

Prabhakar Vs. State of Maharashtra

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Court : Mumbai

Decided On : Jul-18-2008

Reported in : II(2008)DMC493

Judge : N.V. Dabholkar and ;P.R. Borkar, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 294, 313 and 374;
[Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 506

Appeal No. : Criminal Appeal No. 83 of 2007

Appellant : Prabhakar

Respondent : State of Maharashtra

Advocate for Def. : R.R. Mane, A.P.P.

Advocate for Pet/Ap. : N.L. Jadhav, Adv.

Disposition : Appeal dismissed

Judgement :

N.V. Dabholkar, J.

1. This is an appeal under Section 374 of the Code of Criminal Procedure, 1973, by which the original accused challenges the judgment and order dated 15th January, 2007 rendered by the Additional Sessions Judge, Omerga in Sessions

Case No. 26 of 2005. By the impugned judgment the appellant is held guilty for offence punishable under Sections 302 and 506 of the Indian Penal Code and sentenced to suffer life imprisonment and fine of Rs. 3,000, in default, rigorous imprisonment for six months. No separate sentence is imposed for the offence punishable under Section 506 of the Indian Penal Code.

2. The incident in question took place on 29.3.2005 at about 9.00 p.m. at Holi, Taluka Omerga, in front of house of the accused. The victim Babybai was wife of the accused and the marriage is more than ten years old.

As per story that unfolds from two dying declarations (Exhibits 14 and 18), while the victim was sleeping in yard/verandah of the house, the accused came home in drunken condition. The accused said his wife to be quarrelsome. He abused her because she had taken an exception to the sale of grams by the accused. He threatened to kill her. Saying so, he brought kerosene from the house, poured it on the person of Babybai and ignited her by means of match stick from his pocket. The victim suffered 79-80% burn injuries all over her body. She tried to extinguish herself by going inside the house and getting some water poured. Hearing her cries, neighbours Sakhubai More, Ashok Kamble, Mahadev Gaikwad, her father Pandurang Survase and uncle Pandit Survase also reached there and extinguished fire. She was then shifted to Omerga Sub-District Hospital and thereafter, to the General Hospital, Osmanabad. She succumbed to her injuries on 10th April, 2005.

3. The prosecution has examined only five witnesses. P.W.1-Naim Karim Shaikh is Head Constable attached to Omerga Police Station. He recorded the first dying declaration (Exh. 14) on 30.3.2005 between 00.05 and 00.30 hours. Dr. Dilip Soundade was then Medical Officer attached to the Sub-District Hospital, Omerga. He admitted the patient and recorded the history. He was also in attendance when the dying declaration was recorded by the Head Constable Nairn and had certified fitness of the patient to make a statement. Shri Vikas Gaikwad, A.S.I. (P.W.2) recorded another statement of the victim (Exh. 18) on 30.3.2005 between 05.00 and 05.30 hours. This was at the Government Hospital, Osmanabad and when he recorded the statement, Dr. Ashok Kathare (P.W.4) was the Medical Officer, who

certified fitness of the patient. The last witness examined by the prosecution is Madhav Gaikwad (P.W.5) who was present when the panchanama of scene of occurrence (Exh. 26) was drawn.

4. Exhibit 9 of the record of the Trial Court shows that the inquest and the post-mortem report were admitted under Section 294 of the Code of Criminal Procedure, as the defence did not dispute genuineness of those documents. These documents are at Exhs. 11 and 12 respectively. After examination of Head Constable Nairn on 27.7.2006, the Additional P.P., Omerga seems to have filed pursis at Exh.15 discharging witness Pandurang (father of the victim), Pandit Survase, Balasaheb Jadhav and Sakhubai More. Another such Pursis is filed on 23.8.2006 at Exh. 21 by which witnesses Rajashri and Kiran (daughters of the accused and the deceased) were discharged. In both the pursises the learned A.P.P. has stated that it was verified by him that the witnesses are not supporting the prosecution.

