

(2003) 04 MP CK 0044
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 681/91

Ram Milan and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 28-04-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2003) 4 MPHT 373

Hon'ble Judges : Dipak Misra, J; A.K. Shrivastava, J

Bench : Division Bench

Advocate : Sudha Pandit, for the Appellant; Chanchal Sharma, Panel Lawyer, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Shrivastava, J.—This appeal has been preferred by the accused persons against the judgment of conviction and order of sentence passed by the learned IIIrd Additional Sessions Judge, Bhopal, in S.T. No. 166 of 1990 convicting the appellants of the offence punishable u/s 302/34 of the Indian Penal Code (in short "the IPC") and sentencing them to suffer rigorous imprisonment of life.

2. In brief the case of prosecution is that in the mid-night of 1-2-90 Janak Ram (hereinafter referred to as "the deceased") was sleeping in his hut. At that time accused Ram Milan and Omprakash called him to come out from the hut. As soon as he came out from his hut his mouth was tied by a torn cloth of a shirt and thereafter accused Gorabai poured kerosene oil on the deceased and accused Ram Milan lit the fire. It is alleged that a day prior to the date of incident, i.e., 31-1-90 accused Ram Milan was assaulting Tenamma and as the deceased rescued her, the accused Ram Milan threatened to kill and hurled abuses. Further the case of prosecution is that the accused Ram Milan was having illicit relationship with accused Gorabai who is the wife of the deceased and he was

desirous to keep her. This created the background for the accused persons to kill the deceased.

3. The neighbours of the deceased, when going with the deceased to lodge the report at that time his brother Laxman and Chatura arrived who carried the deceased in an autorickshaw to the police station where the deceased himself lodged the FIR (Ex. P-11).

4. After lodging the FIR, the deceased was sent for medical examination and he was admitted in the medical ward. On 7-2-90, the deceased passed away. After his death his dead body was sent for postmortem and Dr. Ashok Sharma conducted the post-mortem. In his report Dr. Sharma opined that deceased breathed his last on account complication arising out of burn injuries resulting in cardio respiratory failure. During the investigation, the investigating officer prepared the spot map, seized the burnt pieces of the shirt from which odour of kerosene oil was coming out, seized the earth, seized the burnt trouser and underwear which smelled of kerosene oil. These articles were sent for chemical examination from where positive report (Ex. P-3) was received affirming the presence of kerosene on these articles.

5. After completing the investigation, a charge sheet was filed in the Competent Court who committed the case to the Court of Session and eventually if it was tried by the Trial Court. The accused persons were charged u/s 302/34, IPC. The charges were denied by the accused persons. Their defence is of false implication. However, the accused persons did not choose to examine any witnesses in their defence.

6. In order to bring home the charges, the prosecution examined as many as 11 witnesses and has placed Ex. P-1 to Ex. P-24, the documents on record.

7. The Trial Court after appreciating the evidence brought on record came to the conclusion that all the accused persons did commit the offence of which they were charged and accordingly, they were convicted for the said offences to suffer the sentence of life. Hence the appellants have preferred this appeal.

8. In support of the appeal, Smt. Sudha Pandit, learned Counsel for the appellant has submitted that though the incident had taken place on 1-2-90, and the deceased breathed his last on 7-2-90, the police did not care to record the dying declaration of the deceased. Her further contention is that the doctor who first examined the deceased was not examined by the prosecution and therefore it creates a doubt about the sanguinity of the prosecution story.

9. Combating the aforesaid submission of the learned Counsel for the appellants, Smt. Chanchal Sharma, learned Panel Lawyer for the State argued that the FIR was lodged by the deceased himself who later on died. The said FIR in the eye of law would be deemed to be a dying declaration. According to the learned Panel Lawyer, the Trial Court considered the case from every angle and come to a definite conclusion that the accused persons did commit the offences and

therefore, no fault can be found with the conviction.

