

(1985) 08 BOM CK 0011
In the Bombay High Court
Case No : Criminal Appeal No. 812 of 1981

Ghelabhai

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 08-08-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302

Citation : (1985) 2 BomCR 508

Hon'ble Judges : V.S. Kotwal, J; B.A. Masodkar, J

Bench : Division Bench

Judgement

Masodkar, J.—Lalita Kantilal Parmar met with homicidal death in the evening of April 1, 1980 after being taken in an injured condition to the Breach Candy Hospital. The dead body of Lalita was subjected to post-mortem examination by Dr. Prabhakar Katke (P.W. 9) whose post-mortem notes are at Exhibit 18, while the case papers which were produced by Dr. Neminath Patil (P.W. 8) are at Exhibit 16. They clearly go to show that Lalita was assaulted by means of a sharp-edged weapon like knife. She was rushed in an injured condition by Homi Sethna (P.W. 2) first to the Parsi General Hospital and thereafter to the Breach Candy Hospital where she succumbed.

2. The present appellant-accused is father-in-law of the deceased Lalita. The prosecution alleges that he had a motive against the deceased Lalita, for he suspected some illicit relations she had developed with Govind Patel (P.W. 6). It is further suggested by the prosecution that while the deceased Lalita and her husband Kantibhai (P.W. 7) were residing in Garage No. 4 in Stable Building, on the day of the incident at about 3 p.m., the accused who was working as a domestic servant with Homi Sethna came to the garage and thereafter went back to the flat of Homi Sethna and again came back to the garage and assaulted Lalita by means of the Knife traced as article 4. The direct incident of assault is not eye-witnessed by anyone, but the circumstances closely following the assault are narrated by the witnesses, being the employer, Homi Sethna (P.W. 2), with

whom the accused was serving as a domestic servant, and neighboring inhabitants Dajuba Jadeja (P.W. 3), Dropadi Waghmare (P.W. 4), Magan Rathod (P.W. 5) and William Crasto (P.W. 15). The testimony of the son of the present appellant-accused, Kantibhai Parmar (P.W. 7), as well as the testimony of Govind Patel (P.W. 6) are tendered so as to show that the deceased Lalita could not have possibly any illicit relations with Govind Patel (P.W. 6), as were suspected by the accused.

3. Initially, in the trial Court, the defence of the accused was one of denial. After he was examined under S. 313, Cr.P.C. 1973 by the Additional Sessions Judge, Greater Bombay, he filed a written statement praying that that written statement be treated as part of his say under S. 313, Cr.P.C. That statement is itself Exhibit 52. Practically the circumstantial chain of events disclosed by the prosecution evidence is not disputed in that statement. Apart from that, the accused has added in this statement that when he returned back again from the flat of Homi Sethna (P.W. 2), there was an altercation between him and the deceased Lalita during the course of which he questioned her whether her boy-friend had only the right to visit her and whether she was expecting him. Upon this, the deceased Lalita said that if the accused can see he may do so or put chilly powder in his eyes. According to the accused that triggered a brain storm and he did not know what happened thereafter. He further stated that he saw a knife lying on the wooden shelf. He was unable to say whether it was Sethna's knife or somebody else's. He further stated that he saw visions of the deceased Lalita in intimacy with Govind Patel and his grandchildren looking in a horrified manner. He experienced buzzing in his ears and his brain was in whirl and then came the mental blackout. He had no intention to hurt or kill Lalita or even the slightest idea that such thing would happen. He still does not believe that it is he who killed the deceased Lalita. On the other hand, he stated that he loved his son, his grandchildren and the deceased Lalita until she started misbehaving. According to him, he is full of remorse and he expressed all agony, remorse and sense of frustration and throws himself at the feet of the Court. The written statement so filed appears to have been taken on record, and as we have indicated it is Exhibit 52. That shows that excepting the part as to what happened inside the garage when the accused returned second time from the flat of Homi Sethna (P.W. 2), the entire chain of events spoken to by the witnesses is categorically accepted. The statement, thus, appears to be a statement made to unburden one's mind freely and voluntarily before the Court and could be treated so. Undoubtedly, such a statement has to be taken as a whole and not in piecemeal.