5. So far as the defence of the accused is concerned, it is of total denial. All the questions put to him under Section 313 of the Code of Criminal Procedure are replied by him by saying 'it is false'. To the concluding question, he expressed his desire to examine defence witnesses. However, by Pursis Exh. 34, he declined to examine any witness in his defence.

6. On reference to the judgment of the Trial Court, it is evident that after taking assessment of the evidence of the two witnesses who recorded dying declarations and of the two Medical Officers who had then certified fitness of the victim to make a statement, the learned Judge found the dying declarations to be reliable. According to him, total silence of the accused added some weight to the prosecution case and merely because the Doctor had put single endorsement containing the time of commencement and conclusion of recording of the dying declaration, that by itself was insufficient for raising suspicion against the dying declaration or about fitness of the victim to make a statement. It appears that some support is also drawn from the deposition of Dr. Dilip Soundade who has deposed that at the time of admission of the victim to Sub-District Hospital, Omerga at 11.50 p.m. on 29.3.2005, the victim has narrated history of the incident

that she was set on fire by her husband after pouring kerosene and he had accordingly noted the history in the case papers of the patient as well as M.L.C. register. According to the learned trial Judge, the spot Panchanama also supported the theory by presence of kerosene container in the verandah.

9. Heard respective counsel together, they have taken us through the entire evidence and the judgment of the Trial Court.

It was submitted by Advocate Mr. Jadhav for the appellant that the two dying declarations are at variance. The victim is not sure whether she was sleeping in the verandah or in the yard. The story that she tried to extinguish herself by going inside the house and getting water poured on her, is missing from the first dying declaration and not supported by the spot Panchanama. Mr. Jadhav was critical because the father and the daughter who were at the scene are not examined and even the dying declaration is not recorded by the Executive Magistrate, although the victim was alive for about 10 days. According to him, when the father and the uncle had taken the victim to the hospital, possibility of tutoring could not be ruled out. By relying upon some reported judgments he claimed benefit of doubt, by saying that the two dying declarations should not inspire confidence when better evidence of the witnesses present is not brought on record by the prosecution.

The learned A.P.P. tried to reply by pointing out that the spot Panchanama confirms that incident appears to have occurred in the verandah and not in the yard. According to her, the two dying declarations are consistent and minor variances are indicator of the fact that those are not tutored. She urged that the Trial Court committed no error in relying upon the dying declarations as the relatives have turned hostile and were discharged only after ascertaining their hostility.

8. The learned Counsel for the appellant has tried to urge that the two dying declarations are unworthy of belief. He has done so by three-fold arguments that there are variances/discrepancies between the two dying declarations, that the dying declarations are relied upon by withholding eye-witness account and that there are other infirmities in recording the dying declarations. So for the variances between the two dying declarations, Shri Jadhav has pointed out that in dying

declaration (Exh. 14) the victim has claimed that she was sleeping in the yard, whereas in the dying declaration (Exh. 18), she has narrated that she was sleeping in the verandah. The statement in Exh. 18 in response to question No. 15 that she herself tried to extinguish the fire by going inside the house and getting water from container poured upon her person, does not find place in Exh. 14. In fact, these are the only variances between the two dying declarations and relied upon by the Advocate for the appellant.

So far as first variance regarding the place where the victim was sleeping just before the commencement of the incident is concerned, on reference the same cannot be said to be fatal. In any case the variance is not such as to create doubts whether the incident occurred inside the house or outside the house. Whether the description is verandah or yard, the fact remains confirmed that the incident occurred outside the house. On reference to the panchanama of the spot of the incident (Exh. 26), it is evident that a blanket, three quilts, an empty kerosene container, so also some pieces of burnt saree are lying in the verandah. Thus, it can be confirmed that the incident occurred in the verandah of the house and the description 'yard' in Exh. 14 is erroneous or loosely worded description of the victim. About the second variance, it can at the most be said that the victim has added something over and above the first dying declaration. In Exh. 14, she claimed that as she raised shouts, neighbours gathered including her father and they extinguished her fire. In the second dying declaration and in reply to question No. 15, she has not abandoned this part, but she has also claimed that she had been inside the house and she got poured water from a container. The important part which is taken exception by the learned Counsel, gets some support from the Panchanama of scene of offence. On reference to Exh. 26, it is evident that the Investigating Officer entered the house, which was of three rooms and he had noticed even burnt pieces in the central room of the house. No doubt, as rightly pointed out by the learned Counsel for the appellant, the Panchanama makes no reference to the presence of water. However, it cannot be ignored that the incident took place on 29th night and the Panchanama is drawn on 30th noon. Otherwise also if there is no reference to the existence of some water or wetness, the same also can be a result of failure on the part of the Investigating Officer to record the same. The existence of few burnt pieces inside the house confirms the fact that

