

Suresh Vs. State of Maharashtra

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Court : Mumbai

Decided On : Jul-17-2002

Reported in : I(2003)DMC400

Judge : R.K. Batta and ;V.M. Kanade, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 304 and 498A; [Evidence Act, 1872](#) - Sections 32

Appeal No. : Criminal Appeal No. 400 of 1997

Appellant : Suresh

Respondent : State of Maharashtra

Advocate for Def. : Lony, A.P.P.

Advocate for Pet/Ap. : Amol Mardikar, Adv.

Disposition : Appeal dismissed

Judgement :

V.M. Kanade, J.

1. The appellant-accused was charged under Sections 302 read with Section 498-A of the Indian Penal Code for having committed murder of his wife Kalpana on 12.6.1995 in the evening between 6.00 p.m. and 8.00 p.m. The Trial Court

convicted the accused-appellant herein for having committed an offence under Section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default to suffer further rigorous imprisonment for one year. He was also convicted under Section 498-A of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for one year and to pay a fine of Rs. 1,000/- in default to suffer further Rigorous Imprisonment for two months. The Trial Court, however, directed both the sentences should run concurrently. The appellant-accused is challenging the said judgment and order in this appeal.

2. The facts are that the deceased Kalpana was the daughter of Ramkrishna Thakre, resident of Karanja Wanipura, District Akola. She and the accused got married in 1990. The appellant-accused was resident of Mangrul Chavhala. It is the case of the prosecution that after marriage Kalpana was subjected to ill-treatment at the hands of the accused. It was contended that the accused used to raise quarrel with his wife and used to beat her. It is the case of the prosecution that the appellant-accused had told Kalpana that he would finish her. The accused and Kalpana had two children, one aged five years and other aged three years. It is the case of the prosecution that on 9.6.1995 Kalpana had gone to him at Karanja with both her children and that time her elder sister Bebi and brother-in-law Bharat Wankhede had also gone to Karanja. It is the case of the prosecution that on 11.6.1995, appellant-accused Suresh had gone to Karanja and there was a quarrel at night in between the husband and wife and in the morning on 12.6.1995, the accused-appellant left the house without informing anybody. In the afternoon, Kalpana left the house of her parents and proceeded to go to her matrimonial house with her children and with one Sunita, who was the daughter of her sister Bebi. They reached village Ner at about 6.00 p.m. and at about 7.30 p.m. accused raised quarrel with Kalpana as to why she had taken Rs. 200/- from him and, therefore, it is alleged that he poured kerosene oil on the person of Kalpana and set her on fire. At that time only the husband and wife were at home. It is alleged that the accused also assaulted her with a stone on her head. It is the case of the prosecution that after she caught fire she ran out of the house and raised hue and cry and people gathered there and, thereafter, the accused tried to extinguish the fire with the help of a quilt. Kalpana was thereafter immediately removed to the

hospital. She gave a statement to the Police Constable which was recorded as First Information Report. Thereafter, two dying declarations were recorded by the Executive Magistrate, who has sent the requisition to the Doctor and Doctor had certified that she was in a fit condition to make a statement. The two dying declarations were recorded by the Executive Magistrate and during recording of the said dying declaration, the Doctor was present. The accused was also sent for medical examination and the Doctor found burn injuries on the right leg and index finger of the accused.

3. On 18.6.1995, Kalpana succumbed to burn injuries and, thereafter, the investigation was carried out. The charge-sheet was filed against the accused. The accused pleaded not guilty to the said charge and his defence was that of total denial. In the statement which was recorded under Section 313 of the Code of Criminal Procedure, he contended that he has been falsely implicated in the case. He also filed his written defence in which he stated that he suspected that Kalpana had an affair with his brother-in-law Bharat and that on the night of 11.6.1995 he had seen Kalpana and Bharat together in a compromising position and, therefore, he had quarrel with Kalpana and had asked her that she should not come back to his village. It was further stated in the written statement that in order to take revenge, Kalpana had gone to her matrimonial house and committed suicide and had falsely implicated the accused in order to take revenge on him.

4. We have heard learned Counsel appearing on behalf of the appellant-accused and learned A.P.P. appearing on behalf of the respondent-State, Learned Counsel appearing on behalf of the accused has taken us through the evidence on record including the depositions recorded by the Sessions Court as also the dying declaration and other documentary evidence on record. We have also gone through the evidence, judgment and orders passed by the Trial Court.

