

(2010) 06 BOM CK 0109
In the Bombay High Court
Case No : Criminal Appeal No. 462 of 1992

Madan alias Madhu Patekar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374, 428
Penal Code, 1860 (IPC) — Section 302, 323, 504

Citation : (2010) 112 BOMLR 2653

Hon'ble Judges : Mridula Bhatkar, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : Abhaykumar Apte and Sandeep Waghmare, for the Appellant; P.P. Shinde, APP, for the Respondent

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—This appeal filed u/s 374 of Cr.P.C. arises from the order of conviction and sentence passed in Sessions Case No. 91 of 1992 by the learned Addl. Sessions Judge at Nashik on 23rd July 1992 and by the said order the appellant (the sole accused) came to be convicted for the offence punishable u/s 302 of IPC and sentenced to suffer life imprisonment. He was acquitted for the offences punishable under Sections 323 and 504 of IPC. He was arrested on 19/1/1992 and was released on bail after this appeal was admitted on 10/9/1992.

2. Latabai, the daughter of Shri Daryavsingh Mohansingh Pardeshi, resident of village Ajan, Taluka Malegaon Dist. Nashik was married to Shri Balusingh Pardeshi, resident of village Ghoti, Taluka Igatpuri, Dist. Nashik for about 13 years and she begot a son from the said wedlock. However, she was deserted by her husband and continued to stay in village Ghoti while working as a construction labour. Her son was staying with PW 2 Daryavsingh Mohansingh Pardeshi and she was living alone at village Ghoti and for 4-5 years prior to the date of the incident, she was the mistress of the accused who was married to some other lady. The accused was also resident of village Ghoti and was working

as a meson. On 13/12/1991 while Latabai was in her house in the evening between 7 to 7.30 p.m. the accused went to her and asked her to cook but she declined to do so on the pretext that there was shortage of kerosene in the house. The accused got annoyed and started beating her. However, while she started cooking, the accused poured kerosene on her person and set her on fire with a matchstick lying nearby. With the burn injuries she came out of her house shouting "Save me, Save me". The neighbours heard the shouts and in the mean while the accused tried to extinguish the fire, put a chaddar around her person and when the neighbours arrived at the spot, he ran away. He also sustained burn injuries while extinguishing fire while rescuing Latabai. The neighbours took her to the Civil Hospital at Ghoti and from there she was shifted to the Civil Hospital at Nashik with more than 85 per cent burn injuries. While under treatment, she died on 16/12/1991 but on 14/12/1991 her dying declarations were recorded by PW 1 - Jayprakash Chavan, Special Judicial Magistrate and PW 12 Nivrutti Baburao Godhade, the Police Head Constable and in both these dying declarations the deceased had stated that she was set on fire by the accused. The accused had sustained 40 per cent burn injuries and he was also hospitalised till 16/1/1992. He was arrested on 19/1/1992. Initially the investigation was undertaken by PW 11 - Prabhakar Jadhav who was working as PSO at Ghoti Police Station and had registered Crime No. 76/91 on the basis of the statement recorded by Police Constable Godhade - PW 12. However, after 15/12/1991 the investigation was taken over by PW 9 - Balkrishna Kulkarni, ASI and again on 16/1/1992 PW 11 reported for duty and conducted further investigation. CA report was received at Exhibit 32. The dead body of Latabai was sent for post mortem which was conducted by Dr. Ramesh Agarwal, - PW 6, Medical Officer at Civil Hospital, Nashik. On completion of investigation the charge-sheet came to be filed and the case was committed to the Sessions Court which framed the charge on 26/6/1992

3. The prosecution examined in all 12 witnesses and PW 2 Daryavsingh Pardeshih, was the father of the deceased. PW 5 - Nandu Shingole, PW 7 Satayabhamabai Shinde, both neighbours, turned hostile. Similarly the panch witnesses PW 3 - Shankar Mande and PW 4 - Dattu Ambekar also turned hostile. PW 8 - Dr. Praksh Keshav Kotkar was the Medical Officer on duty at Civil Hospital, Nashik when the dying declarations of the deceased were recorded by PW 1 and PW 12. The prosecution case is thus based on two written dying declarations and the oral dying declarations made by the deceased to PW 2, PW 5 and PW 7. However, all these three witnesses i.e. PW 2, PW 5 and PW 7 turned hostile and, therefore, the oral dying declarations as relied upon by the prosecution could not be proved. We are, therefore, required to examine whether the impugned order of conviction and sentence is sustainable only on the basis of the written dying declarations of the deceased as recorded by PW 1 Jayprakash Chavan and PW 12 Nivrutti Godhade. The accused denied the charge and while recording the statement u/s 313 of Cr.P.C. he has taken a specific defence which is required to be considered from the questions and replies reproduced herein below.

