

(2003) 08 BOM CK 0065
In the Bombay High Court
Case No : Criminal Appeal No.223 of 1996

Bajirao Hari Shalake

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-08-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161(3), 428
Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 302, 304, 325

Citation : (2003) 08 BOM CK 0065

Hon'ble Judges : D.S. Zoting, J

Bench : Single Bench

Advocate : R.M.Deshmukh, for the Appellant; P.B.Warale, learned A.P.P, for the Respondent

Judgement

1.This is an appeal preferred by the appellant (original accused) against the Judgment and order of conviction and sentence dated 20th February, 1991 passed by Sessions Judge, Dhule in Sessions Case No.3/1989, whereby appellant (original accused) has been convicted and sentenced for the offence punishable u/s 304, Part II of the Indian Penal Code to undergo rigorous imprisonment for (7) seven years and to pay a fine of Rs.500/- (Rs.Five hundred only) i/d to suffer rigorous imprisonment for (6) six months.

2.The appellant (original accused) was put on trial for the offence punishable u/s 302 of Indian Penal Code for having assaulted deceased Kacharu who succumbed to the injuries. The learned trial Judge found that the accused had no intention to cause the death of deceased Kacharu. However, he could be imputed with knowledge that by his act there was likelihood of the death of deceased Kacharu and therefore, the learned trial Judge found him guilty and convicted the accused for the offence punishable u/s 304 Part II of the Indian Penal Code.

3.Deceased Kacharu was the son of Tarachand Parkhe (P.W.2). Shantaram (P.W.7) is the brother of deceased Kacharu whereas Dashrath (P.W.5) is his

distant relative. The incident took place in the field of accused Bajirao. The field of accused Bajirao is just adjacent to the field of complainant Tarachand (P.W.2). Witness Supadu (P.W.3) and Pandurang (P.W.4) were the servants of the accused Bajirao.

4.The prosecution case arises out of the F.I.R. dated 15.06.1988 lodged by Tarachand (P.W.2) the father of deceased Kacharu. The incident occurred on 13th June 1988 at about 4.00 p.m. On that day complainant Tarachand (P.W.2) alongwith his son Kacharu had been to their field for the purpose of collecting fodder. Deceased Kacharu brought the spade from the accused. He started shifting the fodder in a bullock cart. Dashrath (P.W.5) was entrusted with the work of carrying the said fodder in the bullock cart from the complainants field. At that time ploughing operation were going on in the field of the accused. Witness Supadu (P.W.3) and Pandurang (P.W.4) were working as agricultural labourer in the field of the accused. After making 2 to 3 trips for carrying fodder to the house of deceased Kacharu, he had gone to the field of accused to return the spade. At that time complainant Tarachand was present in his land. Supadu (P.W.3) made alarm in his name. On hearing the alarm, complainant Tarachand (P.W.2) rushed towards the field of accused. When he went there, he saw Kacharu lying on the ground and accused was sitting on his neck. On inquiry to Kacharu, he came to know that accused lifted Kacharu and knocked him on ground with force twice or thrice, because the spade was returned late. Kacharu was made free from the hands of accused. Kacharu was then taken in the bullock cart of the accused to his house and then he was taken to Navalnagar where Doctor advised to take him to Civil Hospital at Dhule. Kacharu was admitted in the Civil Hospital at Dhule at about 11.30 p.m. It being a medico legal case the Medical Officer informed the police. Police made arrangement to call the Executive Magistrate for recording dying declaration. Balu Mahadu Suryawanshi (P.W.1) recorded the dying declaration of the deceased Kacharu immediately as per his version. On 15.06.1988 at about 8.00 a.m. Kacharu succumbed to his injuries. On 15.06.1988 complainant Tarachand went to police station and lodged F.I.R. (Exh.13).

5.On the basis of the F.I.R. (Exh.13) C.R.No.166 of 1988 came to be registered against the accused for the offence u/s 302 of the Indian Penal Code. P.S.I. Jadhav took up the investigation. He visited the place of offence and drew panchanama (Exh.21). He recorded the statements of the witnesses on 15.06.1988 and on the same day he arrested the accused at about 2.00 p.m. Further investigation was carried out by P.S.I.Navale. After completion of investigation, he submitted charge sheet in the court of Judicial Magistrate, First Class, Dhule on 01.08.1988, for the offence punishable u/s 302 of the Indian Penal Code.