4. That being the position of the defence taken in the trial Court by eventually filling Exhibit 52 which is a confessional statement and which appears to be made voluntarily, in this appeal the controversy is very narrow. After the judgment of conviction was delivered, this appeal has been presented both questioning the conviction under S. 302, I.P.C., and the sentence imposed of imprisonment for life.

5. We were taken through the evidence which is relevant for our purposes. For the accused, Mr. Mehta strenuously argued that the possibility of Sudden and grave provocation is not ruled out, while for the State Mr. Patil contended that if the evidence of Homi Sethna (P.W. 2) and the conduct of the accused are taken into account, such a possibility is clearly ruled out.

6. Now, briefly stated, Homi Sethna's evidence shows that on the day of the incident, as usual, the accused left for garage No. 4 at noon time and returned thereafter in a short while, he kept a Tiffin-box on the table and after some time again went back and within minutes returned and told Homi Sethna that the deceased Lalita is injured or assaulted. There is a dispute with regard to the exact words told by the accused to Homi Sethna in this regard which were spoken to in Gujarati and which according to Homi Sethna he made the part of the record on the very same day as his statement was recorded by the Police. If that statement were true, then the accused had made the confessional statement that he had assaulted the deceased Lalita. However, the cross-examination of Homi Sethna shows that, looking to his past service with Homi Sethna, he is in an obliging mood and does not firmly stick to the position that the accused uttered the Gujarati words : "Main Lalitane Chhari Mari". On the other hand, he restricts himself much more to "Lalitane Chari Mari". The fact remains that immediately after coming to the flat, the accused was seen by Homi Sethna coming with tiffin-box, sitting at the table and thereafter again leaving the flat and again returning to the flat and reporting this matter. We are not impressed by the proof of the extra-judicial confession because of prevarications available in the obliging mood of Homi Sethna. But Homi Sethna's evidence shows that he noticed blood-stained clothes on the person of the accused when the accused reported about the assault on the deceased Lalita. Homi Sethna rushed down and went straight towards the garage where the deceased Lalita was assaulted while the accused did not stir out of the flat till the police arrived. Then we have the evidence of Dajuba Jadeja (P.W. 3), Dropadi Waghmare (P.W. 4), Magan Rathod (P.W. 5) and William (P.W. 15), which clearly shows that the injured Lalita had held her neck and in a bleeding condition came out followed by the accused who was armed with knife. There is some variation with regard to the holding of the knife and the accused leaving or throwing the knife and going towards the flat, but that is hardly material. A close reading of all this evidence goes to show that the injured and assaulted Lalita came out of garage No. 4 following each other, the accused behind Lalita having the knife in his hand. He left the knife nearly on a quilt. Dropadi Waghmare (P.W. 4), William Crasto (P.W. 15), Homi Sethna (P.W. 2) as well Dajuba Jadeja (P.W. 3) and Magan Rathod (P.W. 5) all speak that the injured Lalita was taken to the hospital by calling a taxi. The prosecution relied on William Crasto's statement, which is tried to be supported by Magan Rathod's evidence, that he enquired from the deceased Lalita what happened and it is said that the deceased Lalita told William Crasto while being put in the taxi that the accused assaulted her. Magan Rathod's testimony is not consistent with his police statement on his aspect. Similarly,

Dropadi Waghmare, who appears to have arrived almost immediately after hearing the hue and cry, does not support William Crasto on the dying declaration. It is possible that the deceased Lalita might have whispered something which William Crasto is speaking about, but the matter is not free from doubt. We rule out, therefore, the testimony of the oral dying declaration given by William Crasto in this regard.

7. The testimony of Kantibhai Parmar (P.W. 7), Govind Patel (P.W. 6) and Homi Sethna (P.W. 2) goes to show that while the accused was on leave, Govind Rathod was working with Homi Sethna for some time. He used to go and have his meals with Kantibhai Parmar as his friend. The accused was complaining about Govind Patel's behaviour after he resumed his duty and there was a lurking suspicion in his mind about the relations between the deceased Lalita and Govind Patel, but the evidence shows that this suspicion was baseless. The evidence of Homi Sethna (P.W. 2) as well as Kantibhai Parmar (P.W. 7) goes to show that even before the date of the incident, there was altercation between the accused and the deceased Lalita in the flat of Homi Sethna and Homi Sethna tried to pacify and mediate that about three days before.

