
(1994) 08 BOM CK 0079
In the Bombay High Court
Case No : Criminal Appeal No. 66 of 1993

Mohmed Shafi Sardar Patel	Vs	APPELLANT
The State of Maharashtra and Another		RESPONDENT

Date of Decision : 11-08-1994

Acts Referred:

Evidence Act, 1872 — Section 3, 32, 59
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (1994) 4 BomCR 514

Hon'ble Judges : Vishnu Sahai, J;M.S. Rane, J

Bench : Division Bench

Advocate : D.B. Bhosle and Jayant Dawar, for the Appellant; B.R. Patil, Assistant Public Prosecutor for State and T.E. Mane, for the Respondent

Final Decision : Dismissed

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the judgement and order dated 25-1-1993 passed by the IInd Additional Sessions Judge, Solapur in Sessions Case No. 91 of 1992 convicting him u/s 302 I.P.C. and sentencing him to undergo life imprisonment and to pay a fine of Rs. 10,000/- in default to further undergo R.I. for two years, has come up in appeal before this Court.

2. The prosecution case in brief is that the informant (deceased) Mohammed Nadaf was resident of Vijapur, Begumpet, House No. 58, District Solapur. He used to reside in the aforesaid house along with his wife P.W. 7 Anwarbi Nadaf (respondent No. 2). He is alleged to have been selling ice at Vijapur and Shastrinagar. It is also alleged that the appellant used to sell ice at his shop in Vijapur. On account of the common business, a rivalry is alleged to have been existing between the two of them. It is said that the appellant in order to eclipse the informant-deceased was reducing and increasing the prices of ice. It is also said that about a month prior to the incident one Sayyad Sahab (not examined) had told the informant that the appellant had a complaint against him on account of the manner in which he conducted the aforesaid business. This according to

the prosecution is alleged to have been the motive for the incident.

On 16-11-1991, at about 6 p.m. while the informant was returning on a cycle, from his shop in Shastrinagar to his home and had reached near the mortuary of Civil Hospital, Solapur, the appellant from the backside on a cycle came and pulled down the informant. Thereafter, he is alleged to have given two blows with a knife on the stomach of informant and abused him in filthy language. As a sequel to the assault, the informant started running and at that time the appellant is alleged to have dealt another blow with a knife on his hip. It is said that the informant ran and came in front of the doctor in civil hospital. At the aforesaid hospital, he was admitted in the casualty ward.

It is alleged that as soon as the informant rushed to the Civil Hospital, P.W. 5 Police Head Constable B.B. Dighe and P.W. 6 Head Constable J.D. Zombade met him and on making inquiries from him as to how he came to be injured, they were told by him that the appellant had assaulted him. A similar oral dying declaration near about the same time is also alleged to have been given by the informant to his wife P.W. 7 Anwarbi Nadaf who had reached the hospital on learning about the assault on her husband. P.W. 8 Wazir Nadaf real brother of the informant and P.W. 9 Noor Mohammed (Cousin brother of informant). P. Ws. 5, 7, 8 and 9 are alleged to have said that the informant had told them that Mohammed Shafi Patel had assaulted him.

4. P.W. 5 Police Head Constable B.B. Dighe immediately informed the Sadar Bazar Police Station by phone about the informant being assaulted by the appellant. On his telephonic information P.W. 14 A.S.I. Ajij Gulab Atar made an entry in the station diary of the aforesaid Police Station, at 6.15 p.m. Exhibit 53 is a copy of that entry. P.S.O. of Sadar Bazar Police Station directed P.S.I. Godase to get the dying declaration of the informant recorded. Accordingly, P.S.I. Godase went to the civil hospital, Solapur and after seeing the informant (injured) sent requisition Exhibit 39 to the Special Executive Magistrate P.W. 13 Durgadas Krishnath Paraswar to record the dying declaration. Accordingly, the aforesaid Executive Magistrate after ascertaining from P.W. 11 Dr. Prakash Gangadhar Ghatole that the injured was in a fit condition to give a statement, recorded his dying declaration. Exhibit 33 is the certificate of Dr. Ghatole to the effect that the injured was in a fit mental condition at that time. This dying declaration is the sheet anchor of the prosecution evidence and in our opinion crucial for the decision of this appeal. We are reproducing the same :-

"I Mahamood Abdul Nadaf age 45 yrs. occu : Ice business R/o Vijapur Ves. H. No. 58, Solapur give statement as.