6.Offence punishable u/s 302 of the Indian Penal Code is exclusively triable by Court of Sessions, therefore, the learned Magistrate committed the case to the Court of Sessions for trial according to Law.

7.Charge u/s 302 of the Indian Penal Code was framed against the accused. It was read over and explained to him. He pleaded not guilty and claimed to be tried. His defence is not one of total denial, but he met the prosecution case to some extent. However, he contended that he is not the author of the injuries sustained by the deceased Kacharu. According to him deceased Kacharu had taken the spade from him. He requested Kacharu to return the same. At about 4.00 p.m. Kacharu came with spade and hurled abuses at him and got annoyed. There was some altercation between them. Kacharu caught hold the accused and in that scuffle accused fell down and when he got up, deceased Kacharu took position to jump on the person of the accused. Therefore, in order to save himself from the attack accused went aside and in that attempt deceased Kacharu fell down on his neck and sustained injuries. According to him at his request, Supadu (P.W.2) gave alarm in the name of Tarachand, who came there and asked him as to what had happened and Kacharu told him that he was at fault. It is further submitted by the accused that he kept the bullock cart ready and took the injured Kacharu to the hospital; First of all Kacharu was taken to his house, where he disclosed to the people that nobody should be held responsible for the injuries sustained by him, as he received it due to his mistake. It is further submitted by the accused that despite of such circumstances, as Kacharu expired, he (accused) has been falsely implicated without any fault on his part.

8.During the trial as many as 11 witnesses have been examined as under :-

OCULAR EVIDENCE

P.W.2 Tarachand Malhari Parkhe (Exh.12).

P.W.3 Supadu Bandu Bhil (Exh.14).

P.W.4 Pandurang Tanaji Zalte (Exh.15).

DYING DECLARATION

P.W.1 Balu Mahadu Suryawanshi (Exh.9).

P.W.5 Dashrath Abhiman Thorat (Exh.16).

P.W.6 Jijabai Krishna Hatkar (Exh.17).

P.W.7 Shantaram Tarachand Parkhe (Exh.18).

MEDICAL EVIDENCE

P.W.8 Kailash Rameshwardas Gindodiya,

Medical Officer (Exh.20).

P.W.11 Dr.Sunil Sahebrao Shinde (Exh.30).

POLICE OFFICERS

P.W.9 Raghunath deoram Navale, P.S.I.(Exh.24).

P.W.10 Pundlik Daulat Jadhav, P.S.I. (Exh.25).

9. After hearing the arguments of both the parties and after going through the evidence of prosecution witnesses, mainly consisting of the dying declaration as well as the ocular evidence of complainant Tarachand (P.W.2), the learned Sessions Judge found that the accused is not guilty of offence punishable u/s 302 of the Indian Penal Code. However, the learned Judge held him guilty of the offence punishable u/s 304 part II of the Indian Penal Code and convicted and sentenced him in the manner stated at para 1 of the Judgment. Being aggrieved by the said order of conviction and sentence passed by the learned Sessions Judge, the appellant original accused has preferred this appeal challenging the said conviction and sentence before this court. 10. I have heard the arguments advanced by Mr. R. N. Deshmukh, learned counsel for the appellant (original accused) and Mr. P. B. Warale, learned A. P. P. for the State of Maharashtra.

11. After hearing the arguments advanced by both the parties and after going through the entire evidence of the prosecution, I find that there is ample - cogent, reliable and trustworthy evidence in the form of the circumstances together with the evidence of dying declaration, which is sufficient to establish fairly that the accused is responsible for the injuries sustained by the deceased Kacharu. However, I am unable to agree with the finding of the learned Sessions Judge to the effect that the accused could be imputed with the knowledge that, his act would likely to cause the death of the deceased Kacharu and in my opinion facts proved constitute offence under Sec. 325 of the Indian Penal Code, for the following reasons.

12. The fact that deceased Kacharu died an unnatural death due to injuries received by him in an incident in the field of accused on 13.06.1988, has not come to be disputed in any manner by and on behalf of the accused. The deceased Kacharu was a healthy man of 23 years old. As a result of injuries sustained by him, he died on 15th June, 1988.