5. Learned Counsel appearing on behalf of the accused submitted that the only evidence against the accused was in the form of dying declaration and he submitted that Doctor who had given the certificate merely stating that the deceased Kalpana was in a fit condition to make a statement. He submitted that it was the duty of the Doctor to point out whether the patient was mentally and

physically fit to make a statement. In the absence of such certificate, he submitted that the dying declaration could not have been relied upon by the Trial Court. He further submitted that the second dying declaration is at Exh. 46 which was recorded by the Executive Magistrate was rightly discarded by the Trial Court. He, therefore, submitted that there was discrepancy between the two dying declarations which created doubt about the dying declaration. He submitted that the appellant-accused had tried to extinguish the fire by putting a quilt on the body of the deceased and as a result had also suffered burn injuries on his person. He submitted that therefore if this Court came to the conclusion that the accused had poured kerosene and had lit the deceased with the means of match-stick, because of his subsequent conduct, he could at the most be convicted under Sections 304 Part-II and not under Section 302 of the Indian Penal Code. He also relied on the judgment of the Apex Court in the case of Smt. Laxmi v. Om Prakash & Ors., reported in : 2001 CriLJ3302 . Learned A.P.P. appearing on behalf of the prosecution vehemently opposed the said submissions made by the learned Counsel appearing on behalf of the appellant-accused. He submitted that there was a oral dying declaration which was given to the brother and mother of the deceased and also to the Police Constable, who had recorded First Information Report and apart from that there were two dying declarations which were recorded by the Executive Magistrate at Exh. 42 and Exh. 46. He submitted that even dying declaration Exh. 46 ought to have been relied upon by the Trial Court. He relied on the judgment of the Apex Court reported in 1999 4 Cri. L.J. 4582 in support of his submission.

6. In our view, looking at the evidence on record, we have no doubt that the prosecution has proved beyond reasonable doubt that the accused had committed the murder of Kalpana by pouring kerosene on her and by setting her on fire with the means of match-stick. P.W. 1 Deepak Ramkrishna Thakare, who is the brother of deceased Kalpana, has stated that the deceased Kalpana had complained on number of occasions that the accused used to ill-treat her. He has further stated that two months prior to the death of Kalpana, there was a quarrel between the accused and the deceased Kalpana and that the accused had told his wife that he would finish her. He has further deposed that Kalpana had gone to Karanja on 9.6.1995, that Suresh (appellant-accused) came to Karanja on 11.6.1995, and

there was quarrel between them during night and that in the morning accused (appellant) had left without informing anyone. In the afternoon, deceased Kalpana had gone to her matrimonial house and they received message that Kalpana was burnt by her husband. When they had gone to the hospital at Yavatmal, his father, mother, brother-in-law and sister Bebi had met Kalpana and she had told all of them that her husband poured kerosene on her and set her on fire. This evidence has not been shaken in the cross-examination. In fact, the witnesses reiterated that Kalpana had told them in the presence of her father-in-law and mother-in-law that her husband set her on fire. He has also further deposed that when they reached the hospital, the father-in-law and mother-in-law of Kalpana were present, however, her husband was not present. Similarly, P.W. 2 Bharat Namdeorao Wankhede has also deposed that Kalpana had told them that Suresh had poured kerosene on her person and had set her on fire by lighting a match stick.

7. In addition to oral dying declaration, there is dying declaration Exh. 42. The evidence of P.W. 3 Dr. Omprakash Chothmal Patwari clearly establishes that he had examined the patient before recording the dying declaration at 8.10 p.m. on 12.6.1995 and had certified that she was fit to make a statement and he had identified his handwriting and the certificate at Exh. 35. He had stated that the Executive Magistrate had recorded the statement and he was present throughout and that the patient had signed the statement after it was read out to her. In the cross-examination, Doctor had clearly stated that when he had mentioned that the patient was fit to record the statement, by that he meant that she was physically and mentally fit. The testimony of this Doctor is, therefore, not shaken. The dying declaration at Exh. 42 clearly states that her husband had set her on fire after pouring kerosene on her person and that when she went outside the house and started shouting, thereafter, her husband had tried to extinguish the fire. She has further stated that her father-in-law brought her to the hospital, which is another circumstance to show that the subsequent conduct of the accused was also not proper.

8. The prosecution has also examined the Executive Magistrate (P.W. 5) Sayed Irfanuddin Syed Zahiruddin, who recorded the dying declaration of the deceased, which is at Exh. 42. He has stated that on 12.6.1995 he was the Naib Tahsildar in

Ner Taluka and at about 8.00 to 8.15 p.m. he received memo from Ner Police Station for recording dying declaration of Kalpana Dhole. He has stated that he reached Rural Hospital, Ner at about 8.10 to 8.15 p.m. Thereafter, he met Dr. Patwari and informed him that he had come to record the dying declaration of Kalpana Dhole. P.W. 5 Syed has stated that he specifically asked the Doctor whether patient was fit to make her statement. It is pertinent to note that the said witness has said that the doctor examined her and, thereafter, informed him that she was fit to give her statement and issued a certificate to that effect which is exhibited at Exh. 35. Thereafter, P.W. 5 Syed has stated that while the dying declaration of Kalpana Dhole was being recorded, he and Dr. Patwari were alone present alongwith Kalpana Dhole. He has narrated the manner in which the statement was given by her and the contents of her statement. Thereafter, he has stated that he had reduced the said statement in her handwriting and after the said statement was reduced in writing, it was read out to her and then he took her signature on it and, thereafter, he signed the said statement. Perusal of the said dying declaration at Exh. 42 accordingly shows that the Doctor has given endorsement at Exh. 35 that the patient was fit to make her statement. He has further made an endorsement on the said dying declaration and has stated that the dying declaration was recorded in his presence which is at Exh. 36. P.M. 5 Syed has further stated that after the dying declaration was recorded and the endorsement of the Doctor was taken, he forwarded the dying declaration with covering letter.

