The deceased Durga was the second wife of the accused-appellant. He has his first wife by name Mala. The deceased came to be married to the appellant about 10 years prior to the incident. After her marriage, she and her co-senior wife used to stay with the appellant. It is the prosecution case that there were some bickerings between these two co-wives. In the morning of the date of the incident i.e. 25-2-1984, there was an exchange of words between them on a cup of tea. As a result of that exchange the senior co-wife Mala left her marital house and went to stay with her sister-in-law at Mangrul.

3. While the deceased was at the house, there was some exchange of words between her and the appellant. It is the prosecution case that the appellant supplied a kerosene can full of kerosene to the deceased, as a result of which the deceased poured on her person the kerosene, kindled the match stick and set fire to her clothes. She then came running outside. This was in between 12 noon and 1 P.M. Persons assembled there on hearing the cries and flames were extinguished. The accused also participated in extinguishing the flames. The deceased was removed to Amravati and she was admitted to the Irwin Hospital in Ward No. 4. She suffered 100 p.c. burn injuries of second degree. Her dying declaration came to be recorded at about 10 p.m. where she alleged that her husband instigated her and in pursuance of that instigation supplied a can of kerosene which she had poured on her person and set fire to her clothes. The deceased succumbed to her injuries at about 3 A.M. on the same night. The offence was registered on the basis of the dying declaration. It was investigated into and the charge-sheet was put up against the appellant.

4. A charge under Section 306 of the Indian Penal Code along with some other sections was framed. The accused pleaded not guilty to the same and claimed to be tried. His defence was purely of denial. It was suggested that while the deceased was preparing meals, her clothes caught fire and she came running outside. The accused was not present at the house then. He was coming to the house at about 12.30 or 1 in the noon when he found her wife on the road in

flames. He, therefore, raised cries. Persons assembled there and he himself extinguished these flames. The deceased was then removed to the hospital where she died in the same night.

5. The learned Additional Sessions Judge on trial held that there was no other evidence except the dying declaration which could implicate the accused. He relied solely on the dying declaration and on the basis of the dying declaration he held the accused guilty of the offence punishable under Section 306 of the Indian Penal Code and sentenced him to the terms detailed in the opening paragraph of this judgment above.

6. Feeling aggrieved with the order of conviction and sentence, the appellant-accused had come up in appeal. Mr. Vaidya, the learned advocate for the appellant, strenuously urged before me that the trial court committed an error in accepting the so-called dying declaration at its face value without seeking for any further corroboration in support. There appears to be much force in what Mr. Vaidya says. It is not necessary to go into the details of other evidence, though the prosecution has examined about 17 witnesses. The learned Additional Sessions Judge has not relied on any oral evidence of the other witnesses or the documentary evidence, but he has relied upon the dying declaration and two witnesses supporting that dying declaration i.e. Dr. Deshmukh (PW 5) and Ramkrishna Dadhu (PW 4), who was the Executive Magistrate. It will, therefore, be necessary to examine and scrutinise the dying declaration and its effect.

7. Before going to the dying declaration, it will be necessary to point out the factual positions which are either undisputed or well-established and not challenged :

(1) There is no evidence to show that the relations between the appellant and the deceased were strained any time prior to the date of the incident.

(2) The accused and the prosecution have given different versions and according to the accused the clothes of the deceased caught fire while she was cooking inside the house.

(3) There is evidence on record to show that while she was removed from the village to Amravati she was unconscious. We have also the evidence of one Jaikisan (PW 1) who was the ward-boy.

(4) The deceased was unconscious when she was brought to the Outpatient Department. She was admitted to the Outpatient Department at about 8-35 p.m. and her dying declaration came to be recorded at the hands of the Executive Magistrate Mr. Ramkrishna Dadhu (PW 4) at about 10 p.m.

(5) The deceased succumbed to her injuries in the early hours of the following day i.e. at about 3 a.m.

8. As the prosecution is relying solely on the dying declaration, it will be necessary to scrutinise the whole dying declaration. In the early part of the declaration she has given the history as to when she was married and how they were living. The relevant part of the declaration reads as follows :

(matter omitted in vernacular)

9. For the acceptability of the dying declaration the prosecution has to prove, firstly, that it is voluntary and secondly, that it is truthful. Voluntariness cannot be challenged in this case because it is more or less an undisputed position that there was hardly any chance of tutoring. There is ample evidence on record to show that the appellant was all along with his wife after the incident till her death. It is also an admitted position that there were no other persons from the side of the deceased till she breathed her last. The only attack which Mr. Vaidya had was on the truthfulness of this dying declaration.

10. Mr. Vaidya strenuously urged before me that the deceased was not at all in a position to narrate anything much less making a dying declaration. He invited my attention to some of the circumstances which are well-established on record :

(1) That when the deceased was seen in dunes in front of her house by the people, she had already suffered serious burn injuries.

(2) When she was removed from the village to the hospital at Amravati she was unconscious throughout.

