

(2018) 04 BOM CK 0072
In the Bombay High Court
Case No : CRIMINAL APPEAL NO.182 OF 2004

SHAILESH MAHADEORAO GAWAI	Vs	APPELLANT
STATE OF MAH.THR.PSO WARDHA		RESPONDENT

Date of Decision : 03-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 302, 304-I, 324, 326
Criminal Procedure Code, 1971 — Section 428
Indian Evidence Act, 1872 — Section 32(1)

Citation : (2018) 04 BOM CK 0072

Hon'ble Judges : ROHIT B. DEO, J

Bench : Single Bench

Advocate : N.A. Badar, V.P. Gangane

Final Decision : Partly Allowed

Judgement

1 Exception is taken to the judgment and order dated 23.2.2004 rendered by the Sessions Judge, Wardha in Sessions Trial 70 of 2000 by and under

which the appellant "accused is convicted for offence punishable under section 304 Part I of the Indian Penal Code (IPC for short) and is

sentenced to suffer rigorous imprisonment for ten years and to payment of fine of Rs. 2000/.

2 Heard Shri N.A. Badar, the learned counsel for the accused and Shri V.P. Gangane, the learned Additional Public Prosecutor for the respondent

/ State.

3 Prosecution Case:

Oral report Exh. 29 is lodged by the deceased Bharat Thool at Hinganghat Police Station on 8.2.2000 stating that at 11.30 p.m. when he was returning

to his residence from Shriram talkies, the accused met him near the bridge at

the drainage and, using an abusive expression asked him as to why the accused was not permitted to sit in the theater to watch the movie. After abusing Bharat, the accused, suddenly delivered knife blows on the right hand thumb, lower abdomen and waist and grievously injured Bharat. Bharat somehow managed to reach home and narrated the incident to his mother Bakubai (PW 3) and brother Pramod (PW 4). Bharat accompanied by PW 3 and PW 4 lodged report at Hinganghat Police Station.

Bharat was referred to the Cottage Hospital, Hinganghat for medical examination. PW 1 Dr. Sudhakar Jivankar examined Bharat, issued provisional injury certificate Exh. 16 and referred injured Bharat to Kasturba Gandhi Medical College and Hospital, Sevagram for further treatment.

Bharat was admitted in Kasturba Gandhi Medical College and Hospital, Sevagram and was medically examined at 1.50 p.m. on 9.2.2000. Bharat expired during the course of treatment at 11.50 p.m. on 10.2.2000. The printed First Information Report (FIR) Exh. 31 would reveal, that section 302 of IPC is added to the printed FIR recorded contemporaneously with the oral report, since Bharat expired during the course of the treatment.

Investigation ensued, upon completion of the investigation, charge sheet was submitted to the court of Judicial Magistrate First Class, Hinganghat, who committed the case to the Sessions Court, Wardha. The learned Sessions judge framed charge (Exh. 8) for offence punishable under section 302 of the IPC. The accused abjured guilt and claimed to be tried. The defence is of total denial.

4 The prosecution case is predicated substantially, if not entirely, on oral dying declaration of the deceased Bharat to his mother Bakubai (PW 3) and brother Pramod (PW 4). The oral report lodged by Bharat which is admissible under section 32(1) of the Indian Evidence Act and the Dying Declaration recorded by the Executive Magistrate (PW 6) at the Kasturba Gandhi Medical College and Hospital, Sevagram on 9.2.2000. The learned Sessions Judge, was pleased to discard the dying declaration recorded by the Executive Magistrate. However, accepting the dying declaration to Bakubai PW 3 and Pramod PW 4 and the oral report Exh. 29, the learned Sessions Judge was pleased to hold that the prosecution has proved offence punishable under section 304 part I of the IPC beyond reasonable doubt.

5 Shri N.A. Badar, the learned counsel for the accused is vehement in the submission that the oral dying declarations and the report Exh. 29 are not

implicitly reliable since the prosecution did not establish that Bharat was in a condition to make the declarations and to lodge the report EXh. 29.Â

Shri Badar, the learned counsel would submit that concededly, there is no corroborative evidence and it would be extremely hazardous to permit to

conviction to rest on the basis of the dying declarations and the oral report Exh. 29. Per contra, the learned Additional Public Prosecutor, Shri V.P.

Gangane, would submit that there is clinching evidence on record to show that Bharat was conscious and well oriented at the time of making the

declarations and lodging the report.Â The learned APP would submit that there is no reason for the deceased Bharat to falsely implicate the accused

and to exculpate the guilty.