the victim had entered the house and the existence of empty container in the verandah confirms that the incident took place in the verandah and not inside the house.

9. Advocate Mr. Jadhav has urged to disbelieve the two dying declarations, although reasonably consistent, by contending that the daughters of the victim and the father were on the spot. In fact, one of the dying declarations states that one of the daughters had also suffered minor burns. But, none of these eye-witnesses were examined. We have already referred to the Pursis filed by the learned A.P.P. at Exhs. 15 and 21. The learned A.P.P. has disclosed to the Court that he is not inclined to examine Pandurang (father), Rajashri and Kiran (daughters) of the victim because he had ascertained that they are not going to support the prosecution. This is not a case wherein they were not recited as witnesses. It is also not a case where the prosecution has not made attempt to record their statement. No doubt, ordinarily the learned A.P.P. could have put them in the witness box and demonstrated the Court that they were not supporting the prosecution. However, the result could not have been any different than requiring the prosecution to urge the Court that its case may be weighed on the basis of two dying declarations.

It must be taken a note that the accused himself did not take any positive stand. It is neither his case that wife suffered burns as a result of an accident or that wife has committed suicide. Even the accused initially showed inclination to examine witnesses in his defence and although he claimed that he will file list of witnesses, he refrained from examining any witness by filing Pursis Exh. 34 that no witnesses were to be examined in defence. In the peculiar facts and circumstances of the case, the submission of learned A.P.P. to the Court in writing that father and daughters of the victim were not inclined to support the prosecution needs to be considered as possible and therefore no adverse inference need be drawn merely because Pandurang, Kiran and Rajashri were not examined. It can be visualized that after death of mother the children must be in the custody of grand-father Pandurang and Pandurang was not likely to support, it is possible that even the grand-daughters would not have supported the prosecution.

10. The learned Counsel has placed reliance upon quite a few reported decisions in order to propound that the defects such as non-examination of eye-witnesses and defective endorsement of the Doctor (only single endorsement regarding fitness of the patient) require the Court to disbelieve the dying declarations. In the matter of P. Mani v. State of Tamil Nadu (2006) 1 DMC 471 : (2006) 4 CCR 241 : 2006 (2) Supreme 415, the Hon'ble the Apex Court has laid down the law thus:

14. Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regard the correctness of the dying declaration, the Court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on record suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof.

Reliance was placed on this case by learned Advocate Shri Jadhav by specifically referring to the contents in the dying declaration to the effect that the accused is alleged by the wife to be liquor addict and quarrelsome. In the second dying declaration she has specifically said that the husband had taken to liquor addiction for last ten years and had become quarrelsome, causing her mental and physical torture. Referring to these contents in the dying declaration, Advocate Shri Jadhav relied upon further observations in para 14 of the reported judgment, to following effect.

If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable.

Thus, the observations of the Supreme Court as made in the matter before the Hon'ble the Apex Court, must be read in the light of the facts of that case. On reference to para 4 of the reported judgment, it is evident that it was defence of the accused that the deceased had committed suicide. She had undergone Hysterectomy operation. She had suffered hormonal imbalance leading to mental stress and strain. She was not only suffering from mental illness but also from

depression. The son and daughter of the deceased categorically stated that the deceased had been suffering from mental illness and had made attempts to commit suicide by pouring kerosene and setting fire on her person on an earlier occasion which was prevented by P.W.9. In the matter at hands, the accused is not even bold enough to say that his wife attempted to commit suicide and therefore the observations and conclusion by the Hon'ble the Apex Court as in the reported judgment, cannot be borrowed in the present case, to support the defence of the accused.