My attention was invited to the testimony of Jaikisan (PW 1) who was the ward boy attached to the O.P.D. of Civil Hospital, Amravati. He deposes that when the lady was brought to the O.P.D. she was unconscious and she could not speak anything. It is because of her unconsciousness that Dr. Rathie who was incharge of the O.P.D. had to ask about her name and address to the persons accompanying her. Mr. Habibuddin, the learned Additional Public Prosecutor for the State urged before me that the evidence of this ward-boy may not be accepted because he is not an expert. It is really surprising that the prosecution is condemning their own witness without declaring him hostile. If at all, the evidence witness were false, the learned Public Prosecutor who was incharge of the case before the trial Court could have very well requested the Court for permission to declare the witness as hostile or otherwise for permission to put questions to the witness in the nature of cross-examination. Nothing has been done. The learned Additional Public Prosecutor cannot now legitimately go behind what this witness has said and circumvent that story. The testimony of Jaikisan (PW 1) also shows that it was Dr. Rathie who had the first opportunity to see the deceased at the O.P.D. when she was brought to the hospital. It is Dr. Rathie who directed her to be admitted to Ward No. 4. Dr. Rathie has been examined as (PW 12), but not a single question regarding the deceased has been put to him. As the evidence stands, we have to hold that she was unconscious when she was brought to the hospital at Amravati.

11. It is evident from the record that she was admitted to ward No. 4 at about 8 35 p.m. The bed head Ticket has been filed on record and it mentions the physical conditions of the patient which was observed by the doctor. The bed-head ticket mentions that the patient had suffered 100 percent burns of the second degree. By second degree burner, according to Dr. Tekade (PW 13) it is meant that the injury has gone deep even below the skin. It is contended that the burns were pretty serious. The history recorded by the doctor in the bed-head ticket is of burning while cooking food at the house. The first entry in the bed-head ticket is that the wholebody surface is burnt. Some medicines are prescribed, but pathidine injunction is directed to be administered only after the recording of the dying

declaration. There is nothing in the case papers to show that she was conscious when admitted.

12. The authorities incharge of Ward No. 4 sent a requisition to Rajapeth Police Station with a request for recording the dying declaration of the deceased and accordingly Mr. Ramakrishna Dadhu, the then Executive Magistrate was summoned. There is a discrepancy as far as the time is concerned, but let us not be overwhelmed by these technicalities. Mr. Ramakrishna Dadhu came to Ward No. 4 and he asked the doctor to certify whether the patient was in a condition to make the declaration. We have, then, the evidence of Dr. Deshmukh (PW 5). Dr. Deshmukh was not the incharge of this Ward, but he was called only for the purposes of certifying the physical condition at that particular moment. The evidence of Dr. Deshmukh shows that he saw the pulse and heart-beats. He asked the name to the deceased and from this perfunctory examination, he certified that the patient was in a position to make a declaration. As a matter of fact, the physiological symptoms disclosed by the heart-beats and the pulse rate only could satisfy an expert about the receptivity of the individual and nothing more. Similarly asking the name to the person would merely show that the patient is receptive. What, the doctor had to satisfy himself was whether the patient was in a rational state of mind so as to make a rational and logical disclosure of the evidence. This opinion becomes important particularly in view of the fact that the patient had suffered 100 percent burns of second degree and that she was unconscious when was brought to the hospital. There is absolutely no evidence to show that Dr. Deshmukh had practised means to ascertain not only the receptivity but also the facility of reasoning of the deceased. As far as PW 4 Ramakrishna Dadhu is concerned he was not at all an expert witness and had to rely upon the opinion given by Dr. Deshmukh. The dying declaration came to be recorded in pursuance of this opinion. It is now for us to decide as to whether the dying declaration and the contents thereof were truthful.

13. The learned Additional Sessions Judge has considered the evidence of Dr. Deshmukh and Ramakrishna Dadhu (PW 4) and he has come to the conclusion that both of them are the responsible officers working under the State Government and their evidence could not be discarded on any count. According to me, this is

too vague a reasoning to be accepted because what is concerned in this case is a right of a person to life and liberty. PW 4 Ramakrishna and PW 5 Dr. Deshmukh might not have any axe to grind against the accused. They might have no sympathies with the deceased. But what we find in the present case particularly in respect of Dr. Deshmukh is a most rational approach. He just comes from another Ward, asks the name of the patient, only sees the pulse rate and heart-beats and declares that she is in a state to make a statement and this has to be viewed on the background that when the patient was brought to the hospital she was unconscious. There is evidence of Dr. Tekade (PW 13), who is equally an expert and who says that with these 100 percent burns of second degree, the patient must have become unconscious within 3 to 6 hours.

14. What has been established in this case is that when the patient was admitted in the hospital she was unconscious. Surprisingly the doctor who has admitted the patient and who was incharge of Ward Dr. Dixit has not been examined by the prosecution. There was no best person to depose about the faculties of the deceased. Dr. Tekade, who is working in the same hospital, says that with such nature of burns the patient is bound to go into unconsciousness after 3-4 hours. This evidence thus cautions the Court to be very alert in appreciating the evidence of Dr. Deshmukh, whose approach to the whole problem has been very casual. In spite of the fact that the patient was unconscious when reached to the hospital, on merely perfunctory examination he declares her fit. It is surprising to note at this stage that there is evidence on record to show that the patient was groaning with pains even at that stage. We can just imagine the pains that the deceased could have suffered after 100 percent burn injuries of second degree.

