

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1708 OF 2009

SURYAKANT DADASAHEB BITALE

... APPELLANT

VERSUS

DILIP BAJRANG KALE & ANR.

... RESPONDENTS

J U D G M E N T

Sudhansu Jyoti Mukhopadhaya, J.

This appeal is directed against the judgment and order dated 18th October, 2007 passed by the High Court of Judicature at Bombay in Criminal Revision Application No.321 of 2004. By the impugned judgment, the High Court set aside the judgment dated 29th May, 2004 passed by the Sessions Judge, Satara in Sessions Case No.4 of 2004 acquitting the appellant-accused for the offence punishable under Section 498A and 302 of the Indian Penal Code and remanded back the proceedings for consideration afresh to the Session Court.

2. The factual matrix reveals that the deceased Archana married to the appellant-accused on 6th June, 2003. Satyanarayan Puja was performed on 8th June, 2003. As per family traditions, Archana returned to her father's house on 9th June, 2003 and, thereafter, she went back to matrimonial home on 11th June, 2003.

3. On 14th July, 2003 the deceased Archana sustained 95% burn injuries in her matrimonial house. Her husband, appellant-accused was present in the house at the relevant point of time. She was admitted in Civil Hospital, Satara, where the Special Executive

Magistrate had recorded her dying declaration on 14th July, 2003 (first dying declaration).

4. The message of the burn injuries suffered by Archana was received by her maternal uncle on 15th July, 2003. He along with his wife, went to see Archana and found that she was under medical treatment in Civil Hospital at Satara.

5. On 16th July, 2003, Special Executive Magistrate recorded another dying declaration of Archana at Civil Hospital, Satara (second dying declaration).

6. Dilip Bajrang Kale (in short Dilip), father of the deceased Archana, thereafter lodged an FIR on 16th July, 2003 with the Pusegaon Police Station, District Satara against the appellant-accused alleged that the accused had given mental and physical harassment to Archana, since dowry demand was not fulfilled and that, ultimately, Archana was made to suffer burn injuries.

7. On 17th July, 2003 inquest panchnama on the body of the deceased was carried at Civil Hospital, Satara and the dead body was sent for postmortem. The postmortem report suggested that death is caused due to 90% superficial and deep burn injuries.

8. The appellant-accused was arrested and initially proceeded for the charges under Section 498A and 307 IPC. After the death of Archana, he was charged for the offence punishable under Section 302 and 498A IPC.

9. After investigation, the case was committed to the Sessions Court at Satara. The prosecution produced a number of witnesses and documentary evidence.

10. The Sessions Judge tried the accused for the offences punishable under Section 302 and 498A IPC and after recording the evidence and appreciating submissions made by the parties acquitted the appellant-accused of the offences alleged against him.

11. Being aggrieved by the aforesaid order of acquittal dated 29th May, 2004 passed by the Sessions Judge, the complainant Dilip, father of the deceased invoked revisional jurisdiction of the High Court under Section 397 Cr. P.C. to challenge the legality and validity of the order of acquittal. The High Court under revisional jurisdiction while accepted that appreciation of evidence is not within the jurisdiction of the revisional court, re-appreciated the dying declaration and observed as follows:

"23. Having taken survey of the law regarding dying declaration and value which is to be attached to it, now let me turn to the dying declarations which are available on record.

24. The deceased had stated in her first dying declaration dated 14.7.2003 that on 4.7.2003 i.e. on the date of incident at about 3.30 p.m. while cooking in the kitchen on gas stove fire caught to the shore of her saree which she tried to extinguish, and, ultimately, suffered injuries. That her husband, who was in the next room brought a bed sheet and bad cover to extinguish fire. That he had also suffered burn injuries.

25. In the second dying declaration recorded on 16.7.2003, Archana had stated that first dying declaration was given by her under pressure and she went on to say that she having refused to have the sexual intercourse on second occasion her husband (accused) got annoyed and in the hit of anger poured kerosene on her person and set her on fire using matchstick. That her husband did not try to extinguish fire.

