

(2017) 11 BOM CK 0137
In the Bombay High Court
Case No : 755 of 2004

Mahendra S/o. Tekchand Behere

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-11-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#), [Section 313](#) - Examination of witnesses by police - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 302](#)

Citation : (2017) 11 BOM CK 0137

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : Anil Mardikar, A.V. Palshikar

Final Decision : Allowed

Judgement

1. The appellant seeks to assail the judgment and order dated 7.12.2004, in Sessions Trial 85 of 2000, delivered by the 1st Adhoc Additional Sessions Judge, Nagpur, by and under which the appellant (hereinafter referred to as "the accused") is convicted for the offence punishable under section 326 of the Indian Penal Code ("IPC" for short) and is sentenced to suffer rigorous imprisonment for 5 years and to payment of fine of Rs. 10,000/.
2. Heard Shri. Anil Mardikar, learned senior counsel for the appellant and Shri. A.V. Palshikar, learned Additional Public Prosecutor for the respondent / State.
3. The case of the prosecution, as is unfolded during the course of trial is thus:
4. The voting for the Loksabha and State Assembly election was scheduled on 5.9.1999. The deceased, Bhaiyyalal Damodar Sharma, who was a resident of village Khadka situated in Tahsil Hingna, District Nagpur, cast his vote and at 5.30 p.m. or thereabout and then came at the square near the Khadka Hingna road. The accused, who and the deceased were on inimical terms, accosted and

abused the deceased Bhaiyyalal Sharma. The accused, who was armed with spear, inflicted a spear blow on the left rib. Bleeding from wound, Bhaiyyalal proceeded towards his house. The son and wife of Bhaiyyalal, accompanied him to Police Station Hingna. Bhaiyyalal lodged report on the basis of which offence punishable under section 326 of the IPC was registered against the accused.

5. Bhaiyyalal was referred to and admitted in the Medical Collage & Hospital, Nagpur. The next day, on 6.9.1999, the dying declaration of Bhaiyyalal was recorded by Assistant Sub Inspector Laxminarayan Tiwari, who is examined as PW 8. A second dying declaration was recorded by Head Constable Panjabrao (PW 13) on 7.9.1999.

6. Bhaiyyalal expired on 24.9.1999 and offence punishable under section 302 of the IPC was additionally registered against the accused.

7. In the interregnum, the spot panchanama was prepared on 6.9.1999, the sketch map of the spot of incident was drawn by the Revenue Inspector, the accused was arrested on 14.9.1999 and one spear with stick was seized from the accused in the presence of the panchas, clothes of the accused were seized, the clothes of the victim Bhaiyyalal were seized from his son Damodar.

8. The inquest panchanama was prepared on 25.9.1999 and the dead body was referred for post mortem. The post mortem examination report was obtained, the spear which was seized from the accused was sent to the medical expert for opinion and the doctor opined that the injuries suffered by the deceased were possible by the said weapon. The blood sample of the accused was taken, the seized property was sent to Chemical Analyzer, the statements of the witnesses were recorded and the chargesheet was submitted in the Court of Judicial Magistrate First Class, Nagpur, who committed the proceedings to the Sessions Court.

9. The learned Sessions Judge framed charge for offence punishable under section 326 and 302 of the IPC, the accused abjured guilt and claimed to be tried in accordance with law, the defence as is discernible from the tenor of the cross-examination and the statement recorded under section 313 of the Code of Criminal Procedure, is of total denial and false implication.

10. The learned senior counsel Shri. Anil Mardikar for the accused advanced the following submissions, amongst others:

(a) The accused is not named in the First Information Report lodged by the deceased Bhaiyyalal (Exh. 26). The First Information Report refers to one Behere as the assailant. The prosecution has not excluded the possibility of existence more than one persons with the same surname (Behere), who could be the residents of the village or the vicinity.

(b) Dying declaration (Exh. 45), which is recorded by PW 8 Assistant Sub Inspector Shri Tiwari does not bear the thumb impression or the signature of the injured nor a certification of the medical practitioner stating that the deceased

was in fit condition to give the statement. PW 8 - Laxminarayan Tiwari has not explained why he could not have requested a doctor to certify that the injured was in a fit condition to give the statement nor has PW 8 deposed that he was satisfied that the injured Bhaiyyalal was in a fit physical and mental state to give the statement.