Today on 16-11-1991 on Saturday at night at 5.00 p.m. I came near Civil Hospital (Near the gate behind postmortem room) while I was returning to my house from my ice shop at Shastri Nagar. At that time Mohmed Shafi Inamdhar or Patel came there and immediately gave two blows on my stomach and one on the right portion of the hip and three more blows on the other parts of my body

with a dagger without talking any thing from me. He said and abused me today I will kill you. So I was afraid and came in front of the doctor by running in Civil Hospital.

He and myself are running ice business. Mohamed Sharif has threatened me before fifteen days about beating. I have given this statement in full conscious condition. It is read over to me and it is correct.

Sd/- Mahamood Abdulla Nadaf."

5. It is alleged that P.S.O. of Police Station Sadar Bazar asked P.S.I. Rasal P.W. 24 to go to Civil Hospital Solapur and record F.I.R. (dying declaration) of the injured. Accordingly, P.S.I. Rasal went to Civil Hospital, Solapur and reached there sometime between 7.30 p.m to 7.55 p.m. At the aforesaid hospital, after obtaining a certificate from P.W. 21 Dr. Gautam Vithal Jagtap that the injured was in a fit condition to give a statement, he recorded his statement. Exhibit 64 is the doctor's endorsement about the injured being in a fit condition to give the statement. Exhibit 73 is the F.I.R. which was recorded by the aforesaid witness. We may mention that the prosecution case, which we have disclosed in paragraph 2 of our judgment is on the basis of the averments contained in Exhibit 73.

6. After the two dying declarations, namely, the dying declaration recorded by the Magistrate and that recorded by P.W. 24 P.S.I. Ravindra Manikrao Rasal were received by P.S.I. Godase he went to Police Station Sadar Bazar and handed them over the P.S.O. of the aforesaid Police Station who registered Crime No. 214 of 1991 under sections 307/504 I.P.C. and section 135 of the Bombay Police Act against the appellant. Thereafter a search was launched for the appellant and on 18-11-1991 at about 6.00 p.m. the appellant was arrested by P.S.I. Ravindra Manikrao Rasal and brought to Sadar Bazar Police Station. At the aforesaid police station his blood-stained shirt was seized.

7. Police Inspector Radhakrishna Nagoji Gamene P.W. 5 took over the investigation from P.W. 24 P.S.I. Rasal. On receipt of information about the death of the informant, he went to civil hospital Solapur and prepared the inquest (Exhibit 15) of the dead body. He also seized plain earth and blood stained earth from the place of the incident. On 21-11-1991, he recovered at the pointing out of the appellant that the dagger with which he is alleged to have committed the crime. At this stage, we felt it necessary to point out that it would not be safe to place reliance on the recovery of blood-stained shirt of the appellant and the recovery of blood-stained dagger at his pointing out. Consequently, we are rejecting the evidence of the aforesaid recoveries. Inspector Gamene P.W. 25 also sent articles to the Chemical Analyser and ultimately after completing the investigation on 20-12-1991, he submitted the charge-sheet.

8. Going backwards, the informant on his arrival at civil hospital Solapur was first medically examined at 6.00 p.m. by Dr. Prabha Shankar Patil P.W. 10. On his person Dr. Patil found the following injuries :-

1. Stab injury 1 and a half inch x 1 inch on rt. umbilical region (coils of intestine are protruding out) by sharp object;
2. Stab injury 1 and a half inch x one inch on rt, lumber region (coils of intestine are protruding out) by sharp object;
3. Incised wound 1 inch x 1 inch on rt. gluteal region (muscle deep) by sharp object.

According to the doctor the aforesaid injuries were grievous in nature and were caused within 6 hours. In the injury report Exhibit 29 Dr. Patil also mentioned that the patient gave history of alleged assault at 5.50 p.m. by knife at the corner of civil hospital Vidhya Nagar Housing Society. Dr. Patil also opined that all the injuries could be caused by a knife. He also stated that these injuries were sufficient in the ordinary course of nature to cause death.