8. That the accused was having bloodstained clothes is also spoken to by Dajuba Jadeja (P.W. 3) and Homi Sethna. Eventually, after the accused was put under arrest and his clothes were taken charge of by the police, his clothes, being the half shirt (article 1), the banian (article 2) and the half pant (article 3), all revealed the blood-stains of the same group as that of the deceased Lalita.

9. The chain of circumstances is full and complete and that does not leave any doubt in our mind about the culpability of the accused in assaulting the deceased Lalita after he returned second time from the flat of Homi Sethna.

10. We rule out the theory of grave and sudden provocation as triggering the assault, for it is obvious from the testimony of Homi Sethna that the accused had first gone to the flat and had returned from the garage. He came back and was seen sitting at the table and thereafter again he left the flat and went to the garage. During this visit the incident obviously occurred. The knife traced as article 4 is the knife which Homi Sethna stated was in his flat and is a kitchen knife. This shows that there was quite a time lag as well as the factor of distance between the flat and the garage which would take the case out of sudden provocation. Although the confessional statement (Exhibit 52) makes a statement to that effect, the same can hardly be accepted to make out a case of grave and sudden provocation, leading to loss of control. The liability of the accused is clearly covered by S. 302, I.P.C.

11. In the result, the appeal against the conviction under S. 302, I.P.C. is dismissed and so also appeal against the sentence.

12. The next question is the invocation of mercy jurisdiction. We have affirmed the sentence awarded, being the sentence of imprisonment for life. In this court, Homi Sethna (P.W. 2), with whom the accused was serving almost without

blemish for 30 years, has filed an affidavit and so also the accused has filed his affidavit. We find that the accused appears to be consistently remorseful and repentant. Even this stand taken by him even at the close of the trial in the trial Court suggests that it must be so. Further, he has already crossed the age of 63 years and does appear to have committed this act of assault prompted by suspicion or in some anger. In fact, he has made clean breast about it by filing Exhibit 52. Added to old age, he is suffering from some ailment which appears to be dogging him. The accused has been in jail since the date of the incident for over a period of five years. If he were to remain in jail further, that would mean he may not return back to society. Looking to all these factors and the affidavit of Homi Sethna, expressing that in case the accused is realised, he would restitute him by re-employing him, we think no useful purpose is likely to be served particularly in view of his falling health and the old age. Under these circumstances, we think and hence recommend that the State Government will be well advised to commute rest of the sentence of imprisonment in this case under S. 433(b), Cr.P.C. 1973, (hereinafter "the Code") treating the period of imprisonment already undergone as enough. This appears to us to be a fit case where the executive mercy should be extended, particularly when the imprisonment for life would mean practically no return for the accused.

13. Having placed our recommendation for extension of executive mercy under S. 433(b) of the Code, the question is, do the provisions of S. 433-A of the Code eclipse the authority of the Executive Government in that regard ? We do not think so.

14. That provision was added by the Amending Act No. 45 of 1978 and it acts as an independent proviso of the scheme of Ss. 432 and 433 of the Code. Both of those sections are in Chapter XXXII and form the part of Part E thereof. The provisions therein are intended to confer power and authority upon the Executive Government with regard to suspension, remission as well as communication of sentences. These are not overlapping powers but independent and separate ones in spirit and substance.

15. While S. 432 of the Code deals with the powers that operates upon the sentence passed by the Court and permits the Executive Government to suspend or remit such sentences, S. 433 of the Code confers the power to commute similarly such sentences. The distinction between these two sections is vital and important. Under S. 432 of the Code, the sentences passed by the Court remains as it is and there is no change in the identity of the sentence; the sentence indicating sentence imposed by the competent Court as distinct from the one commuted under S. 433 of the Code. The process indicated by S. 432, therefore, does not affect the sentence as such while the process distinctively under S. 433 of the Code changes the character of the sentence notwithstanding that it is a judicial sentence imposed by the competent Court. This position is inferable and is reinforced if the legal connotation of the word "remission" in contrast to the word "commutation" is taken note of. Black's Law Dictionary (Fifth Edition, page

