

Subhash Vs. State of Maharashtra

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Court : Mumbai

Decided On : Mar-04-2005

Reported in : I(2006)DMC261

Judge : D.D. Sinha and ;P.B. Gaikwad, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 313; [Indian Penal Code \(IPC\), 1860](#) - Sections 300, 302, 304 and 307

Appeal No. : Criminal Appeal No. 326 of 2000

Appellant : Subhash

Respondent : State of Maharashtra

Advocate for Def. : T.A. Mirza, Additional Public Prosecutor

Advocate for Pet/Ap. : M.R. Daga, Adv.

Judgement :

D.D. Sinha, J.

1. Heard Mr. Daga, learned Counsel for the appellant and Mr. Mirza, learned Additional Public Prosecutor for the respondent-State.

2. Criminal appeal is directed against the judgment and order, dated 23rd October, 2000, passed by Fourth Additional Sessions Judge, Nagpur, in Sessions Trial No.

336 of 1993 whereby the appellant is convicted for the offence punishable under Section 302 of Indian Penal Code, and is sentenced to suffer rigorous imprisonment for life, and to pay a fine of Rs. 250-00.

3. In the present case, before we consider the facts and circumstances, which have given rise to the prosecution of the appellant for the offence charged, we wish to mention that initially the appellant was convicted by Fourth Additional Sessions Judge, vide judgment and order, dated 21st November, 1994, passed in Sessions Case No. 336 of 1993, for the offence punishable under Section 302, Indian Penal Code and was sentenced to suffer rigorous imprisonment for life. The appellant challenged the judgment and order of conviction by filing a Criminal Appeal bearing No. 8 of 1995 before this Court. At the time of hearing of the said appeal, it was argued by the Counsel for the appellant that the Trial Court did not follow the proper procedure while conducting examination of the appellant-accused under Section 313, Criminal Procedure Code, which had resulted in serious prejudice to the appellant. This Court accepted the contention canvassed by learned Counsel for the appellant and vide judgment, dated 13th September, 2000, quashed and set aside the judgment and order, dated 21st November, 1994, passed by Fourth Additional Sessions Judge and directed the Trial Court to properly examine the appellant-accused under Section 313, Criminal Procedure Code, afford an opportunity in case he desires to lead any defence evidence, hear the prosecution as well as the accused/his Counsel and thereafter pass a judgment afresh. In view of the above referred directions given by this Court, the Trial Court examined the accused under Section 313, Criminal Procedure Code, and after taking into consideration the contention canvassed by the learned Counsel for the defence and the prosecution, vide judgment and order, dated 23rd October, 2000, again convicted the appellant for the offence punishable under Section 302, Indian Penal Code, and sentenced him to suffer rigorous imprisonment for life. Being aggrieved by the said judgment and order, the appellant preferred the present criminal appeal.

4. The prosecution case, in nutshell, is as follows:

Deceased Rekha was the wife of the appellant and the marriage was performed about eight years prior to the incident in question. On the date of incident i.e., on 18th May, 1993, appellant and deceased Rekha was staying in the house of parents of deceased Rekha. The appellant has one daughter and one son.

5. It is the case of the prosecution that on 12th May, 1993 at about 5.00 p.m., appellant, under the Influence of alcohol, poured kerosene on the person of deceased Rekha and set her on fire. She shouted for help. Her mother Parbatabai (P.W. 2), who was sitting in the courtyard of the house, rushed to the spot. After hearing the commotion, neighbours also gathered on the spot. In the presence of witnesses, deceased Rekha said that appellant had poured kerosene on her person and set her on fire. Deceased Rekha was initially taken to Primary Health Centre at Jalalkheda. The doctor on duty informed Jalalkheda Police Station about admission of the deceased in the Hospital. Bargat, Head Constable, (P.W. 4) went to the hospital. He obtained opinion of the doctor as to whether the deceased was in a fit condition to give her statement, and after obtaining such opinion, he recorded dying declaration of deceased Rekha, which is Exh. 37. In the dying declaration, deceased Rekha stated that the appellant, under the influence of alcohol on the day of incident, poured kerosene on her person and set her on fire. She also gave description of the clothes which were worn by her at the time of incident. She also stated that Parbatabai (P.W. 2), mother of the deceased, was present in the courtyard of her house. People extinguished fire and took her to the hospital. The thumb impression of deceased Rekha was obtained on the dying declaration. The doctor also signed the statement of deceased Rekha. Deceased Rekha was shifted to Mayo Hospital, Nagpur, for further treatment. Deceased succumbed to the burn injuries on 26th June, 1993.

