
(2000) 08 BOM CK 0008
In the Bombay High Court
Case No : Criminal Appeal No. 166 of 1995

Bhimrao Gedam	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 29-08-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235, 428
Evidence Act, 1872 — Section 8, 9
Penal Code, 1860 (IPC) — Section 302, 304, 32

Citation : (2001) ALLMR(Cri) 113 : (2001) 5 BomCR 346 : (2001) CriLJ 4920 : (2001) 1 MhLj 550

Hon'ble Judges : R.K. Batta, J;P.S. Brahme, J

Bench : Division Bench

Advocate : P.V. Ikhankar, for the Appellant; D.B. Yangal, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Batta, J.—The appellant was tried for the murder of his wife by burning u/s 302 of the Indian Penal Code. The trial Court found the appellant guilty of the said charge and sentenced the appellant to undergo life imprisonment as also fine of Rs. 2,000/- in default R.I. for six months. The period of detention during the trial has been set off in terms of section 428 Cri.P.C.

2. The prosecution case, as unfolded by the dying declaration of the deceased Nirmala is that on 28-3-1990, at about 3 p.m., there was a quarrel between her and her husband namely the appellant. The quarrel had taken place over the issue of sale proceeds of a pair of bullocks sold by her husband. The appellant was demanding money from the deceased and since the deceased refused to part with money, the appellant beat her. In a fit of anger, the deceased threw the money, upon which the appellant closed the door of the house and said: "you have thrown the money, now you must die." On hearing this, the deceased, in a fit of anger, poured Kerosene on her person and the appellant set her on fire by

closing the door. The appellant made attempts to extinguish the fire and also sustained burn injuries on his hands in the process. The deceased was taken to the hospital. The appellant was also hospitalised on account of injuries suffered by him. The dying declaration of the deceased to the above effect was recorded by the Executive Magistrate Namdeo Ambagade on 20-3-1990 at 4 p.m.

3. The prosecution case in fact, solely rests on the dying declaration of the deceased and the trial Court had accepted the dying declaration as voluntary and trustworthy and relying upon the same, has convicted the appellant.

4. The learned Advocate for the appellant has urged before us that the dying declaration does not bear any endorsement of the doctor; that though the Doctor had certified the evidence of the deceased at 10.15 a.m., yet the dying declaration was recorded at 4 p.m. and there is nothing on record to suggest that at the time the dying declaration was recorded by the Executive Magistrate P.W. 4 Namdeo Ambagade the deceased was in a fit state to give evidence. It is also pointed out by the learned Advocate for the appellant that no requisition was sent to the Doctor or Executive Magistrate and in this respect, reliance has been placed on the case of Paparambika Rosamma and Others Vs. State of Andhra Pradesh, . It is next contended by the learned Advocate for the appellant that non-examination of Police Officers Thorat and Choudhary and Medical Officer who are material witnesses for the purpose of unfolding the prosecution case is fatal to the prosecution and in this respect, reliance has been placed on the case of Ashraf Hussain Shah v. State of Maharashtra, reported in 1996 Maharashtra Law Journal 3147. He also drew out attention to the evidence of P.W. 9 Pandurang Gourkhede who has stated that the deceased told him that she had set fire to herself as also the report which was sent from the hospital to the police station which is at page 79 of the paper book. In the light of the above submissions, it has been urged that no reliance can be placed on the dying declaration of the deceased and that the appellant is entitled to acquittal. Alternatively, it was submitted by learned Advocate for the appellant that the deceased had herself poured Kerosene and the incident in question not only was a matter of spur of movement, but also on account of grave and sudden provocation on the part of the deceased herself. It is, therefore, urged that the offence in question would at best fall u/s 304 Part II of the Indian Penal Code.

5. The learned A.P.P. urged before us that the dying declaration was recorded by the Executive Magistrate P.W. 4 after making enquiries about the fitness of the deceased with the doctor; that the dying declaration of the deceased herself shows that she was in a fit state to give statement and that the version of the deceased is not only truthful, but trustworthy since she has even referred to what was done by her in the course of the incident. The learned A.P.P. further submitted that intention to kill is crystal clear and that there is no reason to interfere with the impugned judgment. In support of his contention, he has placed reliance on the case of Ram Bihari Yadav Vs. State of Bihar and Others, , Harjit Kaur Vs. State of Punjab, and Ismail Vs. State of Karnataka, .