26. With the aforesaid two dying declarations on record, it was expected on the part of the learned Sessions Judge to appreciate both dying declarations and to find out which was reliable. It was open for

him to appreciate and to accept either of the dying declarations or to reject both. But it was not open for him not to appreciate any of the dying declarations and exclude and/or omit or to overlook this vital evidence from consideration.

27. The spot panchnama shows that gas cylinder was empty; whereas, the report of Chemical Analyser shows that residues of kerosene were detected on the clothes which were seized including those of the accused and the deceased. The earth collected from the kitchen had also traces of the kerosene and that her husband (accused) had also suffered burn injuries."

In view of such observation, the High Court remitted the matter back to the Session Court for consideration afresh.

12. Learned counsel for the appellant assailed the judgment on the ground that in absence of appeal against the acquittal under Section 378 Cr.P.C., it was not open to the High Court to re-appreciate the evidence like dying declarations under Section 397 Cr.P.C. It was further contended that the Sessions Judge had extensively appreciated the dying declarations of the deceased and thereafter had come to the conclusion that the appellant is not guilty of the offence charged against him. Where two views are possible, the High Court should not have interfered with the order of the acquittal.

13. To appreciate the arguments, it is desirable to refer the two dying declarations made by the deceased Archana and recorded by the Special Executive Magistrate, one on 14th July, 2003 and the other on 16th July, 2003.

14. Dying declaration dated 14th July, 2003 is in the form of statement and reads as follows:

"Statement

Dated: 14.7.2003

I, Archana Suryakant Bitale, age 22, R/o Garwadi Taluka Khatav, District Satara.

On being asked I hereby give my statement in Ward No.27 that I have been residing at the aforesaid place alongwith my father-in-law Tai Dadaso Bitale. My husband Suryakant Dadaso Bitale is working as Mothadi Labourer in Nhava Sheva Project Mumbai and my marriage took place as per my wish and with the consent of people from parent's side. My marriage took place on 6th June, 2003. Since my marriage I have been residing at my husband's place. I have studied upto 12th and my marriage took place at Kalewadi i.e. my parent's place.

Today i.e. 14.7.2003 around 3.30 I was cooking on the gas stove and my husband was sleeping in the other room. While cooking my saree accidentally fell on the flame of the gas and caught fire. I tried to extinguish but my saree caught fire and since I got burnt I came out of the kitchen shouting. My husband and neighbours extinguished the fire with bed sheet and bed cover. My husband also suffered burn injury while trying to extinguish the fire. I got burn injuries on both the legs, chest, back, abdomen, both legs and neck and it is paining. I was taken to the primary health centre Diskal in a jeep from our village and from there I was taken to the Civil Hospital, Satara. I am being treated here.

Therefore on 14.7.2003 around 3.30 my husband had to go to Mumbai and while I was cooking around 3.30 my saree caught fire and I got burnt. At the time of incident me and my husband were at home and my father-in-law had gone to the field and nobody has set me on fire. My saree fell on the gas stove and therefore, I got burnt I do not have any complaint against anyone.

The aforesaid statement is written down correctly as stated by me and hereby signing the same.

The aforesaid statement started at 16.00 and completed at 6.30.

14.7.2003

Sd/-
A.S.I.
Hospital Duty'
Satara City Police Hospital."

15. On the other hand dying declaration dated 16th July, 2003 is recorded in the format which reads as follows:

"DYING DECLARATION DATED 16.7.2003

I, Sou, Archana Suryakant Bitale, again state and answer the following questions:

1. Full Name : Sou. Archana Suryakant
2. Age : 22 years
3. Occupation : Household work
4. Residing at : Garvadi Taluka Khatav
5. Reason of Burning : My husband Suryakant Dada Saheb Bitale poured Kerosene on my person and lit me on fire after I disallowed him to have intercourse on second occasion.
6. Quarrel with Whom : There was no quarrel with anybody in the house.
7. Did husband or in-laws make any demand for dowry : No
8. How many years : Marriage took place on have lapsed 6,6,2003. After marriage?
9. Is this second Statement being Recorded at the Behest of anybody? : Nobody asked me to give the second statement.
10. Why did you not tell the information given in the earlier statement recorded on 14.7.2003 ? : Statement dated 14.7.2003 was recorded under pressure and, therefore, I could not state. However, since my agony has increased, I am making this fresh statement.