(c) The second dying declaration Exh. 65, recorded by Head Constable Punjabrao is suspect. The name of the accused is inserted by scoring out the name of one Kishor Gond. Head Constable Punjabrao who is examined as PW 13 has no satisfactory explanation to offer for the failure to obtain the certification of the doctor. PW 13 - Punjabrao has not stated that he was satisfied that the injured Bhaiyyalal was in a fit physical and mental condition to give the statement.

(d) The prosecution is not forthcoming with any explanation for the failure of the Investigating Officer to have the dying declaration of the injured Bhaiyyalal, who concededly, was undergoing treatment from 5.9.1999 to 25.9.1999, recorded by a Executive Magistrate.

(e) PW 5 - Sanjay and PW 9 - Kishor, who were examined as independent eye witness, did not support the prosecution.

(f) PW 1 Ramu Sharma and PW 2 Ratnakala, the son and the widow of the deceased Bhaiyyalal, could not have witnessed the incident, in the teeth of their own version and admissions extracted in the cross examination.

(g) The evidence of the prosecution witnesses PW 1 and PW 2 is render ipso facto suspect and unreliable since their statements under section 161 of the Code of Criminal Procedure were recorded on 25.9.1999, after 20 days of the incident.

11. The learned APP Shri. A.V. Palshikar, would urge that the learned Sessions Judge did not commit any error in marshaling the evidence on record and recording a finding that the prosecution has established the offence under section 326 of the IPC.

12. The learned senior counsel Shri. Anil Mardikar, is right in contending that both PW 1 - Ramu Sharma and PW 2 - Ratnakala, have not witnessed the incident. PW 1 - Ramu Sharma states thus, in the examination in chief:

" The wife of my brother was fetching water from the handpump. She told me that my father is injured and having blood stains and coming towards house. I came out of the house and proceeded towards my father. I had seen that the father was injured and had bleeding injuries. I inquired him. He told me that the accused stabbed him by spear and injured. I had seen that the accused was standing there and was attempting to injure my father by spear".

In the cross examination, the following omissions are brought on record, and the same have been proved through the evidence of PW 12 - Maheshwarprasad Singh, who recorded the statement of PW 1 Ramu Sharma:

"It was stated by me to police that accused stabbed my father by spear. It was also stated by me that accused was attempting to injure my father by spear. It was also stated by me to police that accused used to stray his cattle in my crop and on query the accused threatened to take initiate at his desire. I do not assign the reason why it is not writing in my statement".

The version of PW 2 - Ratnakala that she was in the field which is adjacent to the pan shop where the incident happened and that she witnessed accused come to the pan shop, then going to his house and returning armed with spear and stabbing Bhaiyyalal, is unreliable. PW 2 - Ratnakala, further deposes that she inquired with the accused as to why the accused stabbed Bhaiyyalal and the response was that Bhaiyyalal was "watching the accused". Every material statement in the examination in chief is brought on record as omission as is evident from the portion of the crossexamination reproduced below:

" It was stated by me to police that my husband came from casting vote and was standing on the pan shop. Accused was also there. He went back to his house, brought spear, stabbed my husband and injured and then left the spot. I do not assign the reason why it is not written in my statement. I was stated by me to police that statement of my husband was taken by police and he put his thumb impression. I do not assign the reason why it is not written in my statement".

13. The omissions are proved through the evidence of PW 12 Maheshwarprasad Singh.

14. The learned senior counsel Shri. Anil Mardika, is also more than justified in contending that the unexplained delay in recording the statements of PW 1 and PW 2 destroys the probative value thereof. The learned senior counsel Shri. Anil Mardikar relies on the observations of the Apex Court in Ganesh Bhavan Patel and another v. State of Maharashtra, AIR 1979 SC 135 in paragraph 15 which reads thus:

"15. As noted by the Trial Court, one unusual feature which projects its shadow on the evidence of P. Ws. Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under S. 161 Cr.P.C. were recorded on the following day. Welji (P. W. 3) was examined at 8 a.m. Pramila at 9.15 or 9.30 a.m. and Kuvarbai at 1 p.m. Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lead such significance to this delay, exists in the instant case."

15. Shri. Anil Mardikar, the learned senior counsel for the accused would also rely

on the following observations of the Hon'ble Apex Court in *Shahid Khan v. State of Rajasthan*, AIR 2016 Supreme Court 1178.

"The statements of PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they are not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eyewitnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. The circumstances in this case lend such significance to this delay. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir, in view of their unexplained silence and delayed statement to the police, does not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source either. We find it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants. The High Court has failed to advert to the contentions raised by the appellants and reappreciate the evidence thereby resulting in miscarriage of justice. In our opinion, the case against the appellants has not been proved beyond reasonable doubt".