6 In the light of the submissions advanced at the bar, two issues arise for my consideration.Â The first issue is whether a finding can be recorded on

the basis of the dying declarations and the oral report Exh. 29 that it was the accused who assaulted Bharat and the second issue is what is the

offence committed.Â The learned Sessions Judge was pleased to discard the dying declaration recorded by the Executive Magistrate PW 6 and I am

inclined to concur with the said finding albeit for slightly different reasons.Â Concededly, the Executive Magistrate did not obtain, or as per his

version, could not obtain, the certificate of doctor, which is of course not sine qua non in view of the constitutional Bench of the Apex Court in

Laxman ...vs.. State of Maharashtra, (2002)6 SCC 710, but then the dying declaration does not show that any attempt was made by the Executive

Magistrate to satisfy himself that the patient was in a fit condition to give the statement.Â The time of completion of the recording of the dying

declaration is not mentioned.Â The questions put by the Executive Magistrate to the patient to ascertain the fitness to give the statement or to elicit

the details of the incident are not ascertainable from the dying declaration.Â Perusal of the dying declaration shows that a certificate of fitness, with

the name of the doctor left blank was already prepared, and the contents left blank were not filled in since according to the Executive Magistrate the

doctor was not available.Â The learned Sessions Judge was justified in discarding the dying declaration Exh. 36 which was recorded the by Executive

Magistrate (PW 6). 7 PW 3 Â Bakubai, who was aged 70 years when the evidence was recorded 3 years and 10 months after the incident, has

deposed that Bharat was brought to her by two persons in an injured condition and he disclosed that accused assaulted him.Â In the crossÂ?

examination, it is elicited that Bharat did not talk with Bakubai.Â Shri N.A. Badar, the learned counsel would urge that entire evidence of Bakubai

must be discarded in view of the admission that Bharat did not talk with her.Â The evidence that Bharat did not talk with Bakubai must be considered

in the context of the statement earlier elicited that Bharat was lying over the bed in house.Â No suggestion is given to PW 3 Bakubai, presumably in

view of what is elicited and referred to supra, that Bharat did not disclose the name of the accused as the assailant.

8 PW 4 â?" Pramod has deposed that when he returned home, he asked Bharat the name of the assailant and was told that Bharat was assaulted by

the accused with knife.Â PW 4 states that he and PW 3 Bakubai took Bharat to Police Station and Bharat lodged the oral report.Â The evidence of

PW 4 is not shaken in the cross examination.Â PW 4 denies the suggestion that Bharat was not in a position to speak although he admits that Bharat

was not in a position to stand or walk.Â The suggestion that Bharat did not speak in the police station is denied.

9 PW 5 Pramod Deshpande then attached with Hinganghat Police Station as Assistant Sub Inspector has deposed that it was Bharat, who lodged

report Exh. 29 which bears the signature of Bharat.Â It is elicited in the cross examination that the medical condition of Bharat was not good.Â

However, PW 5 denies the suggestion that Bharat was not mentally conscious or that Bharat was not in a position to speak.Â PW 5 denies the

suggestion that the contents in the oral report were narrated by PW 4 Pramod.

10 The probative value of the oralÂ dying declarations and the oral report Exh. 29 which is admissible under section 32 (1) of the Indian Evidence

Act may now be considered.Â The defence has not suggested to the prosecution witnesses that there was any previous enmity between the

deceased and the accused. The thrust of the defence submission is that Bharat was in no position to give the statement and in the absence of

corroborative evidence, this Court must be slow to base the conviction on the statements admissible under section 32 (1) of the Evidence Act, which

statements are not on oath and are not tested for veracity by cross examination.Â The submission that the conscious of the Court must be satisfied that the maker of the statement was in a condition to give the statement, is, as a proposition of law, unexceptionable.Â

11 The juristic justification for the admissibility of a dying declaration as substantive evidence, which is an exception to the rule against the admissibility of hearsay evidence which is not tested by crossÂexamination, is that a person who is facing eminent death would not ordinarily indulge in false

implication or resort to falsehood.Â The sanctity of the dying declaration is juristically explained by the maxim â??Nemo moriturus praesumitur

mentireâ?.Â No one at the point of death is presumed to lie.Â The Honâ??ble Apex Court enunciates the law thus in Kundula Bala Subrahmanyam

Vs. State of Andhra Pradesh, (1993) 2 Supreme Court Cases 684:

â??18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is

tested by crossÂexamination, it is not creditworthy, Under Section 32, when a statement is made by a person as to the cause of death or as to any of

the circumstances which result in his death, in cases in which the cause of that personâ??s death comes into question, such a statement, oral orÂ in

writing, made by the deceased to the witness is a relevant fact and is admissible in evidence.Â The statement made by the deceased, called the dying

declaration, falls in that category provided it has been made by the deceased while in a fit mental condition.Â A dying declaration made by person on

the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement.Â The shadow of

impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his

death.Â A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased

victim.Â Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the

courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any

embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration.Â If there are

more than one dying declarations then then the court has also to scrutinize all the dying declarations to find out if each one of these passes the test of

being trustworthy.Â The Court must further find out whether the different dying declarations are consistent with each other in material particulars

before accepting and relying upon the same.Â Â Â

However, while there can not be demur with the proposition that conviction can rest entirely on the dying declaration, the conscious of the Court must

be satisfied that the dying declaration was made by the deceased in a conscious state of mind and the dying declaration is otherwise cogent, reliable

and free from infirmities.