13. Dr. Kailash Rameshwardas Gindodiya (P.W.8) who carried out the autopsy on the dead body of deceased Kacharu, gave evidence that on external examination he noticed contusion on the back of the neck. He prepared the post mortem notes under his signature (Exh.22). On internal examination he found fracture and dislocation of 5, 6 and 7 cervical spine, with haemorrhage in the canal and spinal cord contusion. He opined that the injuries were antemortem. He further opined that cause of death was due to cardio respiratory arrest following spinal cord injury due to cervical spine fracture and dislocation and quadri plegia. He opined that if a person dashed with force on hard surface on a neck then the injuries mentioned in the post mortem notes would be possible. He negated the suggestions given on behalf of the accused that if a person runs and dashed against the ground on the neck, then in that case the injuries mentioned in post-mortem notes are possible. According to him, to have such injuries it must be a major trauma. In the cross - examination also he maintained that a person during scuffle can not have such injury due to an accidental fall. Thus, there is

absolutely no support from the medical evidence to the defence of the accused. Moreover, he has not adduced any evidence to support his defence. Therefore, his defence does not at all appear probable and the same deserves to be rejected.

14. Considering the medical evidence brought on record, there can not be any doubt that the deceased Kacharu died an unnatural death on account of the injuries received by him in the said incident. Whether he died homicidal death or not will have to be considered in the light of the dying declaration made by the deceased Kacharu.

15. In order to prove that the accused is responsible for the injuries sustained by the deceased Kacharu, the prosecution relies on the dying declaration recorded by the Executive Magistrate Balu Mahadu Suryawanshi (P.W.1) and the oral dying declaration before Dashrath (P.W.5), Jijabai (P.W.6), Shantaram (P.W.7) and Tarachand (P.W.2).

16. As the conviction is based on only dying declaration, before appreciating the evidence of dying declaration, I think that it would be useful to note the importance of dying declaration and also to note the factors, which should be seen while relying on the dying declaration.

" Section 32(1), Indian Evidence Act, speaks about it. Dying declaration is an exception to the general rule of evidence, that hear say evidence is not admissible. Now, it has been accepted by the Legislature that a dying declaration may be admitted, in evidence, even though it is hear say evidence, on firm footing, namely, the first reason is that, that is the best evidence available from the person who has been aggrieved by whatever injury has been caused to him and the second reason is that the occasion is very solemn, and the dying man is face to face with his/her maker (God), it is the belief that the injured person on the death bed would not tell a lie. On this footing, this hear say evidence has been accepted as admissible.

Now, this dying declaration may be made to any person; he may be a prince or a pauper, may be a police man or a Magistrate. Dying declaration is made, if the person who is expecting to die, gives out the cause of injury on him, before any person. All these statements are equally admissible. But I may say that if that is reproduced in writing in his own words, then it is very helpful, because human memory fails as the time passes and it will be very difficult to recollect what the dying person was telling exactly in his own words after, say lapse of year or two, when that person is asked in a court of law as to what he heard.

The question that always arises is whether dying declaration is a weaker type of evidence. It is settled law that dying declaration is not a weaker type of evidence. On the basis of the dying declaration alone the accused can be convicted without insisting any corroboration from any other source. Therefore, what the Judge has to see while relying on the dying declaration, is at what time the dying declaration was made; what were the chances of that person of observing the assailant; whether it was day time, or whether it was night time;

whether the assailants were known to him previously; whether he had occasion to be on the scene for quite some time. So that he has a clear impression about the assailant. Again when the dying declaration is made, what were the earlier opportunities to him to make the dying declaration. Whether there were many earlier occasions when it could have been made. Then the Judge has to find out the cause of not making the statement earlier. If he finds that there are good reasons not to make a statement earlier, because the dying man was groaning in pain or was more concerned with his health and such other causes, the Judge may find whether the dying declaration made late should be accepted. Therefore, the emphasis should be that earlier the statement more reliable it is. The earlier statement has greater weight. If the dying man has several next occasions and he makes the statement and repeats the same several times and they are available to the court for scrutiny, it should be found out whether there is any consistency in all the statements. Consistency does not mean omissions. Some times in some other statement or the next statement or the third statement, such type of lacuna is found and if there are minor contradictions, they should be ignored and it would not reduce the weight of the dying declaration. If the statement made by the injured is all throughout consistent, in saying that a particular assailant or particular number of assailants were identified by him and he has a clear impression that these were the assailants, then it could be accepted."