6. Initially, offence under Section 307, Indian Penal Code, was registered against appellant on the basis of the report (Exh. 10) lodged by Bargat (P.W. 4) and the same was altered to Section 302, Indian Penal Code, after Rekha died due to burn injuries. The prosecution recorded statements of witnesses and after completion of formal investigations, charge-sheet under Section 302, Indian Penal Code, was filed against the appellant. Charge under Section 302, Indian Penal Code, was accordingly framed against the appellant. The appellant pleaded not guilty to the

charge and claimed to be tried.

7. Mr. Daga, learned Counsel for the appellant, contended that the case of the prosecution is solely based on the testimony of dying declaration (Exh. 37) of deceased Rekha. It is submitted that there are certain infirmities in the dying declaration recorded by Police Constable Bargat (P. W. 4). It is submitted that there is no endorsement of doctor on Exh. 37 showing that the deceased was in a fit condition to give her statement. In absence of such endorsement on Exh. 37 (dying declaration), a doubt is created about the authenticity of the said dying declaration alleged to have been given by deceased Rekha. It is further submitted that the opinion given by Dr. Dafale (P. W. 1) in Exh. 32 only shows that the deceased was conscious to give statement. However, it does not show that the deceased was in a fit mental condition to give statement. It is, therefore, contended that the opinion given by doctor on Exh. 32 in this regard is also inadequate to prove that deceased Rekha, at the time of giving her dying declaration, was in a fit mental condition to give such statement. Mr. Daga, learned Counsel, further contended that so far as evidence of Parbatabai (P.W. 2) is concerned, it does not show that the deceased had given oral dying declaration to this witness. On the other hand, the testimony of Parbatabai (P.W. 2) demonstrates that the deceased told the people gathered on the spot that appellant poured kerosene on her person and set her on fire and, therefore, this is not the case where deceased Rekha had given oral dying declaration to her mother Parbatabai and in absence thereof, her evidence is not much of help to the prosecution.

8. Mr. Daga, learned Counsel for the appellant, contended that deceased Rekha died after thirty-nine days from the date of incident. The alleged incident took place on 18th May, 1993 and Rekha died on 26th June, 1993. It is contended that no evidence is brought on record by the prosecution to show what kind of treatment was given to the deceased during the said period. It is contended that deceased Rekha suffered only 45 per cent of burn injuries and as per the opinion of the doctor on Exh. 18, the cause of death is Septicemia due to burn. It is submitted that in the instant case, even if it is presumed for the sake of argument that the prosecution has succeeded in proving the fact that the appellant is the author of

the burn injuries caused to deceased Rekha, the offence committed by the appellant will not fall within the ambit of Section 300, Indian Penal Code, since the appellant without premeditating and in a fit of anger, poured kerosene on the person of the deceased and set her on fire and, therefore, the offence, if any, committed by the appellant would fall within the ambit of Section 304 Part-II of the Indian Penal Code. It is submitted that in the present case, the subsequent conduct of the appellant in extinguishing fire is also a mitigating circumstance. Mr. Daga, learned Counsel for the appellant, contended that the evidence on record is inadequate to prove the case of the prosecution against the appellant and, therefore, appellant is entitled to get acquittal. However, Mr. Daga alternatively contended that even if it is held that the appellant is the author of burn injuries caused to the deceased Rekha, the offence at the most would be under Section 304, Part-II of Indian Penal Code.

