

(2010) 04 BOM CK 0165
In the Bombay High Court
Case No : Criminal Appeal No. 35 of 1991

Prakash Mahadeo Ghorpade

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 302, 323, 34, 506

Citation : (2010) 112 BOMLR 2081

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

Bench : Division Bench

Advocate : J.S. Kapre, for the Appellant; J.P. Yagnik, APP, for the Respondent

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—This appeal filed u/s 374 of Cr.P.C. is directed against the order of conviction and sentence passed on 24/12/1990 by the learned IV Addl. Sessions Judge, Solapur in Sessions Case No. 159 of

2. The appellant along with his parents was tried for the offences punishable under Sections 302, 323 and 506 read with Section 34 of IPC in causing the death of Gangabai (his brother's wife) on 12/4/1990 between 9 to 10 a.m. by setting her on fire. Accused Nos.2 and 3 came to be acquitted of all the charges and the appellant-accused was held guilty for the offence punishable u/s 302 and came to be sentenced to suffer life imprisonment. On admission of this appeal, he was released on bail as per the order dated 24/1/1991. However, the bail granted to the appellant came to be cancelled by our order dated 25/3/2010 and he has been produced before us at the time of hearing of this appeal.

3. As per the prosecution, Mahadeo Ghorpade resident of village Jawalgaon, Taluka Barshi, District Solapur had a joint family of his two sons, Nanasaheb and Prakash and Nanasaheb was married, whereas Prakash was unmarried at the relevant time. Deceased Gangabai was the wife of Nanasaheb, elder brother of

the appellant and from the said wedlock she has two children. Nanasaheb was a contractor and it is alleged that the appellant was cribbing over the transfer of motorcycle by Nanasaheb to him as well as the license of contract. It is further alleged that the appellant felt that it was the deceased who was not allowing her husband to do either of these things and used to ill-treat her, sometimes assaulted her and abused her on these counts. One day earlier to the date of incident she was caught and assaulted by the appellant but she did not disclose the same to her husband and she felt that her in-laws were against her and were, in fact, instigating the appellant.

On 12/4/1990 the appellant asked her to heat water as he wanted to take bath and while she was heating water, he poured kerosene on her person and set her on fire after about 9 a.m. and fled on the motorcycle. She was set ablaze and in that condition she started shouting for help. Neighbours like Bharat Galande PW 2 and Chandrakant Veer PW 3 as well as Arjun Disale PW 5 came and poured water on her person. Her cousin from maternal side Navnath Kapse who is also the resident of the same village arranged for a private jeep and she was taken to the hospital at Vairag. However, the Doctor at Vairag advised them to take the patient to the civil hospital at Solapur and accordingly she was admitted in the hospital at Solapur around 1 p.m. on the same day. Her dying declaration (Exh. 19) was recorded by PW 1 Nagnath Kshirsagar, Special Executive Magistrate around 1.30 p.m., after he had received intimation from the police. PW 8 Bajrang Digge, Police Constable also recorded her statement and registered the same as the FIR (Exh.33). While under treatment, Gangabai died on 14/4/1990 in the early hours. Inquest panchanama was drawn at Exh.10 and Dr. S.S. Sardar along with Dr. Kanki from the Government Hospital at Solapur conducted the post mortem at about 7.30 a.m. on 14/4/1990 and post mortem report at Exh.11 was signed. The accused came to be arrested at about 9.30 p.m. on 12/4/1990 from his village. The articles seized from the spot of the incident i.e. house of the appellant as per the spot panchanama at Exh.9 were sent for chemical analysis and the C.A. Report was received on 22/6/1990 at Exh. 13. Charge-sheet came to be filed on completion of investigation by PW 9 Rajan Tele, PSI. The case being exclusively triable by the Sessions Court, it was committed and the charge was framed on 12/11/1990.

4. The prosecution case is based on two written dying declarations and one oral dying declaration made to PW 2 Bharat Galande by the deceased in the presence of PW 3 Chandrakant Veer, immediately after the incident and when Bharat was trying to help her.

Prosecution examined in all 12 witnesses and mainly relied upon the evidence of PW 1 Nagnath Kshirsagar, PW 2 Bharat Galande, PW 3 Chandrakant Veer, PW 5 - Arjun Disale and PW 11 Navnath Kapse. None of these witnesses are the eye witnesses and PW 6 Vithhal Kokate was the Police Constable who had taken the Muddemal property to the C.A. PW 8 Bajrang Digge was the Police Constable, who had recorded the dying declaration at Exh. 33 and registered the same as

an FIR. Whereas PW 7 - Shatrughna Admane, a Police Constable had approached PW 1 - Nagnath for recording of dying declaration of the deceased.