9. In our view, the ratio of the said judgment reported in Smt. Laxmi v. Om Prakash (supra) would not be applicable to the facts of the present case. In the said case, the Apex Court has held that merely because there were more than one dying declaration and they were apparently consistent that by itself was not sufficient to persuade the Court to act on the said dying declaration. In the said case the statement which was alleged to have been made by the deceased to the ASI (Police Officer) when he reached the place of the incident in PCR van, was not shown to be recorded in the Roznamcha in PCR van. Similarly, the said information was not conveyed by him to control room/or Police Station. Similarly, the said ASI also did not mention making of said statement by the deceased, to Investigating Officer at the time of recording of his statement and, therefore, under

these circumstances the Apex Court held that the omission was fatal to his testimony. Similarly the statement by attending doctor that the deceased was brought to ward 'with alleged history of being burnt by husband, mother-in-law and sister-in-law after pouring kerosene oil, after attempting to strangle her with rope.' This was not deposed by the Doctor in his statement. Similarly, he had not deposed that the deceased had made any such disclosure to him and, therefore, under these circumstances, the statement made to the Doctor was not relied upon. Thirdly in the said case, the Apex Court held that there was no medical evidence to show that the deceased was in fit state of mind and physical condition to have at all made any statement and signed the same and, therefore, under these circumstances, the Apex Court held that the same could not be relied upon and finally the Apex Court has further held that in facts and circumstances of the said case where five statements attributed to the deceased and coming from the mouth of the different witnesses and which had not totally been accepted and, therefore could not be acted upon as dying declaration and, therefore, could not form basis for conviction of the deceased. The facts of the present case are entirely different; Kalpana whose dying declaration is recorded at Exh. 42 is recorded by P.W. 5 Syed, who was an Executive Magistrate and a responsible officer. He has specifically asked the Doctor to examine the deceased who after examining her has made an endorsement that she was in a fit state of mind to make the statement. Further the Executive Magistrate himself asked various questions to Kalpana and after he was satisfied that she was properly giving reply to the questions, he recorded the dying declaration in her own handwriting and after it was concluded, he read out the statement to Kalpana, who later on signed the said statement and the doctor also made an endorsement at Exh. 36 that he was present throughout the recording of the dying declaration. In view of the above, we are of the opinion that the ratio of the judgment relied upon by the appellant-accused cannot be made applicable to the facts and circumstances of the present case. There is no reason to discard dying declaration Exh. 42 which was first in point of time.

10. Coming to dying declaration Exh. 46, the same has been discarded by the lower Court for reasons recorded in Paras 37 and 38 of the judgment. This dying declaration was recorded at 1.25 p.m in 13.6.1995. Why the second dying

declaration was recorded is not known. This dying declaration was discarded by the Trial Court on account of discrepancy in timing of certificate recorded by Doctor P.W. 4 before recording of dying declaration interval between the certificate and actual recording of statement as also on account of lack of proper certificate regarding fitness of deceased even though this dying declaration substantiality on material particulars corroborates the first dying declaration. The Trial Court, therefore, kept the second dying declaration out of consideration. Nevertheless, we do not find any reason whatsoever to discard the unequivocal and unambiguous first dying declaration which implicates the appellant and proves that the appellant had poured kerosene and set the deceased on fire.

11. In addition to the dying declaration there is the Chemical Analyser's report which shows that the articles which were seized i.e. mattress, which was partly burnt and towel were also positive for kerosene residues.

12. The submission of learned Counsel appearing on behalf of the accused that at the most the case of the accused would fall under Section 304 Part-II of the Indian Penal Code also cannot be accepted. There are no circumstances brought on record which would probalilise the defence of the accused that the deceased had committed suicide. On the contrary, the accused though he had extinguished the fire of his wife Kalpana with a quilt, that was only after she had come out of her house and raised hue and cry and after people had gathered, he had thereafter tried to extinguish the fire, this was possibly, in our view, in order to make a show that he was not responsible in burning his wife. His further conduct, however, of not accompanying Kalpana to the hospital and remaining there clearly points towards his guilt and, therefore, under these circumstances it cannot be said that the case of the accused-appellant would fall under Section 304 Part-II of the Indian Penal Code. The submission of the learned Counsel appearing on behalf of the appellant-accused that the ratio laid down in : 2001 CriLJ3302 (supra) is applicable to the facts of this case, cannot be accepted.

13. In the result, we find no merit in the appeal filed by the appellant-accused and the appeal is, therefore, dismissed.