The oral report Exh. 29 is lodged with promptitude, and the possibility of false implication is remote.Â It is disclosed in the oral report Exh. 29 that the

informant Bharat revealed the name of the assailant to his mother PW 3 and brother PW 4.Â PW 5 ASI Pramod Deshpande who reduced to writing

the oral report and obtained the signature of the informant Bharat who has also signed on the printed FIR, has emerged as a trustworthy witness. He

is candid in admitting that the health of informant Bharat was not good, however, he denies the suggestion that Bharat was not mentally conscious.Â

Significantly, the evidence that the oral report Exh. 29 and printed FIR Exh. 31 is signed by Bharat, has gone unchallenged.Â PW 5 initially registered

offence under section 324 of the IPC, presumably since he then did not feel that the injuries were serious enough to attract more stringent

provisions.Â The Medical Officer PW 1 does admit in the cross examination that the patient was not in a condition to make statement and was semi

conscious.Â However, perusal of the injury certificate issued by PW 1 Dr. Sudhakar Jivankar (Exh. 16) reveals that there is no reference to the

condition of the patient nor the nature of the injury, whether the injury is grievous or otherwise, is mentioned in Exh. 16.Â In the teeth of the injury

report Exh. 16 and the other medical evidence on record, to which I will make a reference at a later stage, the admission given by PW 1 must be kept

out of the consideration as unreliable.

12 Bharat was examined at the Kasturba Hospital, Sevagram. The injury certificate Exh. 41, which is issued at 1.50 p.m. on 9.2.2000 states that the

patient was conscious and cooperative.Â Injury certificate Exh. 41 refers to two stab injuries and one incised injury to the left hand thumb. The first

stab injury is 2 x 2 x 2 centimeters in size above the pubic hair and the second injury is 2 x 1 x 2 centimeters in size on the left back near the pelvic

region. Exh. 41 does not state whether the injuries are simple or grievous.

13 The medical certificate of death, which is exhibited on admission (Exh. 54) records that the immediate cause of death is aspiration and septicemia

due to stab injury on the abdomen. Alcohol withdrawal is mentioned as an antecedent cause. At this stage, it would be proper to consider the

evidence of PW 8 Dr. Radheshyam Naik, who conducted the autopsy. The injuries noticed by PW 8 Dr. Radheshyam Naik on external

examination are described thus:

1. Abrasion present, dark brown in colour, 0.5 cm x 0.7 cm posterior left forearm 11 cm above wrist joint.

2 Linear abrasion 1.5 cm above and lateral to injury no. 1, 5 cm long with dark brown colour.

3 Abrasion 0.5 cm x 0.5 cm left lateral aspect of chest wall, 21 cm above the left iliac crest on the line corresponding to anterior axillary pole, dark brown.

4 Penetrating injury 3.5 cm x 1 cm x 8 cm left lateral aspect of abdominal wall 6 cm above left iliac crest and 23 cm from umbilicus.

5 Surgical stitched wound slight lateral to the mid line from symphysis pubic 0.9 cm x 3 cm cavity deep.

6 Surgical stitched wound lateral to left palmour surface at the base of thumb 4 cm x 1 cm x 0.5 cm directed from lateral to medial.

All the injuries were ante mortem.

The injuries noticed by PW 8 on internal examination are described thus:

1. Wall: Injury as referred in Col. 17.

2. Peritinium : Incised wound corresponding to injury no. 4 in col. 17, 3.5 x 1.5 cm.

3. Small intestine : Surgical stitched wound at 12 different places.

The opinion is that the cause of death is shock due to internal hemorrhage resulting from stab injury. PW 8 has proved the post mortem report Exh.

40. In the cross examination PW 8 admits that injury 4 described as penetrating injury was caused during operation. PW 8 was confronted with

injury report Exh. 41, PW 8 states that injury 1 in Exh. 41 correspond to injury 5

in column 17, injury 2 corresponds to injury 4 and injury 3 corresponds to injury 6. However, the statement of PW 8 that injury 2 in Exh. 41 corresponds to injury 4 must be appreciated in the context of the admission that injury 4 is caused due to operation.