5. The Spot Panchanama at Exh.9, the Inquest Panchanama at Exh.10 and the Post Mortem Report at Exh.11 are the admitted documents. PW 4 - Dr. S.S. Sardar in his evidence before the trial court stated that he was attached to the Forensic Medicine Department of D.M. Medical College attached to the Rural Hospital, Solapur and had received the dead body of Gangabai at about 7.45 a.m. on 14/4/1990 and he had completed the post mortem at 8.30 a.m. The deceased had received 100% burn injuries as noted in Column No. 17 of the Post Mortem Report and the burn injuries were ante mortem. As per the doctor the probable cause of death was shock due to 100% burns. In his cross-examination, he stated that head, neck and face of the deceased were completely burnt. This evidence of the doctor read with the post mortem report clearly proved that Gangabai died on account of 100% burn injuries.

6. The only question that was required to be proved by the prosecution before the trial court was, whether Gangabai died a homicidal death and it was caused by the appellant. In his statement recorded u/s 313 of Cr.P.C., the appellant had denied everything and he submitted his written defence at Exh. 43. As per the same, he had taken a defence dual in nature. Firstly he stated that while the deceased was heating water, the firewood was wet and, therefore, she poured kerosene on it which resulted in fire and she sustained burn injuries. Secondly, he stated that he himself and his elder brother Nanasaheb were working with Navnath Kapse - PW 11, who was a contractor for, quite some time and had subsequently separated from him. It is his case that he obtained a registration as a contractor but in the name of his brother's daughter - Manisha. His elder brother Nanasaheb and Navnath had joined hands and they were not giving any monetary benefit to him from the contract received by them. An amount of Rs. 3,50,000/- was receivable from the contract, but he was not paid anything and he was raising dispute on the same Hence he was framed.

7. PW 1 - Nagnath Kshirsagar stated before the trial court that on 12/4/1990 he had received an intimation for recording the dying declaration of Gangabai Nanasaheb Ghorpade, resident of Jawalgaon and he produced the same before the court and it was received by him at about 1.15 p.m. He then proceeded to the Civil Hospital at Solapur and went to the burns ward. He made enquiries with the Medical Officer on duty (PW 10 - Dr. Sunil Shah) as to whether the patient was in a position to give a statement and as the doctor informed him that the patient was conscious and able to give a statement, he proceeded to record the same. He went alone to the patient and at that time there was nobody around him and asked her about the incident and recorded the dying declaration as per her narration. She told him that her brother-in-law, namely, Prakash poured kerosene on her by taking it out from the bucket from the kerosene can and set her on fire and ran away on his motorcycle. He further stated that the patient was not in a position to sign or give her thumb impression because of the burn

injuries on her fingers and, therefore, he put an endorsement to that effect and signed it after consulting the Medical Officer on duty. He confirmed the dying declaration recorded by him at Exh. 19 and also the endorsement made by PW 10 - Dr. Shah. He also confirmed that the contents in dying declaration were true and correct and they were recorded as per the narrations made by the deceased. In his cross-examination, he admitted that the patient was found with 100% burn injuries but she was talking calmly with her eyes open and about 10 minutes were required for recording her statement. He did not ask her any question but she had voluntarily given her statement. He also admitted that there was no talk between the doctor and patient in his presence. He admitted that the patient was speaking fluently and he did not enquire about the treatment given to her. He denied the suggestion that he recorded the statement and obtained the doctor's signature on it by going to his cabin. He also stated that he could not state whether the doctor was present or not. He also state that the patient was kept in a room and not in a general ward and while recording the statement no one from her relations was present in the room. He also denied that PW 11 Navnath Kapse and the patient's husband Nanasaheb had accompanied him when he went to record the dying declaration.

8. PW 8 - Bajrang Digge was the Police Head Constable (Buckle No. 901) attached to Sadar Bazar Police Station and he stated before the court that on 12/4/1990 he received a report from the P.S.O. that one Gagabai Nanasaheb Ghorpade, resident of Jawalgaon was admitted in burns ward and she was serious and, therefore, he was required to visit the hospital and take further steps. He issued an intimation (Exh.15) in the name of the Special Executive Magistrate - Kshirsagar and the SEM recorded the statement. Thereafter he also recorded the statement of the deceased but before doing so he had enquired with the Medical Officer on duty regarding the condition of the patient and when the doctor informed him that she was in a position to give statement, he proceeded to record the same. He could not obtain her thumb impression because both the thumbs were burnt and, therefore, he made endorsement to that effect. He signed the statement and the endorsement of the doctor was also made on the same. He reiterated that the patient was conscious and able to give a statement when he recorded the same (Exh.33). He then forwarded it to the Sadar Bazar Police Station. In his cross-examination, he stated that the intimation that was received by him was from Admane - PW 7 and that PW 11 had admitted the deceased in the hospital. He denied the suggestion that PW 11 had informed him that the appellant had set the deceased on fire. As per him the deceased herself had narrated the incident to him. He also denied that PW 11 - Navnath Kapse was present when he recorded the statement of the deceased. He also admitted that the patient had sustained 100% burn injuries. The complaint was reduced in writing at about 2.30 p.m. and while narrating the incident the patient was not crying or shouting and her face was not completely burnt in as much as except nose, mouth and eyes, the entire face was burnt.