254) suggests the process of commutation in the matter of Criminal Law by pointing out that "commutation" signifies the process of alteration, change and substitution and it further signifies the change of punishment to one which is less severe. Distinctively, the term "remission" has not the same meaning nor the same effect. It is a provision more or less curtailing the rigor of the sentence imposed by judicial authority. That is why S. 432 of the Code is titled as powers to suspend or remit sentences. In legal sense, it would mean remission without altering the sentence. No change is brought about in the judicial sentence thus imposed. The process affects the term of the sentence or its run by suspension and not changes its character, while commutation leads to alteration of the sentence itself. It can be seen that power to commute more or less, though conferred upon the Executive, is higher power providing for substituting sentences specified in place of judicial sentence passed by the Court.

16. This underlying principle of remission is and has been so recognised to retain the identity of the judicial sentence. The Supreme Court in the case of Sarat Chandra Rabha and Others Vs. Khagendranath Nath and Others, in different context considering the provisions of the Representation of the People Act, 1951 that imposed disqualification having reference to judicial sentence, pointed out that an order of remission does not in any way interfere with the order of sentence. Remitting process affected only the term of the sentence passed by the Court having result to free the convicted person from his liability to undergo the full term of imprisonment inflicted by the Court, keeping the order of conviction and sentence passed in tact. The power to grant remission is an executive power and cannot have the effect which the order of an appellate or revisional Court would have of reducing the sentence arrived at by the trial Court and substitute in its place the reduced sentence adjudged by the revisional Court. Although, therefore, there was an actual order of remission of sentence, the Court ruled that for the matter of disqualification, the judicial order of sentence was relevant. So also in K.M. Nanavati Vs. The State of Bombay, the Supreme Court considered the provisions of Art. 161 of the Constitution along with Art. 142 of the Constitution in the light of the order made for suspension of sentence during the period when the matter was sub judice in the Supreme Court and it was observed that the power conferred with regard to the suspension of sentence indicated the "mercy jurisdiction" available to the Executive by reason of the statute as well as by reason of the Constitutional considerations and flows from a high prerogative of the State power. This prerogative of mercy jurisdiction is available to the State even under the Constitutional provisions and what is now provided by Ss. 432 and 433 of the Code appears to be in furtherance of that mercy jurisdiction. Undoubtedly, S. 433-A of the Code will have to receive that interpretation which usually is put up on a provision enacting an exception of provisos in a statute and not to curtail the prerogative. In other words, the restrictive import of S. 433-A of the Code will have to be clearly understood and applied.

17. Plain reading, as we have indicated above, of S. 433-A of the Code shows

that notwithstanding the provisions of S. 432 of the Code, which deal with suspension or remission of sentences where the sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, that power will not be available. In other words, the first part of S. 433-A acts as an exception and proviso to S. 432 of the Code and where the prisoner was convicted for the offence for which death is one of the punishments provided by law and has been sentenced by the Court to imprisonment for life, the provisions of S. 432 of the code would not permit the Executive Government to extend its mercy jurisdiction so as to suspend or remit such sentence. The other part of S. 433-A of the Code which is disjunctively phrased and which divides the first clause by the disjunction "or", a limited embargo or an exception is carved out with regard to the power of commuting the sentence and that embargo takes in a case where the sentence of death imposed has been commuted under S. 433(a) of the Code into one of imprisonment for life, such sentence then cannot be further commuted and the prisoner will have to undergo at least 14 years of imprisonment. This clause clearly refers to the provisions of S. 433(a) whereunder while extending mercy the appropriate Government is conferred with an authority of commuting the death sentence and imposing any other punishment provided by the Indian Penal Code, including the one for imprisonment for life, if such an order of commuting the sentence is made pursuant to the exercise of the power under S. 433(a) and not under any other clause.