15. The learned Additional Sessions Judge found that there was some corroboration to the story disclosed in the dying declaration. When the Court seeks corroboration, it seeks corroboration only on the material points and not on other points which are not so material. As is evident from Exh. 12 the only material part of the story is that the accused and deceased were in the Osari, that the accused supplied the deceased a can containing kerosene, the deceased poured that kerosene on her body, ignited the match stick, set fire to her clothes and ran outside. This is the integral part of the story. The deceased had also stated that

while she was out, her husband was inside the house. This is a very material part of the story, because she insists that inspite of the fact that she was in flames, her husband did not do anything. He did not extinguish the fire. There are now circumstances on the record itself which prove that some of the statements in this declaration are false because what she stated in the dying declaration is that she was put in flames in the outer chhapri and from there went outside. On the other hand, as the accused has suggested she was preparing meals in the Mazghar and there her clothes caught fire. We have the panchanama of the spot drawn by the police on 27th morning and shows that half cooked food was still lying on the hearth. This circumstance is consistent with the story put in by the accused and it is inconsistent with the story depicted in the dying declaration.

16. According to the declaration as soon as her clothes were set on fire she ran outside. The panchanama on the other hand shows that there were pieces of burnt clothes, ashes etc. in the inner room i.e. Mazghar, where half cooked food was lying on the hearth. This circumstance is more consistent with the story put up by the accused and it is equally inconsistent with the story put in the dying declaration. This is thus a circumstance which falsifies the dying declaration to that extent. The deceased insisted in the dying declaration, that while she was out, her husband was inside. We have the evidence of Pundlik (PW 8) and other persons who say that the accused was throughout by the side of the deceased when she was in flames outside. This circumstance is contrary to what has been stated in the dying declaration. The deceased has stated in the dying declaration that the accused did not help in extinguishing the flames. The accused on the other hand states that he did extinguish the flames and while doing it he did sustain some injuries and we have the evidence of Dr. Rathi (PW 12), who deposes that the accused had burn injuries on the toe posterior aspect and another contusion on the forearm ulnar aspect. This circumstance is also consistent with the story put up by the accused and it is equally contradictory to the dying declaration. I have pointed out these circumstances only to show that the learned Additional Sessions Judge considered only the part of the circumstances in favour of the dying declaration and there were other circumstances which were running contrary to what is contained in the dying declaration. On the other hand, these circumstances, which I have pointed out above, have a tendency to falsify

whatever has been stated in the dying declaration.

17. Thus what emerges from the evidence on record is that though the dying declaration maintains that it is the accused who supplied the kerosene to the deceased, there is considerable doubt regarding the truthfulness of this statement. The four circumstances which I have pointed out in the foregoing paragraph do show that at least some part of the dying declaration is definitely false. Apart from that, this dying declaration came to be made 7-9 hours after the incident though at the village itself, the deceased had ample opportunity to tell to the neighbours as to what happened. There is evidence on record to show that when she was in flames on the street, males and females in the vicinity assembled there and it is not her case that she was stranger to the village. In fact she is staying at that village for not less than 10 preceding years. There is no evidence that she had enmity with all these persons, as a result of which she could not make a disclosure about it to anybody-else.

18. Taking into consideration all these circumstances together, I find myself unable to agree with the learned Additional Sessions Judge that the dying declaration made by the deceased is hundred percent truthful at its face-value. On the other hand, from the circumstances which I have enumerated. I have grave doubts about the truthfulness of the very essential and important part of the dying declaration, namely, the handing over of the can of kerosene by the accused to the deceased. On this point there is no corroboration. As regards other contents of the dying declaration, there are circumstances to show that this part of the dying declaration are not correct.

19. As far as the law on the point is concerned, there is no dispute regarding the proposition that a conviction can be based solely on the dying declaration without any corroborating evidence. The only requirement is that the Court must be satisfied regarding the voluntariness and truthfulness thereof. In the present case some circumstances are brought on record which have a tendency to falsify some statements in the dying declaration. On the other hand, there is another set of circumstances which throw a considerable doubt on the physical capacity of the deceased to make this declaration. Taking all these circumstances together, I hold

that the dying declaration cannot be accepted at its face-value as it contains falsehood.

20. In view of this, the order of conviction and sentence based solely on this dying declaration cannot be sustained. If this dying declaration is kept aside, there is absolutely no other evidence to connect the accused-appellant with this offence. The dying declaration contains in itself the germs which can falsify it. It will not, therefore, be advisable to rely solely on this dying declaration. The result is that there is no other evidence connecting the accused-appellant with this offence. The order of conviction and sentence thus cannot be sustained. The appeal has to be allowed and it is accordingly allowed. The order of conviction and sentence is set aside. The accused-appellant stands acquitted. Fine, if paid, be refunded to the accused. His bail bond stands cancelled.

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