11. A decision of another Division Bench of this High Court in the matter of Shahu Parshu Rathod v. State of Maharashtra 2006 (1) Bom.C.R. 120, was relied upon by Advocate Jadhav for the appellant for its observation in para 17. There need be no quarrel over the principles referred and relied upon by the earlier Division Bench that the dying declaration should inspire full confidence of the Court in its truthfulness and correctness, that it is impermissible to pick and chose either dying declaration if there are multiple dying declarations and that the dying declarations are required to be examined like any other piece of evidence. The observations in para 17 indicate that the Court found some variances between the two reported dying declarations which included variance if single accused or all three accused set victim on fire. However, the dying declarations were found unworthy to place reliance upon not only in the light of variances in the two dying declarations, but also for additional circumstances such as lack of proof regarding motive for the appellant to commit murder of deceased Dhamabai and absence of endorsement of M.O. on one dying declaration. So far as the matter before us, is concerned, we have already discussed the variances between the two dying declarations and we found those to be not fatal. The two dying declarations, in fact, narrate the same story with slight variation. The variation and the improvement referred by the learned Counsel stood explained by other evidence on record as discussed in para 9 above.

Another Division Bench judgment of this High Court to which one of us [N.V. Dabholkar, J.] was party, was also relied upon by the learned Counsel for the appellant : 2006(2)BomCR873 , Sunil Kashinath Maharashtra Raimale v. State of Maharashtra. An emphasis was laid on headnote 'C' and contents in later half of

para 12. In this case one Sopan Koli and three children of deceased Sarlabai were said to be present when the incident occurred at 7.30 a.m. We have drawn adverse inference for non-examination of any of these three witnesses by observing that direct eyewitness account of the incident should stand on higher footing than uncorroborated dying declaration.

Before swallowing the observations as applicable to the matter before us, we must refer to earlier half of paragraph 12. In the matter at hands, the accused has observed golden silence, in the reported matter, the accused has come with a positive story that while he was outside the house, the wife ignited herself, that there used to be frequent quarrels between them and the wife was short tempered woman. He came inside the house and tried to extinguish the fire. He claimed to have suffered burn injury to his hand in his attempt to extinguish the fire. The accused was alleging the prosecution of unfair play by suppressing of the material that was likely to support the theory of the defence that wife Sarlabai committed suicide. The Investigating Officer had admitted that the accused was taken to Cottage Hospital for examination because he had sustained burn injury to hand. It was in the light of such bold defence, non-production of arrest Panchanama on record and non-examination of children of the victim were found to be the circumstances compelling the Court to draw an adverse inference. In the reported matter, the theory of suicide was found to be probable not only because there used to be quarrel between the couple but the wife had accused that the husband was insisting for divorce, he had expressed desire to get married with an educated girl and the wife found herself cornered and unable to accede to his request, but the couple was already gifted with three children. The dying declaration in the reported matter was also doubtful because father of the victim was allowed to attend the same as if he was a Panch witness and the father had also attested the dying declaration in verification of correct recording. It is evident that in the reported matter the prosecution had acted exactly in diagonally opposite manner instead of observing the precautions required.

Taking into consideration all these details, the matter before us can be distinguished on the facts from the matter relied upon by the learned Counsel. The dying declaration in the reported matter was not thrown as unreliable merely

because eye-witnesses were avoided.

12. In the matter at hands, both the dying declarations, Exh. 14 as well as Exh. 18 bear single endorsement of the Medical Officer regarding fitness of the patient to make a statement by quoting timings of starting and conclusion of recording of the dying declarations. Due to this circumstance it was urged that the dying declarations should be disbelieved, by relying upon the observations of the another Division Bench in the matter of Nivrutti Bala Patil v. State of Maharashtra (2008) 1 CCR 375 : 2005 (Supp) Bom. C.R. 258. In para 10 of the judgment the Court has simply commented that:

The Medical Officer should not have taken short-cut of making only one endorsement. Had Dr. Shroff taken trouble of making another endorsement at the end of the statement at 8.45 a.m., the suspicion in respect of the certificate of fitness could have been removed.