6. The prosecution had examined as many as 11 witnesses in support of the charge, but some of the witnesses examined by the prosecution have not supported the prosecution version. Firstly, insofar as the incident is concerned, there were no eye witnesses and the persons who were present at the time of the incident were only the appellant and the deceased. The law in this aspect is now well settled by catena of authorities of the Apex Court starting from the case of Khushal Rao Vs. The State of Bombay, , State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, , Smt. Paniben Vs. State of Gujarat, to State of Orissa Vs. Bansidhar Singh, . The principle on which dying declaration which is not subjected to cross-examination is held to be admissible in law is that a person who is under the threat of impending death, would not lie and truth sits on the lips of a dying man. The maxim "Nemo moriturus praesumitur mentiri" which is the principle behind acceptance of dying declaration, means a man will not meet his Maker with a lie in his mouth. Therefore, the dying declaration is treated as a substantive piece of evidence since the person in acute agony, is not expected to tell a lie and in all probabilities, expected to disclose the truth. However, the dying declaration requires close scrutiny to ascertain whether the dying declaration is voluntary, reliable and trustworthy. At this stage, we would like to quote the following paragraphs from the judgment of the Apex Court in Paniben v. State of Gujarat, (supra) wherein the law on the subject has been elaborately laid down.

"15. This is a case where the basis of conviction of the accused is the three dying declarations. The principle on which dying declarations are admitted in evidence is indicated in legal maxim: "Nemo moriturus premature mentiri-a man will not meet his Maker with a lie in his mouth."

16. The situation in which a man is on death bed is so solemn and serene when he is dying the grave position in which he is placed, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

17. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of

law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of produce. The Court has laid down in several judgments the principles 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 and Another Vs. The State of Madhya Pradesh, .

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, ; Ramawati Devi Vs. State of Bihar, .

(iii) This 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. Ramachandra Reddy and Another Vs. The Public Prosecutor, .

(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 Alias Surendra Singh Vs. State of Madhya Pradesh, .

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. Ram Manorath v. State of U.P. 1981 S.C.C. (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 Vs. Krishnamurti Laxmipati Naidu, .

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth, Surajdeo Ojha and Others Vs. State of Bihar, .

(ix) Normally the Court 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 cannot prevail. Nanhau Ram and Another Vs. State of Madhya Pradesh, .,

(X) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. State of U.P. Vs. Madan Mohan and Others, ."

7. We have already referred to the dying declaration of the deceased which was recorded by the Executive Magistrate P.W. 4. Insofar as the dying declaration itself is concerned, there was practically no challenge in the cross-examination.

However, what is sought to be challenged is the procedural irregularities in connection with the recording of the dying declaration. It has been pointed by learned Advocate for the appellant that no requisition was made to the Doctor or the Executive Magistrate for the purpose of recording the dying declaration. In this behalf, the Executive Magistrate (P.W. 4) has stated that he was asked by the Saoner Police Station to record the dying declaration and that is how he went to Mayo Hospital for the purpose of recording dying declaration of the deceased. Obviously, unless the Executive Magistrate is called, he would not go to the Hospital to record the dying declaration. Mere fact that no written requisition was sent is of no significance. Likewise, the contention of the learned Advocate for the appellant that no requisition was made to the Doctor is without any merit since a requisition was made which is Exhibit 55 by A.S.I. to the House Officer, Ward No. 3, Mayo Hospital, Nagpur. On this requisition, the Doctor had certified that the patient was fit to give statement. The certificate was recorded at 10.15 a.m. The grievance of the appellant is that the Doctor has not certified on the dying declaration about the fitness of the deceased. In this respect, he has relied upon the judgment of the Apex Court in the case of Paparambika Rosamma and others v. State of A.P. (supra). In this case, the Doctor had recorded an endorsement: "The patient is conscious while recording the statement". The Doctor had not certified that the patient was in a fit state to give statement and even this note that the patient is conscious while recording the statement was recorded at the end of the statement recorded by the Magistrate. It is in these circumstances that the dying declaration was not accepted. The position is altogether different in the case under consideration. The Doctor had certified that the patient was fit to make statement. Besides this, though this endorsement was made at 10.15 a.m., yet the Executive Magistrate P.W. 4, before recording the dying declaration at 4 p.m., had made enquiries with the doctor about the condition of the deceased to give statement. It is only thereafter that the Executive Magistrate had recorded the statement of the deceased. Besides this, the detailed statement of the deceased, by itself, shows that the deceased was in a complete fit state to give dying declaration. In this dying declaration, she has not only related the role played by the appellant-accused, but also truthfully referred to what she did. She has candidly stated that in a fit of anger, she had herself poured kerosene on her person and that the appellant subsequently tried to extinguish the fire, as a result of which he suffered injuries on his hands and was also hospitalised. The dying declaration of the deceased is thus not only voluntary, but reliable and trustworthy upon which implicit reliance can be placed. The trial Court was thus perfectly justified in relying upon the dying declaration in question.

8. The Apex Court in the case of Harjit Kaur v. State of Punjab (supra), has laid down that merely because an endorsement was made by the Doctor, not on the dying declaration, but on the application, that would not render the dying declaration suspicious. In the case of Ram Bihari Yadav v. State of Bihar and others (supra), the Magistrate had recorded the dying declaration after being

satisfied as to the identity of the maker as well as her fitness to make the statement and the signature of trainee nurse were taken on the statement due to non-availability of the doctor. The Apex Court upheld the admissibility of the dying declaration in the circumstances.