9. The postmortem examination of the dead body of the deceased was conducted on 17-11-1991 between 10.5 a.m. to 11.00 a.m. by P.W. 12 Dr. Subhashchandra Sangameshwar Sardar. On the person of the deceased the doctor found the following external injuries :-

1. Sutured wound vertical 8" rt. side of umbilicus on the abdomen.
2. Sutured wound 5" on rt. side of umbilicus connected with injury No. 1.
3. Drain tube in the rt iliac region.
4. Above rt. iliac region lateral aspect of horizontal 2" sutured wound
5. Oblique sutured wound on rt. buttock in the centre muscle deep antemortem.

In the opinion of the doctor, the death of the deceased was on account of shock and hemorrhage due to stab injury to the intestine. We may mention that the sutured wounds and the insertion of drain tube, mentioned in the autopsy report, were the result of emergency surgery which the informant had to undergo after entering the hospital, as a part of desperate effort by the doctors to save his life.

10. In due course, the case was committed to the Court of Sessions. In the trial Court a charge u/s 302 I.P.C. was framed against the appellant to which he pleaded not guilty. He denied his participation in the incident. During trial, the prosecution examined as many as 25 witnesses. It also tendered in evidence two dying declarations :-Exhibit 40, the dying declaration recorded by the Magistrate and Exhibit 73 the F.I.R. of the deceased, recorded by P.W. 24 P.S.I. Rasal. We may mention that the prosecution also relied on a third dying declaration, that being the statement of the deceased, made to P.Ws. 5, 6, 7, 8 and 9 as soon as he entered inside the hospital. To the aforesaid statement, we have made a mention in the earlier part of our judgment. The learned trial Judge believed the prosecution case and passed the impugned judgement.

11. We have heard Mr. D.B. Bhosale learned Counsel for the appellant, Mr. B.R. Patil learned Additional public Prosecutor for the State of Maharashtra and Mr.

T.E. Mane for respondent No. 2 Anwarbi Mohd. Nadaf (widow of the deceased), at a considerable length. We have also gone through the aforesaid dying declarations and the entire testimony, of the prosecution witnesses, referred to above. After giving our anxious consideration to the matter, we are of the firm opinion that the prosecution has established its case against the appellant beyond reasonable doubt and consequently this appeal deserves to be dismissed.

12. Mr. D.B. Bhosale learned Counsel for the appellant made a number of submissions before us. The central submission made by him pertains to the dying declaration and that is :-(a) the dying declarations should not be accepted in the absence of any corroboration; and (b) the dying declarations have not established the identity of the appellant beyond reasonable doubt and inasmuch as there is no other evidence connecting the appellant with the instant crime, he deserves to be acquitted. Taking up first Mr. Bhosale's contention that the evidence of dying declarations should not be accepted without corroboration, we regret that we find the same to be without any merit. The Apex Court in the judgment reported in *Khushal Rao Vs. The State of Bombay*, , has stated in paragraph 16, thus -

"(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made."

In the same decision the Apex Court has observed in paragraph 17, thus -

"Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case."

The law as it stands today is that a uncorroborated dying declaration can form the sole basis of conviction provided it inspires confidence.

13. We now propose taking up the submission of Mr. Bhosale that the dying declarations failed to establish the identity of the appellant and inasmuch as there is no other evidence he should be acquitted. To substantiate his contention Mr. Bhosale submitted that :-(i) in the charge-sheet the appellant has been named as Mohmed Shafi Sardar Patil; (ii) P.W. 5 Baburao Dighe, P.W. 7 Anwarbi Mohd. Nadaf, P.W. 8 Wazir Abdulla Nadaf and P.W. 9 Nisar Nadaf have named him as Mohmed Shafi Patel; (iii) P.W. 6 P.H.C. Jagannath Daulatrao Zombade has named him as Mohmed Patel Inamdar; (iv) P.W. 14 Ajij Gulab Atar who received telephone message from P.W. 5 P.H.C. Bajrang Baburao Dighe from civil hospital Solapur, has mentioned his name in the station diary as Mohmed Shafi Inamdar, (v) P.W. 22 Head Constable Sashikant Banudas Godse has named him as Mohmed Shafi Inamdar and Mohmed Shafi Patel and (vi) in the F.I.R. recorded

by; P.W. 24 P.S.I. Ravindra Manikrao Rasal the informant has named him as Mohmed Shafi Inamdar Patel, Mohmed Shafi and Mohmed Shafi Patel.