10. In the present case the important distinguishing feature is that the deceased himself lodged the FIR, which is Ex. P-11. The FIR was lodged within 45 minutes from the time of occurrence. In the FIR, the deceased had specifically mentioned the role of the accused persons and stated that accused Ram Milan wanted to keep his wife (accused Gorabai) as his own wife. Before the incident accused Ram Milan and Omprakash called him outside his hut, they tied his mouth by a torned piece of shirt and thereafter his wife Gorabai poured kerosene oil and Ram Milan lit the fire by match stick as a result of which when he screamed, his neighbours came out and they were carrying him to lodge the report and in the way Laxman and Chatura met him and thereafter they brought him to the police station in the autorickshaw. He has also stated in the FIR that in the previous year also accused Ram Milan on account of relationship with his wife assaulted him. At the last in the FIR there is a note that as the hands of the deceased had been burnt, therefore, his thumb impression could not be obtained. There is a further note in the FIR that the report was read over and after hearing it the deceased agreed and accepted it. The Supreme Court in the case of Paras Yadav and others Vs. The State of Bihar, , has held that conviction can be based on the basis of oral dying declaration made to the police by the deceased. In this case, their Lordships further held that the deceased made the dying declaration to the police soon after the occurrence. In the present case also the FIR was lodged within 45 minutes only, therefore, reliance could be made placed the FIR which became later on a dying declaration.

11. Dr. Ashok Sharma (P.W. 9) who is the Autopsy Surgeon has stated that the skin of the palm of the deceased was peeled of on account of burn injuries as such his thumb impression could not have been obtained. Ex. P-16 is the injury report of the deceased when he was alive. The doctor examined him at 0.30 a.m. on 2-2-90. At this juncture, it is apposite to mention that at 0.15 hours the FIR was lodged meaning thereby within a span of 15 minutes, the deceased was sent for medical examination. In the form which was sent by the police to the doctor (Ex. P-16), it has been mentioned in it that accused persons Ram Milan, Omprakash and Gorabai after pouring the kerosene oil lit the fire as a result of which both the hands and the legs of the deceased had been burnt. In the report the doctor wrote the history as under:--

"Burned by Ram Milan, Omprakash and Gorabai (wife)."

In the report (Ex. P-16), it has been mentioned that on examining, kerosene smell present, burn over neck, back, chest and forearm etc.

12. True, the doctor who examined the deceased and wrote the report (Ex. P-16) was not examined but there is no cross-examination in regard to his non-examination on behalf of the accused persons, to the Investigating Officer Phool Singh Chouksey (P.W. 11).

13. The Investigating Officer (P.W. 11) has categorically stated in his cross-

examination that after recording the FIR he sent the information to the concerned Magistrate for recording the dying declaration. He also visited the hospital when the deceased was admitted in the hospital and every time the doctor stated that the deceased was not in a fit condition for recording of the dying declaration. He has also stated that he went alongwith the Tehsildar (Magistrate) but the deceased was not in a position to give the dying declaration and therefore, his dying declaration could not be recorded. He has also stated that he visited the hospital for number of occasions but every time, he was informed by the doctor that the deceased was not in a fit condition to give the dying declaration.

14. There is no material on record so as to demonstrate, that the deceased was in a fit state of mind to give the dying declaration and the investigating agency failed to take appropriate steps to record his dying declaration. Thus in the peculiar facts and circumstances of the case, the FIR which was recorded by the deceased can be held to be a dying declaration of his and reliance can be placed on it.

15. The admissibility of the dying declaration rests upon the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath-- *nemo moriturus praesumitur mentire*, i.e., a man will not meet his Maker with a lie in his mouth.

16. In this view of the matter, it has become crystal clear that the deceased was not in a fit condition during the period when he was swinging between life and death so as to give his dying declaration. His condition was quite serious, his both hands were burnt upto the extent that there was no skin on his palm and for this reason his thumb impression could not be obtained on the FIR. As we have discussed hereinabove, but the Autopsy Surgeon himself has stated that when he performed the post-mortem of the dead body of the deceased, he found the skin of the hands was peeled off and such a person could not put his thumb impression and if the same is obtained, the impression would not come. Thus, on the basis of these reasons, the Trial Court did not err in placing reliance on the dying declaration recorded in the form of FIR by the deceased.

17. So far as the next contention of the learned Counsel for the appellant that doctor who first examined the deceased was not examined, therefore, it can not be said that the condition of the deceased was serious upto that degree that he could not give his dying declaration. In this regard, there is no cross-examination on the Investigating Officer. Secondly we have already discussed hereinabove that the Investigating Officer has stated that on account of the serious condition of the deceased as he was not in fit condition to give dying declaration, the doctor on duty was also not permitting him to make arrangement of recording the dying declaration, as such his dying declaration could not be obtained. There is no reason to disbelieve this statement of the Investigating Officer, there is no effective cross-examination on him on this point.

18. The learned Trial Judge has ascribed the sound reasonings in detail in his judgment and we find them to be cogent and therefore, we hereby give our stamp of approval to it.

19. In the result, the appeal has no force. The same is hereby dismissed.