Q.4. It is in the evidence of PW-5 Nandu that on 13-12-1991 at about 9-00 p.m. he heard the shoutings of Latabai, on which, he went there and saw Latabai with burns, sitting near the door of her house. Do you wish to say anything about the same?

Ans. I along with my friend were going. I heard her shoutings. I then went there. She was having fire. I then took Godhadi from her house and extinguished the fire.

Q.5. It is in his evidence that Latabai was then shouting to save her at least for her son. Do you wish to say anything about the same.

Ans. I also received burns.

Q.7. It is in the evidence of P.W. 1 Spl. Judicial Magistrate, Jayprakash Chavhan along with P.W. 8 Dr. Kotkar went to Burn-ward and on the request of PW-1 Jayprakash PW 8 Dr. Kotkar examined Latabai on 14-12-1991 at 12-05 p.m. and issued certificate at the top of statement Exh.10. Do you wish to say anything about the same.

Ans. I do not know. I was in the hospital at that time.

Q.15. It is in the evidence of PW-12 Head Constable Nivrutti Godhade that on 14-12-1991, on the direction of PW-11 PSI Jadhav, he came to Civil Hospital, Nashik. Do you wish to say anything about the same.

Ans. I was not conscious at that time.

Q.22. It is in the evidence of PW-6 Dr. Agrawal that on 17-12-1991 at 3-00 p.m. he received the dead body of Latabai for post-mortem, on which, he performed the post mortem from 4-45 p.m. to 5-15 p.m. Do you wish to say anything about the same.

Q.23. It is in his evidence that he found 86% burns which were ante-mortem. Do you wish to say anything about the same.

Ans. I was unconscious at that time.

Q.24. It is in his evidence that Latabai died due to shock with toximia following 86% thermal burns. Do you wish to say anything about the same.

Ans. I went there to extinguish the fire. Q.32. Do you wish to say anything more.

Ans. I along with my friend going from Indira nagar to Ramrao nagar. It was 7.30 p.m. I heard noise. I then went there. I saw lady was then having fire. I then put Godhadi on her person. I also received 40 % burns.

4. Mr. Apte, the learned Counsel appearing for the accused has challenged the order of conviction on various grounds. He submitted that the prosecution case was full of loopholes and it failed to fasten the guilt on the accused beyond reasonable doubts. As per him the burnt clothes from the spot as well as the

pieces of soil with residue of kerosene were not seized and sent for CA so as to prove that kerosene was poured on the deceased before she was set on fire, the availability of kerosene in the house of the deceased was itself doubtful as the kerosene tin which was noted in the spot panchanama did not indicate the quantity of kerosene in it, kerosene residue was not traced out in the spot panchanama and when it is the admitted case of the prosecution that the accused sustained burn injuries, the prosecution failed to explain the same. The fact that accused sustained 40 per cent burn injuries and was hospitalised for more than a month itself indicated that it was not a homicidal death of Latabai. As per Mr. Apte, the dying declarations recorded by PW 1 and PW 12 do not inspire confidence and they deserve to be discarded. In short as per the defence, the appellant deserves to be acquitted by setting aside the order of conviction passed against him.

5. PW 1 Jayprakash Chavan was appointed as the Special Judicial Magistrate since 5/10/1983 and he stated that as on 14/12/1991 he had recorded about 500 dying declarations. The Police Head Constable Shri Mali attached to the Civil Hospital had approached him on 14/12/1991 with a requisition at Exhibit 9 requesting him to record the statement of Smt. Latabai Balusingh Pardeshi who was admitted in the said hospital late in the earlier night. He, therefore, reached the Civil Hospital, met Dr. Kotkar - PW 8 in the Casualty Room and informed him the purpose of his visit so as to record the statement of Latabai. Along with the doctor he then proceeded to the burn ward, Dr. Kotkar examined Latabai and informed that she was fit to make a statement and such a certificate was recorded by the doctor under his signature at about 12-05 hrs. The doctor was then asked to leave the patient and accordingly he went out of the burn ward. The SEM disclosed his identity to the patient and his intention to record the statement. He asked her full name and she replied as Sou. Latabai Balusingh Pardeshi. He also enquired with her about the age and whether she knew Marathi. Then he proceeded to record her statement in question and answer form. She stated that she had a quarrel with her husband in the earlier night on account of cooking meals for him and he poured kerosene on her, lit a matchstick and set her on fire. She shouted and he started extinguishing the fire by putting a quilt on her person. Because of her shouts the neighbours arrived at her house and they took her to the Ghoti Rural Hospital. Subsequently she was shifted to the Civil Hospital at Nashik. The SEM asked the name of her husband and she stated her husband was Madan Fakira Patekar and the SEM then sought clarification from her as she had disclosed earlier her husband's name as Balusingh, to which she clarified that Balusingh was her husband by marriage and Madan Fakira Patekar, the accused was her keep. The SEM then asked her as to who out of the two men had set her on fire. She replied that it was the accused who set her on fire. The statement was read over to her and she admitted its correctness. He again obtained the doctor's endorsement and the doctor examined her and certified that she was fit to make a statement. The doctor signed below the said certificate at 12.20 p.m. He confirmed that Exhibit