My husband Suryakant Dada Saheb Bitale poured kerosene from the kerosene can in the house and set me on fire by lighting matchstick. At that time, there was nobody else in my house. After I was lit on fire, my husband was lying on the bed. After I was set on fire, I started shouting loudly. However, somebody from the neighbouring house whose name I do not know came to douse the

fire. However, he saw my husband and returned back without doing anything. My husband did not try to douse the fire. On the day of the incident my husband and other persons in the village admitted me to Civil Hospital at 3.30 p.m. It is my accusation that my husband set me on fire. There is no allegation by me against my mother-in-law, father-in-law, brother-in-law in our house and I do not have any complaint against them. My husband should be severely punished. Neither the Police Officer nor any of my relatives were present while recording my statement nor am I making this statement under pressure of anybody. Recording of my statement started at 12.40 in the afternoon and continued till 1.10 p.m. on 16.7.2003. The statement was read over to me and the contents thereof are correct.

Accordingly, the statement is recorded.

Dated: 16.7.2003.

In the presence of

Sd/-

Special Executive Magistrate,
Satara

Thumb Impression of
Archana Suryakant Bitale."

16. From the judgment dated 29th May, 2004 passed by the Sessions Judge in Sessions Case No.4 of 2004, what we find is that the Sessions Judge not only dealt with dying declaration dated 14th July, 2003 and 16th July, 2003 but also noticed that the deceased Archana made a declaration to her father, complainant, Dilip (PW-5) on 15th July, 2003 i.e. a day prior to the lodging of FIR on 16th July, 2003.

17. While dealing with so, the Sessions Judge observed as follows:

"10.....Therefore, what remains for scrutiny is dying declaration of Archana recorded by Pusalkar on 16.7.2003.

11. Before dealing with dying declaration recorded by Pusalkar, it will be just and proper to see what Dilip has stated in his evidence. According

to him after coming in Civil Hospital at Satara on 15.7.2003 he is not asking Archana as to how she sustained burn injuries. Archana on her own accord disclose him that accused was asking for sexual intercourse second time on 14.7.2003 and when she refused for it, he set her on fire. Without knowing as to what statement she made previously, it is his say that Archana on her own accord expressed that accused had forced her to make statement about burn injuries sustained by her accidentally that is why this witness had been to Police Station on the very day to file application. He requested police to record statement of Archana again. He is not filing any complaint with police on said day against accused. Complaint is filed by him on 16.7.2003 it was taken to station diary at about 1.00 noon or about. Whereas dying declaration recorded by Pusalkar in between 12.40 to 1.00 noon. It is denied by Dilip that he was present when Pusalkar recorded dying declaration. Statement of Dilip is recorded by police on 18.7.2003. Dilip denies that he made statement before police about his presence at the time when Pusalkar recorded dying declaration on 16.7.2003. Statement was pointed out by way of contradiction (Exh.36) wherein it is stated by this witness that as per his request statement of Archana was re-recorded on 16.7.2003 and she made such statement in his presence. It means that at the time of filing complaint he was aware of the fact as to what Archana disclosed before Pusalkar in her subsequent dying declaration. In complaint filed by Dilip Exh.24 on 16.7.2003 it is no where stated that accused intended to have sexual intercourse for second time on 14.7.2003 and when she refused for it, he set her on fire. In complaint it is stated by Dilip that Archana herself set on fire due to ill-treatment to her. Thus prosecution itself is coming with two-fold cause about sustaining burn by Archana namely an attempt to commit suicide by Archana by setting fire to herself, at the same time causing burn injuries to her by her husband for the reasons stated above. If at all Archana would not have stated to her father as to how she sustained bur injuries, one would not have found contents in F.I.R. that in an attempt to commit suicide, Archana sustained burn injuries. Attempt is made by Dilip Kale to explain about state of his mind, when he filed complaint with police on 16.7.2003. One cannot attach much importance explanation at belated stage. Prosecution itself is coming with the case that Dilip came to know on 14.7.2003 itself from Hanmant that accused set her on fire. Then on next day he is coming to Hospital where according to him Archana disclosed him that accused set her on fire. He is insisting police to re-record dying declaration of Archana on 15.7.2003 itself. Under