17.The Apex Court has laid down in several judgments the principle governing dying declaration which could be summed up as under:-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. Munnu Raja V/s State of M.P. reported in 1976 SCC (Cri.) 376.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. State of U.P. V/s Ram, Sagar Yadav : Ramavati Devi V/s State of Bihar, reported in 1985 SCC (Cri.) 127 and 1983 SCC (Cri.) 169, respectively.

(iii) Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. K.Ramchandra Reddy V/s Public Prosecutor, reported in 1976 SCC (Cri.) 473.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. Rasheed Beg and Others Vs. State of Madhya Pradesh, .

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. Kake Singh V/s State of M.P., reported in 1981 SCC (Cri.) 645.

(vi) A dying declaration which suffers from infirmity can not form the basis of

conviction. Ram Manorath V/s State of U.P., reported in 1981 SCC (Cri.) 581.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. State of Maharashtra V/s Krishnamurti Laxmipati Naidu, reported in 1981 SCC (Cri.) 364.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Ojha V/s State of Bihar, reported in 1979 SCC (Cri.) 519.

(ix) Normally the courts in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion can not prevail. Nanabhau Ram V/s State of M.P., reported in 1988 SCC (Cri.) 342.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration can not be acted upon: State of U.P. V/s Madan Mohan, reported in 1989 SCC (Cri) 585.

18.For testing the case in hand on the principles referred to above, let us examine the evidence as regards dying declaration on record.

19.Balu Mahadu Suryawanshi (P.W.1) who was working as Executive Magistrate at Dhule stated on oath that he received requisition for recording dying declaration of Kacharu in the hospital at 0.30 hours on 14.06.1988, therefore, within 10 minutes he visited the hospital and requested the Doctor to examine the patient in order to ascertain whether he was conscious or whether he was in a position to give statement. He further stated that Doctor examined him and told that patient was conscious and in a position to give statement and made endorsement to that effect on the top of the paper. Thereafter this witness disclosed his identity to the patient Kacharu and inquired him regarding the cause of injuries and recorded the dying declaration as per his version which is at Exh.11. He further stated that he again requested Doctor to examine Kacharu and accordingly Doctor examined him and after examining him, he again made endorsement under his signature. His evidence is supported by the Medical Officer Dr. Sunil Shinde (P.W.11) who examined the patient and made endorsement regarding the conscious state of the deceased and his condition to the effect that he was in a position to make a statement.

20.In the dying declaration (Exh.11) recorded by the Executive Magistrate (P.W.1) , the deceased Kacharu made a statement that when he went to the field of the accused and returned the spade, the accused asked him as to why he returned the spade so late and on that count he lifted him and threw him on the ground as a result of which he fell down on his head and then the accused sat on his neck and told him that he was not behaving properly and at that time his (Kacharus) father Tarachand came there who separated him from the accused.

21.As regards the oral dying declaration reflected from the evidence given by

Tarachand (P.W.2) , Dashrath (P.W.5), Jijabai (P.W.6) and Shantaram (P.W.7), they stated the same story. Thus, there is a consistency in all these statements. However, there appears more details to the effect that before these witnesses he stated that the accused knocked him down 2 or 3 times. However, as there is a reliable record in the form of dying declaration recorded by Executive Magistrate, the act of only one knock of deceased by the accused will have to be considered as a correct version which also finds support in the admission given by Dr. Kailash Gindodiya (P.W.8) in his cross-examination to the effect that if a person dashed with force on hard surface on the neck then the injuries mentioned in the post- mortem notes are possible. What the witnesses have stated on oath about the dying declaration appears natural, cogent and reliable and there appears no reason to dis-believe in their evidence. It is also difficult to believe that they will tell lie. Their evidence has a ring of truth and there appears no reason for them to speak ill against the appellant.

22.Thus, having considered the dying declaration written as well as oral as referred above, I am of the firm opinion that the evidence led by the prosecution as regards dying declaration is cogent, reliable and acceptable.