10 was the dying declaration recorded by him and the original of the same was sent to the Judicial Magistrate, First Class, Igatpuri along with his enclosing letter (Exhibit 11) and a copy of the requisition at Exhibit 9.

He further stated that on the same day and immediately after recording of the statement of the deceased, he proceeded to record the statement of the accused who was also in the burn ward. After the doctor certified the accused to be fit to make a statement he proceeded to record his statement by following the very same procedure as was done while recording the statement of the deceased. The statement of the accused was also recorded in the question and answer form (Exhibit 12) and on completion of the same the doctor again put his endorsement for the second time at 12-45 p.m. that the patient was fit to give a statement.

In his cross-examination he admitted that he did not enquire from the doctor as to when the patient was admitted in the hospital, did not see the case papers, did not know the number of patients admitted in the burn ward at the relevant time, did not verify the medicines administered to the patient to avoid infection, before recording the statement. He also admitted that he had seen burn injuries on the entire body of Latabai and she was covered with a mosquito net. When he went to record her statement, she was calm on her bed and he did not enquire whether sedative medicine was given to her by the doctor. He also admitted that he did not ask her as to how her husband poured kerosene on her and on which part of the body the matchstick was thrown. He also admitted that he could not say the percentage of burn injuries Latabai had sustained and also whether she could read and write. He also admitted that near her thumb impression he did not obtain attestation. He denied the suggestion that Latabai was not in a fit condition to make a statement. It is pertinent to note that so far as the statement recorded of the accused by the SEM was concerned, no questions were asked in the cross-examination and Exhibit 12, therefore, remained in-tact.

6. The second witness who recorded the dying declaration of Latabai was PW 12 - Nivrutti Godhade, Police Head Constable attached to Ghoti Police Station. He was instructed by PSI Jadhav - PW 11 to proceed to Civil Hospital, Nashik to record the statement of Latabai. He, therefore, reached the hospital and met Dr. Kotkar and requested him to examine the patient Latabai who was admitted in the hospital and issue a certificate about her condition. PW 8 - Dr. Kotkar examined Latabai and gave the certificate that she was in a fit condition to make a statement. Thereafter the doctor left the ward and he proceeded to record the statement of Latabai. She told him that she had an illicit relationship with the accused Madhukar Fakira Patekar since last 4-5 years and he used to visit her on and off but he suspected her character on which count he used to beat her. On 13/12/1991 at about 7.30 p.m. the accused reached her house and asked her to prepare meals. She told him that sufficient kerosene was not available in the house and on this the accused got annoyed and started beating her. Thereafter she went to the kitchen and started cooking and at that time the accused poured

kerosene on her person and set her on fire with a matchstick. She started shouting and the neighbours like Chandrabhagabai and Satyabhamabai (PW 7) had reached her house and tried to extinguish the fire. The accused also tried to extinguish the fire. When other persons started gathering on the spot, the accused ran away. The statement so recorded was read over to her and she admitted that it was correctly recorded. The witness then obtained her thumb impression on the statement (Exhibit 13) and the same was thereafter handed over to PW 11 - PSI Jadhav. In his cross-examination he stated that Latabai had filed complaints with Ghoti Police Station against the accused about 6-8 months prior to the incident and acting on the said complaint he had taken preventive action against the accused. When he reached the burn ward to record the statement of Latabai, there was no one sitting by her side. He also admitted that after recording her statement at Exhibit 30, he did not obtain the doctor's certificate for the second time. He also admitted that the accused himself was having 40 per cent burn injuries at that time. He denied the suggestion that Latabai did not make any statement and Exhibit 30 was recorded on his own and he obtained her thumb impression on it.