9. Dr. Sunil Shah - PW 10 was the House Surgeon attached to the Civil Hospital

since 1/4/1990. He stated before the trial court that on 12/4/1990 at about 1.15 a.m. one Gangabai was admitted in the burns ward and for recording her dying declaration, the SEM had visited the ward. He made enquiry with him about the condition of the patient so as to record her statement. On examination of the patient, he gave opinion to the SEM that the patient was in a position to give statement and thereafter the SEM proceeded to record the statement. He confirmed his endorsement on the same (Exh.19), which was in his hand writing and signed by him. He also stated that the Head Constable of Sadar Bazar Police Station also made enquiry thereafter about the condition of the patient and when he gave positive opinion that she was in a fit condition and was able to give statement, he proceeded to record the same. The patient was not in a position to sign the same or give thumb impression because her fingers were burnt. He confirmed the endorsement made by him on Exh. 33. In his cross-examination, he admitted that the patient was accompanied by her relations and she was in serious condition. Immediate aid was provided as soon as she was admitted in the ward, including the pain killers. However, he denied the suggestion that after the medicines were administered to her, the patient had felt drowsiness. He also denied the suggestion that unless the patient was prompted, she could not speak fluently.

On the analysis of the evidence of these three witnesses i.e. PW 1, PW 8 and PW 10, we are satisfied that the trial court was right in relying upon the dying declarations recorded at Exhs.19 and 33 and on no count any of these dying declarations could be discarded or disbelieved.

10. Now coming to the evidence of PW 2 - Bharat Galande. He stated before the court that his house is in the vicinity of the house of the appellant and on the date of the incident at about 7.30 a.m. he left his house and after taking a round in the village when he met Netaji and Sunil Dhengale and took paan with them, his mother came from the house and asked him to go home as the door was open. He, therefore, proceeded to his house and while he was lifting the water pot, he noticed smoke coming from the house of the appellant. He, therefore, kept the pot down and started proceeding towards the house of the appellant but on the way he saw the deceased coming out of her house with flames of fire coming from her body and she was crying for help. He also stated that thereafter the appellant followed and ran away on the motorcycle which was kept near the heap of fodder. The deceased fell at his door and he poured water on her person. At that time PW 3 - Chandrakant Veer also joined him and he went to the house of the accused, took a chaddar from there and wrapped it around the deceased and that is how the fire was extinguished. He then asked her as to how she sustained the burn injuries and she replied that her brother-in-law - Prakash set her on fire. He then went to the house of the accused and also found Arjun Disale - PW 5 present along with accused No. 2 while extinguishing the fire in the house. He then asked accused No. 2 as to how the deceased sustained burn injuries. Then he asked accused No. 2 to take the deceased in the house. Gangabai died within 2-3 days of the incident. In his cross-examination he

admitted that he knew Nanasaheb Jadhav, the father of the deceased but did not know whether he was present in the house on that day. He also admitted that his statement was recorded on 13/4/1990 by the police in which he had stated that Nanasaheb Jadhav also visited the house of the accused. He further stated that PW 11 - Navnath Kapse came there when Gangabai was being carried to the hospital in a Jeep. He also stated that he had asked the deceased about the incident before Nanasaheb Jadhav and other persons who reached the spot. The deceased was neither hauling nor crying loudly and she did not state anything about the incident. He also admitted that Navnath Kapse was a contractor and the husband of the deceased was working with him. He also denied any knowledge as to whether accused No. 1 was looking after the contract business of Nanasaheb. He also denied the suggestion that the deceased had informed him that while she was heating water, she spread kerosene on the firewood and the flames of fire broke out accidentally. He also denied the suggestion that he along with Nanasaheb and Navnath filed a false case against the accused due to rivalry in contract business. PW 3 - Chandrakant Veer, resident of the same village, stated before the trial court that at about 9 a.m. he was proceeding towards canteen, he found one lady in flames and running towards the house of Bharat Galande and, therefore, he reached the same place and found that Bharat Galande was pouring water on the person of that lady, she was lying in the courtyard of Bharat Galande and her name was Gangabai Ghorpade. Thereafter Bharat took Chaddar from the house of the accused and wrapped her in the same. Bharat asked her about the incident and she replied that her brother-in-law set her on fire. He stated that the name of the brother-in-law is Laxuman, but his real name is Prakash Ghorpade. In his cross-examination he denied the suggestion that he made a false statement about the reply given by the deceased to Bharat stating that the accused had set her on fire. It is thus clear that the oral testimony of PW 2 - Bharat Galande on the point that it was the deceased who had informed him that the accused had set her on fire was corroborated by the testimony of PW 3 and the trial court rightly accepted the same as trustworthy and inspiring confidence.