14. The contention of Mr. Bhosle is that it was obligatory for the prosecution to adduce some ocular evidence to prove that the appellant was known by all those various names. He contended that on account of the failure of the prosecution to adduce such evidence, it has failed to discharge its burden of proving the identity of the appellant beyond reasonable doubt and also the burden of proving its case beyond reasonable doubt.

15. We have given our very anxious consideration to the aforesaid submission of Mr. Bhosle and we regret that we cannot persuade ourselves to agree with the same. As stated earlier, in the charge-sheet, the appellant has been named as Mohmed Shafi Sardar Patel. P.W. 5 P.H.C. Bajrang Baburao Dighe, P.W. 7 Anwarbi Mohamed Nadaf, P.W. 8 Wajir Abdulla Nadaf and P.W. 9 Nisar Ahmed Faiz Ahmed Nadaf who deposed about the oral dying declaration made by the deceased to them stated that the deceased had told the name of the assailant as Mohamed Shafi Patel. We may also mention that P.W. 5 also stated that the surname of the appellant was Patel " Inamdar. If the aforesaid statements of P.Ws. 5, 7, 8 and 9 are closely examined then we find that in the oral dying declaration the deceased gave out the name of the appellant as Mohmed Shafi Patel. In the charge-sheet the name of the appellant (assailant) has been mentioned as Mohmed Shafi Sardar Patel. To our opinion, the only difference is that of word "Sardar". Such a difference in our opinion is not at all material. It is common experience that the same person refers to a certain person by various names, sometimes by his full name, sometimes by his short name and sometimes by a very short name. Omission of word "Sardar" in the oral dying declaration, in our opinion, is not so material that we may agree with the learned Counsel for the appellant that the identity of the appellant has not been established beyond reasonable doubt.

16. At this stage we would like to express our displeasure at certain observations made by the learned trial Judge while rejecting the evidence of the oral dying declaration. The observation of the learned trial Judge was that inasmuch as relations of the victim had deposed about the oral dying declaration it could be ignored. We are afraid that the learned trial Judge is not aware of the correct law. The correct law is that the testimony of interested witnesses is not mechanically rejected but is only to be assessed with caution. After going through the evidence of the aforesaid witnesses, who deposed about the oral dying declaration, we are of the opinion that their evidence inspires confidence and the learned trial Judge grossly erred in rejecting the evidence of oral dying declaration. We place reliance on the same.

17. So far as the other variations in the name of the appellant are concerned we may mention that in all those variations some part of the name of the appellant, which according to the learned Counsel for the appellant is Mohamed Shafi Sardar Patel, is there. As we have said earlier, the same person on different occasions calls a person by different names. For that reason we are not inclined

to accept the submission of Mr. Bhosale that if the same person at different times gave out the name of the same assailant (appellant) he should have mentioned the same name.

18. There are some other reasons in not accepting the aforesaid contention about the identity of the appellant, canvassed by Mr. Bhosale. We find that in the cross-examination of the prosecution witnesses not a single question was put to them to the effect that the appellant was not the same person to whom the deceased had referred to in the dying declarations and he was not known by various names referred. In our opinion, an opportunity should have been given to the witnesses to explain. In the absence of such a opportunity, we cannot ex parte condemn the witnesses and hold that the prosecution has failed to establish the identity of the real assailant.

19. We also feel that if the appellant was not the actual culprit but some other person was responsible for this crime, he would not have kept quiet right till the stage when he filed his written statement on 14-12-1992 in the trial Court, after the recording of evidence was over. It is for the first time, in this written statement, that the identity issue has been raised. In our opinion, right from the moment the appellant came to know about his implication in the instant crime and right from the time when the police arrested him, he would have been crying aloud that he was not the culprit and the culprit was someone else. Such a conduct of the appellant has also weighed with us in rejecting the aforesaid submission of Mr. Bhosle.