7. PW 8 - Dr. Kotkar was the Medical Officer at the Civil Hospital, Nashik for about four years. He stated that Latabai was admitted in his hospital on 13/12/1991 at about 9.45 p.m. and she was transferred by the Rural Hospital at Ghoti. She had sustained 86 per cent burn injuries. On 14/12/1991 at about 12.05 hours PW 1 - Chavan, SEM had come to the Casualty Ward and requested the doctor to examine her in the burn ward. He, therefore, proceeded to the burn ward and examined Latabai and found her fit to make a statement and endorsed accordingly. He confirmed his endorsement made on Exhibit 10 at 12-05 and 12-20 p.m. He also stated that when her statement was recorded, she was in a condition to give her statement. He further stated that on the same day at about 12-30 p.m. he had examined the accused as well on the request of PW 1 - Chavan, SEM and issued the certificate of fitness as was noted on the statement at Exhibit 12. He also stated that after the statement recording was completed he again examined the accused and found him fit. In his cross-examination he admitted that after her statement was recorded, he gave Latabai Forewin injection as a pain killer but he denied that any sedative or pain killer was administered to her prior to the recording of her statement. He was not sure whether any pain killer was administered to Latabai from 9-45 p.m. on 13/12/1991 till 12-20 p.m. on 14/12/1991 but clarified that the case papers did not show any such notings. He also denied the suggestion that the doctors used to give pain killer medicine to the burn patient as soon as the patient was admitted to the burn ward. He also stated that on 14/12/1991 at about 8.40 p.m. the PSI from Ghoti police station had approached him and requested to examine Latabai as he wanted to record her statement. He examined her and found that she was fit to make a statement. He confirmed the endorsement on Exhibit 30. The testimony of this witness thus corroborated the evidence of PW 1 and PW 12.

8. The evidence of these three witnesses clearly proved the dying declarations recorded at Exhibit 10 and Exhibit 30. As per the evidence of PW 11 - Prabhakar Jadhav, PSI the offence was registered on the basis of the statement recorded at Exhibit 30 (C. R. No. 76/91). These statements, therefore, cannot be doubted nor can their reliability. In our opinion, the trial Court was justified in relying upon these two recorded dying declarations and PW 5 and PW 7 turning hostile before the trial Court was material on the issue of the oral dying declarations purportedly made by the deceased to these witnesses. It is also clear that the accused himself had sustained 40 per cent burn injuries while he attempted to extinguish the fire from the person of the deceased and he was hospitalised for more than four weeks. He was not unconscious at any time in the hospital. His statement recorded at Exhibit 12 by PW 1 - SEM has also been duly proved by the evidence of the SEM as well as PW 8 - the Medical Officer. Thus the presence of the accused at the spot of the incident was not in doubt and, therefore, the submissions of Mr. Apte that there was no circumstance to accept the kerosene residues on the spot or on the burnt clothes are totally irrelevant. The accused and the deceased were known to each other and their intimacy was also not in doubt. Nothing stopped the accused from stepping in the witness box in support of his case that he was not present in the house of the deceased and he heard the shouts and, therefore, entered her house and tried to save her from the burn injuries. Even his colleague who was stated to be with him at the relevant time could have stepped in the witness box as a defence witness. Thus the plea taken by the accused to defeat the prosecution case could not be proved. The dying declarations recorded at Exhibits 10, 12 and 30 by PW 1 and PW 12 did not suffer from any infirmities and they inspired confidence. They did not suffer from any exaggerations nor was there any reason to suspect that the deceased tried to frame the accused. As per the accused immediately after the incident, he had gone home with the burn injuries and by hiring a taxi he was admitted to the Civil Hospital at Nashik in the night of 13/12/1991 and thus there is no reason to doubt the reliability of his statement at Exhibit 12 as recorded by PW 1. It is well settled that a conviction can be based solely on the dying declarations so long as they are found to be reliable and inspiring confidence and if the dying declarations are contradictory to each other, the benefit of doubt goes to the accused. In the instant case between the dying declarations recorded at Exhibit 10 and Exhibit 30 there is no material variance so as to weaken the case of the prosecution. The prosecution thus proved its case regarding the complicity of the accused in causing the unnatural death of Latabai by burn injuries, beyond any reasonable doubts and, therefore, the order of conviction and sentence passed by the learned Additional Sessions Judge, Nashik on 23/7/1992 in Sessions Case No. 91 of 1992 is required to be confirmed.

9. In the premises, this appeal fails and the same is hereby dismissed. The order of conviction and sentence passed on 23/7/1992 in Sessions Case No. 91 of 1992 by the learned Additional Sessions Judge at Nashik stands confirmed. Set off, if any, u/s 428 of Cr.P.C. shall be available to the accused. His bail was cancelled

vide our order dated 1/4/2010. The appellant shall surrender to the Ghoti Police Station immediately so as to undergo the sentence.

10. The District Superintendent of Police, Nashik Rural is hereby directed to ensure that the appellant accused is arrested without any delay and admitted to the concerned jail so as to suffer the sentence as awarded by the trial Court. Compliance report shall be submitted by the District Superintendent of Police, Nashik Rural within 15 days from today to the Sessions Court at Nashik under intimation to the Registrar (Judicial) of this Court.