9. Learned Advocate for the appellant had also urged that some of the witnesses who were necessary for unfolding the prosecution case, have not been examined and the non-examination of material witnesses is fatal to the prosecution case. There is no doubt that the witnesses who are necessary for unfolding of the prosecution case and are material, have to be examined. But, in the facts and circumstances, we find that the witnesses which have not been examined in this case were not material witnesses for unfolding the prosecution case. The prosecution case as we have already stated, has been unfolded by the deceased who was the sole witness to the incident.

10. Having come to the conclusion that the dying declaration is voluntary, reliable and trustworthy, we shall now examine the contention of the learned Counsel for the appellant as to whether the offence in question amounts to culpable homicide not amounting to murder. According to the learned Counsel for the appellant, the incident in question took place on the spur of the moment due to grave and sudden provocation of the deceased. On the other hand, according to the learned A.P.P. the dying declaration of the deceased establishes beyond doubt that the appellant-accused had intention to kill since not only he stated to the deceased that she should die, but also closed the door and set her on fire after she had on her own poured kerosene on her. The totality of the incident as revealed by the deceased has to be looked into in order to determine the issue involved. Initially, there was quarrel between the deceased and the appellant over the sale proceeds of a pair of bullocks. The appellant was demanding the sale proceeds, but the deceased refused to part with the same. As a result of which, the appellant is reported to have beaten the deceased. In a fit of anger, the deceased threw the money upon which the appellant closed the door and told the deceased : "You have thrown the money, now you should die". Thereafter, in a fit of anger, the deceased poured kerosene on her and the appellant set her on fire. According to the deceased, the appellant was in a state of intoxication when he set her on fire and subsequently tried to extinguish the fire, as a result of which he suffered burn injuries on his hands and was also hospitalised. The entire incident does not establish the intention of the appellant to kill the deceased since if it was his intention to kill her, he would have never tried to extinguish the fire and in the process, suffered burn injuries on the hands. The act of the appellant, in the circumstances, falls under exception (4) of section 300 I.P.C., which states that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. There was certainly no premeditation for the crime. There was sudden quarrel between the appellant and the deceased as also the heat of passion which is even revealed by the deceased when she speaks of

fit of anger. Besides this, it is pertinent to note that the appellant did not take undue advantage or acted in a cruel or unusual manner in the heat of passion in the sudden quarrel and when the deceased had herself poured kerosene on her, the appellant acted impulsively and set her on fire, but soon thereafter realised his action and tried to extinguish the fire and in the process, suffered burn injuries. Therefore, there can be no manner of doubt that the offence in question would amount to culpable homicide not amounting to murder.

11. The question which remains to be determined is whether the act of the appellant would fall u/s 304 Part I or Part II of the Indian Penal Code. There can be no manner of doubt that the act of the appellant was otherwise imminently dangerous and would in all probability, likely to cause death or such bodily injury as is likely to cause death. The knowledge that, by this act, the appellant was likely to cause the death or such bodily injury, as is likely to cause death, has to be attributed to the appellant even though he was stated to be drunk at the time of the incident. The offence in question would, therefore, fall u/s 304 Part II of the Indian Penal Code. For the aforesaid reasons, we hold the appellant guilty for the offence u/s 304 Part II of the Indian Penal Code.

12. Learned Advocate for the appellant, placing reliance on a Division Bench judgment of the Karnataka High Court in the case of State of Karnataka Vs. R. Varadaraju, , has urged before us that a lenient view in the matter of awarding sentencing be taken as the appellant is in jail for almost more than five years now and the said term should be treated as sufficient and the appellant be released as having already undergone the imprisonment which is to the tune of more than five years. The learned A.P.P. strenuously urged that there is no reason to take a lenient view in the matter since on a petty quarrel, the husband had killed his wife.

13. Taking into consideration the facts and circumstances of the case under consideration, we are of the opinion that the ends of justice would be met by sentencing the appellant to R.I. for seven years and fine of Rs. 2,000/-, in default S.I. for three months. Accordingly, the appeal is partly allowed. The conviction and sentence of the appellant to undergo life imprisonment u/s 302 I.P.C. passed by the 4th Additional Sessions Judge, Nagpur in S.C. No. 541/90 is set aside and instead the appellant is convicted u/s 304 Part II I.P.C. and is sentenced to R.I. for seven years. The fine of Rs. 2,000/- is maintained, but the sentence in default of payment of fine is reduced from six months R.I. to three months S.I. The appellant-accused shall be entitled to set off of the period of detention undergone by him during the trial in accordance with section 428 Cri.P.C.

Appeal partly allowed.