18. This limited exceptional class of cases obviously does not except exercise of mercy jurisdiction of the State under other provisions available in S. 433 itself, whereunder the sentence of imprisonment for life could be commuted to one for imprisonment for a lesser term not exceeding 14 years or even for fine (cl. b); as well sentence of rigorous imprisonment could be commuted for simple imprisonment for any term to which that person might have been sentenced or for fine (cl. c), or the sentence of simple imprisonment, for fine (cl. d). It is even possible under cl. (a) that the sentence of death may also be commuted to any other punishment, if so provided by the Indian Penal Code. What appears to be clear is that S. 433-A of the Code does not operate as proviso with regard to commutation of sentences under S. 433(b), (c) and (d) in any express or implied terms. By implication, such a power having situs with a high prerogative power of sovereign State exercising and extending its mercy cannot just be treated as curtailed.

19. The other decision at this stage which we must notice is the decision of the Supreme Court in Maru Ram and Others Vs. Union of India (UOI) and Others, , where the challenge was to the validity of S. 433-A itself, mainly on the ground that that provision violated the fundamental rights of the prisoners including the one under Art. 14 of the Constitution. While examining the scheme of that section and in the context of the debate raised before the Supreme Court, the majority judgment delivered by Krishna Iyer, J. clearly points out that the character of the provisions of S. 433-A of the Code is one that of an embargo

upon the power under S. 432 and S. 433(a) of the Code. In several passages available in the judgment, this position is differently made clear. In para 4, the provisions of S. 433-A of the Code are taken into account along with S. 432 and S. 433(a) and also a reference is made to objects and reasons introducing the scheme of this provision. It is further pointed out that the scheme of this provision has to be examined in the context of heritage of Arts. 72 and 161 of the Constitution. Thereafter, in para 15 while describing the character of S. 433-A of the Code, the Court termed it as enacting merely "a rider" as it were to Ss. 432 and 433(a). While considering the class of cases of "lifers", the Court pointed out that sentencing was a judicial function but the execution of the sentence, after the Court's pronouncement, is ordinarily a matter for the Executive. Once a sentence has been imposed, the only way to terminate it before the stipulated term is by action under S. 432/433 or Art. 72/161. With regard to "lifers" it was pointed out that the only source of salvation is the play of power under S. 432 and S. 433(a). No release by reduction or remission of sentence is possible under the corpus juris as it stands in any other way. It will, thus, appear that the majority holding in unmistakable terms rules that the scheme of S. 433-A was a proviso intended to act upon Ss. 432 and 433(a) and its character, a legislative embargo. Undoubtedly, in the concurring judgment of the learned Judges (Fazal Ali, J.) while referring to the provisions of S. 433-A of the Code, observations are available to the effect that provision has advisedly been enacted to apply to a very small sphere and includes within its ambit offences under Ss. 121, 132, 302, 303, 396, etc., I.P.C., that is to say, only those offences where death or life imprisonment are the penalties and instead of death, sentence is commuted to that of life imprisonment. This observation does not lead to holding that all other clauses of S. 433 of the Code are completely eclipsed by reason of S. 433-A. Even in this there is clear indication that the observations refer to the exercise of power under S. 433(a) of the Code and thereafter application of the embargo under S. 433-A of the Code.

20. This decision of the Supreme Court in Maru Ram's case (supra) does not lead to the conclusion that S. 433-A of the Code is intended to except the power of commuting sentences conferred upon the Executive Government by S. 433 of the Code. That section only operates when the power is exercised under S. 433(a) of the Code and sentence of death imposed by a competent Court is commuted by reason of the executive power conferred under S. 433(a) to that of life imprisonment and not further.

21. After giving our anxious considerations to all these aspects of the matter, we hold that the power to commute independently conferred by cls. (a) to (d) of S. 433 of the Code still exist, in favour of the Executive Government. Once the power is exercised under cl. (a) of S. 433 of the Code, then the executive power is not further available by reason of the embargo enacted and imposed by S. 433-A of the Code.

22. We are dealing with a case where sentence of life imprisonment has been

imposed and which we have affirmed. There is no impediment for exercise of executive jurisdiction of mercy under S. 433(b) of the Code. Accordingly, as indicated earlier and as the circumstances show, ends of justice will be met by recommending to the State Government to consider the matter of the appellant-accused-prisoner under S. 433(b) of the Code so as to commute the sentence.

23. With this direction, the appeal is dismissed.

24. Order accordingly.