9. Mr. Mirza, learned Additional Public Prosecutor, contended that the case of the prosecution is based on the dying declaration (Exh. 37) of deceased Rekha recorded by Bargat (P.W. 4). It is submitted that the dying declaration was recorded almost immediately after the incident when the deceased was admitted in the Primary Health Centre at Jalalkheda and the recitals in the dying declaration clearly demonstrate that the appellant, at the relevant time, under the influence of alcohol, poured kerosene on the person of the deceased and set her on fire. It is submitted that the dying declaration is truthful and is corroborated by the medical evidence of Dr. Dafale (P.W. 1). Mr. Mirza, learned Additional Public Prosecutor, further contended that the evidence of Parbatabai (P.W. 2) also corroborates the material particulars of the prosecution case narrated by the deceased in the dying declaration. It is submitted that in the instant case, dying declaration the deceased was recorded by Bargat, Head Constable (P.W. 4) after obtaining the opinion of the doctor about the condition of the deceased and, therefore, the contention of the learned Counsel for the appellant in this regard is incorrect. It is submitted that merely because the deceased died after thirty-nine days from the date of incident, that does not reduce the gravity of the offence, nor it can be inferred that the deceased did not succumb to the burn injuries caused to her by the appellant. It is contended that the prosecution succeeded in proving the case of murder against appellant and, therefore, the conviction awarded by the Trial Court for the offence

punishable under Section 302, Indian Penal Code, is sustained in law.

10. We have given our anxious thought to various contentions canvassed by the respective Counsel and scrutinized the evidence of the prosecution.

11. In the instant case, the case of the prosecution is primarily based on the testimony of dying declaration of deceased Rekha recorded by Bargat (P.W. 4) and hence we have carefully considered the evidence of Bargat (P.W. 4) and dying declaration (Exh. 37). The testimony of Bargat (P.W. 4) shows that at the relevant time, he was attached to Jalalkheda Police Station and on 18th May, 1993, he was asked to go to the Hospital to record dying declaration of deceased Rekha, who was admitted in the hospital due to burn injuries. His evidence further shows that this witness went to the Primary Health Centre at Jalalkheda and met Dr. Dafale (P.W. 1), who was on duty in the hospital. This witness gave a requisition to Dr. Dafale for seeking his opinion, whether the injured lady was in a position to give statement. Exh. 32 is the said requisition. P.W. 4 further stated in his Examination-in-Chief that Dr. Dafale (P.W. 1) made an endorsement on Exh. 32 that the patient was conscious to give statement. This witness after obtaining the opinion from doctor about the mental state of the deceased, asked the deceased her name, upon which the deceased told her name. Dr. Dafale (P.W. 1) was present during the course of recording of dying declaration (Exh. 37). The evidence of P.W. 4 demonstrates that deceased Rekha made a statement that on the day of incident, at about 5.00 p.m., appellant rushed towards her. The incident took place at her house. The appellant threatened that he would kill her, since he used to suspect her character. The Examination-in-chief of this witness further reveals that deceased told him that the appellant, at the relevant time, was under the influence of alcohol, poured kerosene on her person and set her on fire. She also gave description of the clothes, which she had worn at the time of incident. The deceased also stated about the presence of her mother Parbatabai (P.W. 2), at the relevant time in the courtyard of the house. The evidence of this witness further demonstrates that deceased in her statement stated that when she was set on fire, P.W. 2 saw the flames coming from the house and, therefore, she rushed inside the house. People gathered on the spot and helped in extinguishing fire. This witness reduced into writing the above referred statement made by the

deceased and obtained her thumb impression as well as signature of the doctor. The said statement is Exh. 37.