these circumstances omission in complaint by Dilip of homicidal death of Archana amounts to making improvement. The contradictory version in complaint is that she sustained burn injuries, in an attempt to commit suicide, is quite inconsistent facts. Prosecution thus itself is coming with two possibilities namely suicidal death by deceased Archana, at the same her homicidal death. Question is to whom benefit of such inconsistency will go. Certainly it will go in favour of accused and not prosecution. Now let us see dying declaration recorded by Pulsakar.

12. Pulasakar was aware of the fact that dying declaration was already recorded by his colleague on 14.7.2003. Therefore he did not read earlier dying declaration of Archana. He came to know from his colleague Mirza that Archana in her statement stated that she sustained burn injuries when her saree came into contact with gas-burshen. According to him he did not put question to Archana as to what statement she made previously. When no question was put to Archana about it, then how question No.9 finds place in D.D. recorded by Pusalka. There is specific question to her as to why she did not state about act of accused when her statement was recorded on 14.7.2003 when question was not put to Archana in suggestive form naturally it was expected to answer that due to some reason she made statement. Then answer to it is that her husband and his cousin brother pressurised her to make statement on 14.7.2003. Now the statement of Archana recorded by Pusalka is mostly in question and answer form up to 9th question. Questions are objective in nature. Question No.5 is put as to whether there was any quarrel between her and other person. It means that Pusalkar pre-supposes that there was quarrel. Answer to this question no doubt is that there was no any quarrel as suggested to Archana. Now question No.8 is as at whose instance she was making this statement. Now in fact this question does not relate to cause of death of a person, but some sort of enquiry with deceased in form of suggestive question. Answer to it which is brought on record is that Archana had not made statement at instance of any other person. I do not understand as to why where was doubt in mind of Pusalkar to put such question. At this stage at the cost of repetition, I may point out here about an attempt made by some person to extinguish fire. He is Hanmant who is coming with such case. He states before us that Archana prayed him to save her from fire. If at all Hanmant would have present there, then Archana would have disclosed his name. In dying declaration what is stated is that one person came but seeing accused he went away. It is not say of Hanmant that in

Hospital Archana disclosed him that accused set her on fire, when she refused to have sexual intercourse for second time. It was specifically put to him whether he asked Dilip to approach police to re-record D.D. Said statement is made by this witness before police, but he denies that he made such statement and contradictory version is brought on record with held of I.O. examined in this case. It is stated by this witness that he asked Dilip to inform police to record statement of Archana again. It is not stated by Pusalkar in his examination-in-chief that father of Archana was present when he recorded D.D. However, we find from D.D. that when Pusalkar recorded D.D. no relative of Archana was present. All these facts clearly suggest that D.D. recorded on 16.7.2003 by Pusalkar must be effect of prompting to her. Questions are also put by Pusalkar to Archana in such way so as to expect answer "Yes" or "No". There is also doubt as to whether Archana really must be in position to make statement.