This dying declaration was recorded by P.S.I. and the P.S.I. had deposed that after Dr. Shroff gave necessary certificate, he recorded the dying declaration. In the matter at hands both the Doctors are examined, Dr. Dilip as P.W.3 and Dr. Ashok as P.W.4. Both the Doctors have deposed that on arrival of the Police Officer they examined the patient before giving a nod to record the statement. Both of them have also deposed about having examined the patient on conclusion of the recording, impliedly claiming their presence throughout the recording. P.W.1-Naim Karim and P.W.2-Vikas who recorded the dying declarations have supported this version by narrating about examination of the patient before commencement of the recording and on conclusion of the recording. In view of the supporting evidence by all the four witnesses regarding examination of the patient before and after recording of the dying declarations, we are not inclined to give much importance to the fact that the Doctors made one common endorsement regarding fitness by putting timings of commencement and conclusion of the recording.

Lastly, reliance was placed upon a judgment in the matter of Abdul Hamid Sk. Hussain and Ors. v. State of Maharashtra 2004 Supp. 2 Bom.C.R. 584. The Court was critical about not getting the dying declaration recorded by the Executive

Magistrate, although the victim in the reported matter of Nagpur Bench had survived for 18 days after the incident. However, on reading paragraphs 12 to 15 which were relied upon by the learned Counsel, it is evident that the two recorded dying declarations (Exhs. 42 and 46) were not found unreliable merely because the dying declaration was not recorded by the Executive Magistrate. Exhibit 42 was the dying declaration said to have been recorded by Head Constable Dayaram. However, Dayaram in his evidence before the Court did not utter a word about having recorded the same. He deposed only about recording of the dying declaration (Exh. 46). Exhibit 42 did not bear endorsement by any Medical Officer showing that the victim was examined by Medical Officer before and after recording of the statement. This was felt to be glaring infirmity of the Division Bench. So far as Exh. 46 is concerned, the same was also felt to be doubtful. The Court has observed in para 13 that a bare look showed that there was insertion which was entirely different than rest of the declaration (Exh. 46). The endorsement did not bear signature of the Medical Officer, although the Head Constable Dayaram claimed that the Medical Officer had issued certificate on the memo regarding fitness of the patient to make a statement. Moreover, the prosecution did not examine the Medical Officer who endorsed the dying declaration (Exh. 46). Thus, three dying declarations including Exh. 22 in the reported matter, all by the Head Constable were disbelieved not merely because the dying declaration at the hands of the Executive Magistrate was not recorded, but there were other reasons which raised serious doubts about trustworthiness of the dying declaration.

13. With the evidence on record which is repeatedly discussed hereinabove of both the Recording Officers and both the Medical Officers, we are unable to agree with the learned Counsel that these dying declarations are required to be looked with doubt merely because the dying declarations at the hands of the Executive Magistrate are not recorded. In the matter at hands the two dying declarations are by two different police officers one by the Head Constable attached to Omerga Police Station and that was when the patient was admitted to the Sub-District Hospital, Omerga and second by A.S.I. attached to the Government Hospital Police Chowki of Osmanabad city when the patient was shifted to the Government Hospital, Osmanabad.

Last but not least, Dr. Dilip Soundade (P.W.3) has deposed as follows:

The history of the incident was narrated by patient herself. She had informed that she was set on fire by her husband by pouring kerosene. I have accordingly noted the said history in the case paper of the patient and M.L.C. register.

This was version earliest in time and although suggestion challenging this deposition was put to the Medical Officer, he was not challenged to show the M.L.C. register or the case papers for demonstrating absence of any such endorsement.

14. For the reasons discussed hereinabove, we are convinced that the Trial Court committed no error in placing reliance on the two recorded dying declarations. The finding of guilty as recorded by the Trial Court and the conviction imposed, therefore, do not call for any interference.

The appeal is dismissed. A certified copy of this judgment be furnished to the accused, free of cost, through the prison authorities.

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