11. Mr. Kapre the learned Counsel appearing for the appellant submitted that the dying declarations at Exhs. 19 and 33 as well as oral dying declaration made to PW 2 could not be relied upon and they did not inspire confidence. He submitted that both PW 2 - Bharat Galande as well as PW 11 - Navnath Kapse were not reliable and PW 1 Nagnath Kshirsagar and PW 2 - Bharat Galande did not appear to be natural witnesses. He reiterated that the appellant was framed at the behest of PW 11 - Navnath Kapse. He submitted that when PW 10 admitted that the patient was given pain killers as soon as she was admitted, it would be unbelievable that the patient would be fit to make a statement and she was calm and fluently speaking. He referred to the post mortem report at Exh.11 and pointed out that the patient had sustained major injuries and in such a condition it would be impossible that she was fit to make a statement. As noted earlier, PW 10 - Dr. Sunil Shah was in the witness box and his testimony supporting the

dying declarations at Exhs.19 and 33, in our opinion, remained intact. We have also independently gone through the statements along with endorsement made by Dr. Shah and noticed no infirmity in the same. The reliance by Mr. Kapre on the decisions in the case of Darshan Singh alias Bhasuri and Others Vs. State of Punjab, and Panchdev Singh Vs. State of Bihar, is misplaced. Mr. Kapre also relied on the following observations made by this Court (DB) in the case of Deepak Baliram Bajaj and another Vs. State of Maharashtra, :

18. Admittedly Jyoti had sustained 100% burn. This apart, the report of the post-mortem examination discloses that most of her organs including the brain were congested and the evidence of Dr. Ingale (P.W.7) shows that Jyoti was in great pain and agony when she was brought to the Central Hospital at 7.45 a.m. Such being the state of her health when she was brought to the hospital, it is difficult for us to believe that she would be in a position to tell the names of the hospitals where she had been taken including the postal zone number of the first hospital as also the exact time of her arrival at the second hospital. In view of such wealth of details and extremely coherent nature of the dying declaration, we find it difficult to believe that the deceased, even if conscious, could have made such a statement.

The testimony of Dr. Sunil Shah clearly went to show that the patient was conscious and was fit to make a statement. We must also note that the dying declarations recorded at Exhs.19 and 33 were within about half hours? time after she was admitted in the hospital. The effect of the sedatives or pain killers would not have appeared so soon, though she was in a serious condition. She survived for two nights after she was admitted in the hospital and it is not a case that any of the vital organs like brain were congested. Hence, in our opinion, the observations made in the case of Deepak Bajaj (Supra) cannot be applied in the instant case. Even otherwise, the oral dying declaration made to PW 2 - Bharat Galande was at the earliest point of time, while Gangabai was at his doors and the same was on the lines to that recorded in the hospital.

12. It has come in the evidence of PW 11 - Navnath Kapse that the sister of the accused is married to him and he was a contractor. He also admitted that the deceased was his cousin from the maternal side. The accused was not available in the hospital when the deceased was admitted and he was seen nowhere around. On the contrary, he came to be arrested at 9.30 p.m. on 12/4/1990 from his house. He did not accompany the deceased to go to the hospital when his brother was not in the house. These are certain other material circumstances which go against the accused and having taken a specific defence, he failed to prove the same either by examining some witnesses or himself stepping in the witness box to prove that it was an accidental death. We, therefore, do not find any error in the impugned order of sentence and having re-appreciated the evidence of all the witnesses, we are of the considered view that the prosecution proved its case beyond reasonable doubt the culpability of appellant No. 1 and, therefore, the order of conviction along with order of sentence requires to be

confirmed, more so when there is no appeal by the State for enhancement of sentence.

13. Hence, this appeal fails and the same is hereby dismissed. The order of conviction and sentence passed by the learned IV Additional Sessions Judge, Solapur dated 24/12/1990 in Sessions Case No. 159 of 1990 is hereby confirmed.