13. Pusalkar states in para 4 of his deposition that entire body of Archana was covered with net. He states that no I.V. was on when he saw Archana. He then states that before giving opinion by Dr. about condition of Archana, Dr. read pulse of Archana. He also checked her chest with stethoscope. Dr. Nalawade states in his deposition at Exh.31 that he did not see pulse of Archana. He also did not see her B.P. He then states that I.V. was on to Archana when Pusalkar recorded her statement in his presence. However, Dr. Nalawade thus took the matter as routine. It appears to be somewhat peremptory approach, when D.D. was recorded by Pusalkar. Shri B.D. Kadam, learned Adv. for defence pointed out observations in Uka Ram vs. State of Rajasthan reported in 2001 (2) B. Cr.C. (SCC) 492 wherein it is observed as below:

"It has always to be kept in mind that though a dying declaration is entitled to great weight, yet it is worth-while to note that as the maker of the statement is not subjected to cross-examination, it is essential for the Court to insist that dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court is observed to rule out the possibility of the statement being the result of either tutoring, prompting, or vindictive or product of imagination. Before relying upon a dying declaration, the Court should be satisfied that the deceased was a fit state of mind to make the statement. Once the Court is satisfied that the dying

declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration as rule requiring corroboration is not a rule of law but only a rule of prudence."

18. The scope of revisional jurisdiction was considered by this Court in **K. Chinnaswamy vs. State of A.P., AIR 1962 SC 1788** and held as follows:

"Where the appeal Court wrongly, ruled out evidence which was admissible, the High Court would be justified in interfering with the order of acquittal in revision, so that the evidence may be re-apprised after taking into account the evidence which was wrongly ruled out as inadmissible. But the High Court should continue itself only to the admissibility of the evidence and should not go further and appraise the evidence also."

19. In **Akalu Ahir & Others vs. Ramdeo Ram, AIR 1973 SC 2145=(1973) SCC 2 583**, this Court held that where the material evidence have been over looked by the Trial Court or Sessions Court, the High Court in revisional jurisdiction can interfere with the finding of acquittal.

20. In the present case the Session Court has not ruled out any evidence which was admissible. Both the dying declarations were considered in proper prospect. The material evidence has not been overlooked by the Sessions Court, as apparent from the discussions made by Sessions Judge and quoted above. In these circumstances, the High Court was not justified in interfering with the order of acquittal in a revision.

21. In **State of Punjab vs. Parveen Kumar, (2005) 9 SCC 769**, this Court noticed different versions of incident in three several dying declarations which created doubt about their truthfulness.

One dying declaration was made by the deceased before the uncle, second before the Executive Magistrate and third before the SI, Police. This Court having noticed the inconsistency with each other, since versions disclosed in those dying declarations were quite different, affirmed the order of acquittal recorded by the High Court.

22. In the present case, in fact, there are three dying declarations. One was made before the Executive Magistrate on 14th July, 2003, the second alleged to have been made by the deceased Archana before her father, Dilip (PW-5)-complainant on 15th July, 2003 and the third dying declaration was made in a format before the Executive Magistrate on 16th July, 2003. The complainant, Dilip (PW-5), father of the deceased in his FIR dated 16th July, 2003 had not stated that her daughter Archana alleged that the accused was asking for intercourse second time on 14th July, 2003, and when she refused the accused sprinkled kerosene on her and put her on fire. The prosecution could not explain as to why the second dying declaration was taken on 16th July, 2003, though in the said declaration the deceased Archana had stated that she had not called for the second dying declaration. All this aspect has been discussed by the Sessions Judge who acquitted the appellant.

23. In the present case, the view taken by the Sessions Judge is neither unreasonable nor perverse. It is possible reasonable view based on the evidence on record. In the circumstances, the High Court was not justified in setting aside the order of acquittal.

24. For the reasons aforesaid, we set aside the impugned judgment and order dated 18th October, 2007 passed in Criminal Revision

Application No. 321 of 2004 and affirm the order passed by the Sessions Court. The appeal is allowed.

.....J.
(SUDHANSU JYOTI MUKHOPADHAYA)

.....J.
(R.K. AGRAWAL)

NEW DELHI,
JULY 2, 2014.

SUPREME COURT OF INDIA



JUDGMENT