16. In the light of the discussion supra, I have no hesitation in holding that the evidence of PW 1 Ramu and PW 2 - Ratnakala must be discarded as wholly unreliable and untrustworthy.

17. I, having held that the evidence of PW 1 Ramu and PW 2 Ratnakala must be kept out of the consideration, find it extremely hazardous to permit the conviction to rest on the two dying declarations Exh. 45 and Exh. 65, recorded on 6.9.1999 and 7.9.1999, respectively. Both the dying declarations are recorded by police officers and no explanation is forthcoming as to why the dying declaration could not be recorded by Executive Magistrate although the deceased Bhaiyyalal was undergoing treatment at the Government Medical Hospital for 20 days. Neither of the dying declarations bear the certification of doctor that "Bhaiyyalal was in a fit physical and mental state to give the statement". No attempt is made to offer a satisfactory explanation for the failure to obtain a certification from the doctor nor do PW 8 and PW 13, who have recorded Exhs. 45 and 65 assert that they were satisfied that Bhaiyallal was in a fit condition to give statement. A bare perusal of dying declaration Exh. 65, reveals that the name of the assailant was initially recorded as Kishor Gond. The name of Kishor Gond was scored out and the name of the accused inserted. PW 13 - Punjabrao Yewale who recorded dying declaration Exh. 65 fairly admits in the crossexamination thus:

"I do not know who were with the patient. The name Kishor Chintaman Gond is scored on the statement Exh. 65. The injured had stated the name of Kishor Gond as assailant and therefore he stated the name of accused and scored the first name"

18. The learned Additional Public Prosecutor Shri. A.V. Palshikar, invites my attention to the following observations in the Constitution Bench judgment of the Apex Court in *Laxman vs. State of Maharashtra*, AIR 2002 Supreme Court 2973. Paragraph 4

"Bearing in mind the aforesaid principle, let us now examine the two decisions of the court which persuaded the bench to make the reference to the Constitution Bench. In *Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh* 1999 (7) SCC 695 the dying declaration in question had been recorded by a judicial magistrate and the magistrate had made a note that on the basis of answers elicited from the declarant to the questions put he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. Doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law the court also had found serious lacunae and ultimately did not accept the dying declaration recorded by the magistrate. In the latter decision of this court in *Koli Chunilal Savji & Another vs. State of Gujarat* 1999(9) SCC 562 it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. The court relied upon the earlier decision. In *Ravi Chander vs. State of Punjab* 1998 (9) SCC 303 wherein it had been observed that for not examining by the doctor the dying declaration recorded by the executive magistrate and the dying declaration orally made need not be doubted. The magistrate being a disinterested witness and is a responsible officer and there being no circumstances or material to suspect that the magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the magistrate does not arise.

Paragraph 5

"The court also in the aforesaid case relied upon the decision of this court in *Harjeet Kaur VS. State of Punjab* 1999(6) SCC 545 case wherein the magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in *Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh* 1999 (7) SCC 695 to the effect that "...in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to

accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh, 1999 (7) SCC 695 must be held to be not correctly decided and we affirm the law laid down by this court in Koli Chunilal Savji & Another vs. State of Gujarat, 1999(9) SCC 562 case".

Submission of the learned APP is that a certification by the doctor is, as held by the Apex Court, is a rule of caution and there is no requirement of law that a dying declaration must necessarily been made to a Magistrate or that the doctor must certify that the maker was in fit condition to make the declaration.

19. In view of the Constitution Bench judgments of the Apex Court, the submission of the learned APP, is unexceptionable, as a proposition of law. However, the two dying declarations Exh. 45 and Exh. 65, do not inspire confidence, for reasons recorded supra, that they are voluntary or truthful. Even if the dying declarations Exh. 45 and Exh. 65, are tested on the anvil of law enunciated by the Apex Court in Laxman vs. State of Maharashtra, the two dying declarations Exh. 45 and Exh. 65, are not implicitly reliable and confidence inspiring. On holistic appreciation of the material on record, I am not in a position to uphold the conviction.

The judgment and order impugned is set aside. The accused is acquitted of the offence punishable under Sections 326 of the Indian Penal Code. Fine paid by the accused, if any, be refunded. The bail bond of the accused shall stand discharged. The appeal is allowed.