20. It is true that in the instant case the only evidence adduced by the prosecution clinching the participation of the appellant is that of the dying declarations. However, all the requirements before accepting the evidence of dying declarations as laid down by the Apex Court in the case mentioned above *Kushalrao v. State of Bombay*, have been satisfied in the instant case. Since, it was a broad day light incident there was no difficulty for the victim to recognize his assailant who was known to him from before the incident. No question has been put by the defence in cross-examination either on the time of the incident or on the place of the incident. Further the learned Special Executive Magistrate and P.S.I. Rasal, before recording the dying declarations, took the precaution of ascertaining from the doctors namely P.W. 11 Dr. Ghatole and P.W. 21 Dr. Gautam, respectively, that the victim was in a fit physical and mental condition to give the declaration. The suggestion given to the witnesses that the dying declarations were the product of tutoring has been emphatically denied by them. In the dying declaration, namely, the F.I.R. (Exhibit 73) motive has also been mentioned. In our opinion the victim was in a position to speak and could have made the dying declarations. In the earlier part of our judgment, we have mentioned the injuries found on the person of the victim by the various doctors. None of those injuries are either on his neck region or near about his neck region whereby damaging his vocal cord and impairing his powers of speech. Probably the learned defence counsel, in the trial Court, also felt that way because neither

in the cross-examination of the doctors nor in that of any other witness, a single question has been put to the effect that the victim was unable to speak on account of the injuries sustained.

21. The fall out from the facts stated above is that the dying declarations are implicitly reliable and in our opinion by themselves are sufficient for sustaining the conviction of the appellant.

22. Mr. Bhosle, learned Counsel for the appellant, also strenuously contended that it was the bounden duty of the prosecution to have examined Sayyad Sahab, to prove the motive of the incident. His contention is that inasmuch as it was Sayyad Sahab who had told the deceased that in case he did not reduce the rates of his ice, the appellant would kill him, he was a witness whose evidence was essential to the unfolding of the narrative. There can be no immutable formula covering all cases and situations regarding the impact of non-examination of a witness. It would all depend on the facts of each case. Since in this case, we find the evidence of the dying declarations to be implicitly reliable, the failure of the prosecution to examine Sayyad Sahab would not have any bearing on the fate of this case.

23. Lastly Mr. Bhosle contended that the learned trial Court erred in convicting the appellant u/s 302 I.P.C. and the proper section to convict him would be either section 304 I.P.C. or section 326 I.P.C. We regret that we cannot accept the aforesaid contention of Mr. Bhosle in view of the decision of the Apex Court reported in Virsa Singh Vs. The State of Punjab, . In that case the application of clause thirdly of section 300 I.P.C. namely "3rdly - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death" came up for consideration before the Apex Court. The Apex Court laid down that the aforesaid clause would have application if the injury caused is the injury intended (in other words it is not accidentally and that injury was sufficient in the ordinary course of nature to cause death. In the dying declarations it is mentioned that the appellant deliberately gave two blows on the stomach region of the deceased and one on the hip region. In other words, he had, intended causing those injuries. The evidence of Dr. Patil P.W. 10, to which we have referred in the earlier part of our judgment, is pointedly to the effect that the injuries of the victim were sufficient in the ordinary course of nature to cause his death. We accept that evidence because in the first two injuries which were in the region of umbilicus, Dr. Patil noted that the coils of intestine were protruding out. That being so, the case of the appellant is squarely covered by clause thirdly of section 300 I.P.C. In our opinion the offence committed by the appellant would only fall in the ambit of section 302 I.P.C and the learned trial Judge correctly convicted him under that section.

24. For the aforesaid reasons we are of the opinion that there is no merit in this appeal and it deserves to be dismissed.

25. In the result, this appeal is dismissed. The conviction and sentence of the appellant is confirmed. The appellant is in jail and will remain there till he serves out his sentence.

Appeal dismissed.