14 I have given my anxious consideration to the medical evidence on record in the context of the vehement submission that the oral dying declarations and oral report Exh. 29 must be discarded since Bharat was not in a fit mental and physical condition to give the statements. Having done so, the conscious of this Court is satisfied that Bharat was indeed in a fit condition, albeit severely injured, to give the statement. I do not see any reason to disbelieve the testimony of PW 5 ASI Pramod Deshpande who reduced the oral report to writing. The possibility of false implication can be safely excluded. The dying declarations made to PW 3 and PW 4 and the oral report Exh. 29 are broadly consistent. The finding recorded by the learned Sessions Judge that it is proved that the accused assaulted Bharat, is unexceptionable.

15 The other question which needs to be answered is whether the prosecution has proved offence punishable under section 304 part I of the IPC.

PW 1 Dr. Jivankar, who first examined the deceased describes the injuries thus:

1. Lacerated wound near base of left thumb 3 x 2 cm.
2. Incised wound in pelvic region, 5 cm below umbilicus, 3x2 cm vertical.
3. Incised wound, left iliac crest, 3 x 2 cm., peritoneum deep.

As noted supra, the injury certificate Exh. 16 make no reference to the nature of the injuries. However, PW 1 referred the deceased to Kasturba

Hospital, Sevagram, where the deceased was medically examined at 1.50 p.m. on 9.2.2000. Exhibit 41 was exhibited since the injury report is

referred by the defence while cross examining PW 8 Dr. Radheshyam Naik. The omnibus statement by PW 8 that the injuries referred to in

column 17 of the post mortem report were sufficient to cause death must be viewed with caution. PW 8 admits that injuries 1, 2 and 3 are abrasions

and minor. Injury 4 was caused during operation, is the admission. PW 8 does state that injury 4 corresponds to injury 2 in injury report Exh.

41. However, it is obvious that the size of the penetrating injury (injury 4) is magnified due to the surgical intervention. Injury 2 in Exh. 41, which

according to PW 8 corresponds to injury 4 in column 17 of the post mortem report is stab injury of size 2x1x2 centimeters on the left back near the

pelvic region.Â Injury 6 in column 17 is a incised wound to the left hand thumb.Â Injury 1 in Exh. 41 which according to PW 8 corresponds to injury

5 in column 17 is stab injury of size 2 x 2 x 2 centimeters above the pubic hair.Â Column 17 refers to the injury as surgical stitched wound present

slight lateral to the mid line from symphysis pubic â?" 9 cm x 3 cm and cavity depth.Â PW 8 has not referred to any particular injury as an injury

which in ordinary course is sufficient to cause death.

16 Exh. 54, which is medical certification of death issued by Kasturba Hospital, Sevagram refers to aspiration and septicemia due to stab injury on

abdomen as the immediate cause of death and alcohol withdrawal as an antecedent cause.Â In medical jurisprudence aspiration is either inhalation of

some foreign material like vomitus, blood or leucones when a person is unconscious or under the effect of general anesthetic or process of withdrawal

of fluid by an aspirator, a method widely used during surgery to drain the air or other body fluids from the part being operatedÂ and keep it clear of

excess blood and other fluidsÂ to facilitate visualization of the surgical field.Â Exh. 54 is produced on record by the prosecution and is admitted by

the defence. Aspiration has two meanings in medical jurisprudence.Â Breathing in a foreign object is the first meaning and the medical procedure

with the device of aspirator which removes either air, body fluids or bone fragment from a area of the body is the other meaning. The possibility that

the cause of death was inhalation of some foreign material is not excluded.Â On a holistic appreciation of the injury certificates on record Exh. 16

and Exh. 41, the death certification Exh. 54 and the post mortem report Exh. 40, it is difficult to conclude with any degree of certainty that the injuries

sustained by the deceased were sufficient to cause death in the ordinary course.Â The conviction of the accused under section 304 part I of IPC is

unsustainable, and is set aside.

17 However, in the teeth of the evidence on record, the accused is liable to be convicted for offence punishable under section 326 of the IPC, and is

accordingly convicted.Â

18 The conviction and sentence for offence under section 304 part I of IPC is set aside and instead the accused is convicted for offence punishable

under section 326 of IPC and is sentenced to suffer rigorous imprisonment for three years.

19 The accused be taken into custody forthwith to serve the sentence.Â The bail bond of the accused stands cancelled.

20 The accused shall be entitled to set of under section 428 of the Code of Criminal Procedure.

21 Police Station Officer, Police Station Hinganghat, District Wardha is directed to file a compliance report in the Registry of this Court within 15 days.

22 Appeal is partly allowed.