23.Complainant Tarachand (P.W.2), the father of the deceased Kacharu gave evidence that on the fateful day of the incident deceased Kacharu, witness Dashrath (P.W.5) and he himself were working in his field. He stated that fodder was to be shifted from his field to the house, therefore, his son Kacharu brought spade from accused and started carrying the fodder in bullock cart. After finishing that work at about 4.00 to 4.30 p.m. Kacharu had gone to the field of the accused to return the spade. At that time two servants namely Supadu (P.W.3) and Pandurang (P.W.4) were working in the field of the accused. He further stated that he heard alarm of Supadu (P.W. 3), hence he rushed to the field of the accused and on reaching there he saw Kacharu lying on the ground and accused sitting on his neck. On inquiry, he came to know from Kacharu that accused lifted him and knocked him down twice or thrice, on the ground, because spade was returned late. He further stated that on his request to the accused to leave Kacharu, Kacharu was made free. Thereafter, Kacharu was taken to hospital. In the cross-examination, he admits that accused was accompanying him up to Navalnagar in the bullock cart while taking the deceased Kacharu to the hospital. He further admits that the accused requested Doctor to examine Kacharu. The other two eye witnesses namely Supadu (P.W.3) and Pandurang (P.W.4) though have been examined as eye witnesses, have not supported the prosecution. They were declared hostile by the prosecution, they have been cross-examined and many material contradictions have been brought on record. Thus, what ever they may have stated before the police during the investigation when their statements came to be recorded u/s 161(3) of Criminal Procedure Code, when they came witness box to depose on oath they under went a complete metamorphosis. It is quite natural that as they were the servants of accused they have not supported the prosecution to oblige the accused, and therefore, their evidence will have to be ignored.

24.Now, it is to be considered as to what offence is proved to have been committed by the appellant (original accused).

25.On assessing the evidence, the learned trial Judge found that the following circumstances have been fairly established:-

(i)There was a scuffle as the deceased Kacharu returned the spade late.

(ii)No previous enmity has been shown against the accused.

(iii)The scuffle took place on the trifle reason.

(iv)The scuffle took place without any pre -mediation. In other words, it

was a scuffle which took place on sudden provocation.

26.In the background of these facts fairly established, the learned Judge found that though there was no intention to cause death or bodily injury as is likely to cause death of deceased Kacharu, but on the basis of the evidence led by the prosecution it can be inferred or attributed to the accused that there was knowledge to the accused that it is likely to cause death of deceased Kacharu and, therefore, he held that the case of the accused squarely falls under Part II of Section 304 of the Indian Penal Code.

27.I am unable to agree with the finding recorded by the learned Sessions Judge in this regard especially in the light of the fairly established facts referred to above by the learned Sessions Judge. It is to be noted that the deceased Kacharu returned spade to the accused. Despite of having the spade in his possession, the accused had not attacked the deceased Kacharu with a spade. The incident occurred on the spur of moment. It is also pertinent to note that deceased Kacharu was healthy man. It is difficult to believe that on simply knocking such a healthy man on the ground accused could be imputed with the knowledge that it is likely to cause death of the accused. However, under such circumstances, it would be reasonably presumed that the appellant possessed the requisite knowledge that by his act grievous hurt could be caused to the victim and as such he can be held guilty of the charge u/s 325 of the Indian Penal Code only. His conviction u/s 304, Part- II of the Indian Penal Code is clearly erroneous, and must be set aside.

28.Coming to the question of sentence, it is to be noted that offence u/s 325 is punishable with imprisonment for (7) seven years and fine. Having regard to the facts and circumstances, in my opinion the sentence of (3) Three years and (6) six months with fine would adequately meet the ends of justice.

29.In the result, appeal deserves to be partly allowed and the conviction u/s 304, Part II of the Indian Penal Code is thus converted u/s 325 of the Indian Penal Code and the sentence of imprisonment is reduced from (7) seven years rigorous imprisonment to (3) years and (6) six months rigorous imprisonment with fine of Rs.500/- (Rs.Five hundred only) i/d to suffer rigorous imprisonment for (6) six months.

30.Preconviction period of detention undergone by accused from 15.06.1988 to 07.07.1988 and 20.02.1991 to 07.03.1991 be set off against the substantive sentence of imprisonment as per Section 428 of Cr.P.C.

31.The appellant - accused is reported to be on bail. His bail is cancelled. He shall surrender immediately to serve the sentence.

32.Non-bailable Warrant be issued for his arrest and he shall be remanded to Jail custody to serve sentence awarded to him.

D.S.Zoting,J.