12. We have carefully considered the cross-examination of Bargat (P.W. 4) and found that the facts stated by P.W. 4 in his Examination-in-Chief are reaffirmed in the cross-examination. It has come in the cross-examination of this witness that P.W. 4 reached the hospital at about 8.00 p.m., and at about 8.10 p.m. he gave requisition (Exh. 32) to the doctor. The cross-examination further reveals that recording of dying declaration was completed by this witness within half an hour. It is, no doubt, true that the time of recording of dying declaration has not been mentioned in Exh. 37. However, it has come in the cross-examination of Bargat (P.W. 4) that he started recording dying declaration within a short time after he gave requisition (Exh. 32) to Dr. Dafale (P.W. 1) for giving his opinion about the mental fitness of the deceased. It is specifically stated by P.W. 4 in his cross-examination that he reached the hospital at 8.00 p.m., and at about 8.10 p.m., he gave requisition (Exh. 32) to doctor and within five minutes there from, he started recording dying declaration. All these facts demonstrate that P.W. 4 started recording dying declaration of the deceased at about 8.15 to 8.20 p.m., and, therefore, merely because the time of recording of dying declaration is not mentioned in Exh. 37, that by itself, in the facts and circumstances of the present case, does not affect the genuineness of testimony of dying declaration (Exh. 37). The testimony of P.W. 4 completely corroborates all the material particulars of the prosecution case narrated by the deceased in her dying declaration, which was recorded by Bargat (P.W. 4) and there is no inconsistency of any kind noticed in the testimony of Bargat (P.W. 4) in regard to the disclosure made by the deceased in her dying declaration (Exh. 37).

13. In the instant case, we cannot turn the Nelson's eye to the fact that deceased was admitted in the hospital with only 45% of burns, and she died after thirty-nine days from the date of incident. Looking to the percentage of burns and taking into consideration the endorsement of the doctor on Exh. 32 that the deceased was conscious to give statement, it can safely be inferred that deceased Rekha, at the time of recording of her dying declaration, was in a fit mental condition to give statement. Recitals in the dying declaration (Exh. 37) demonstrate that on 18th

May, 1993, since morning the appellant was consuming liquor and at about 5.00 p.m., in the evening on the same day, he rushed towards deceased to beat her. At that time, appellant said that he would kill her and thereafter he poured kerosene from a big bottle on the person of deceased and set her on fire. The mother of deceased namely Parbatabai, notices flames coming from inside the house and, therefore, she rushed inside the house and saw the deceased on flames. Parbatabai shouted that her son-in-law set her daughter on fire. In the dying declaration, deceased also stated that appellant used to suspect her fidelity.

14. After a close scrutiny of the dying declaration (Exh. 37) as well as evidence of Bargat (P.W. 4), we are of the view that dying declaration is truthful, consistent and inspires confidence. The deceased was in a fit condition to give dying declaration. The contention canvassed by the Counsel for the appellant that there is no endorsement of doctor on Exh. 37 about the mental condition of the deceased is misconceived, since the endorsement is given by doctor in this regard on Exh. 32, i.e., the requisition given by Bargat (P.W. 4) for this purpose. Similarly, though the doctor has not in specific words given an endorsement on Exh. 32 that the deceased was mentally in a fit condition to give statement, however, the endorsement shows that deceased was conscious to give statement and, therefore, in our considered view, this is not such a discrepancy, which would affect the veracity of the dying declaration (Exh. 37) and, therefore, contention canvassed by the learned Counsel for the appellant in this regard is also misconceived.

15. In the instant case, the dying declaration (Exh. 37) is completely corroborated by the evidence of Dr. Dafale (P.W. 1). Dr. Dafale in his Examination-in-Chief has stated that on 18th May, 1993, at about 8.00 p.m., he was in the burn ward of the Hospital, where deceased Rekha was admitted. He had also received a requisition from Jalalkheda Police Station for ascertaining whether the patient was conscious and he made an endorsement on the said requisition, which is Exh. 32. Dr. Dafale (P.W. 1) also stated in his Examination-in-Chief that the statement of deceased Rekha was recorded in his presence and after recording her statement, deceased Rekha was shifted to Mayo Hospital, Nagpur. Perusal of the cross-examination of this witness, in our considered view, does not affect the ocular testimony of this

witness and, therefore, the evidence of Dr. Dafale corroborates the material particulars of the prosecution case. Similarly, the post-mortem report (Exh. 23) reveals the following burn injuries found on the deceased:

(1) Chest and abdomen 18%(2) R-Upper Extremity 9%(3) L-Upper Extremity 9%(4) L-High in front 9%Total 45%

In the instant case, the post-mortem report is admitted by the defence and, therefore, the doctor, who conducted the post-mortem examination, is not examined by the prosecution to prove the contents thereof. However, the recitals in the post-mortem report completely corroborate the prosecution case narrated by deceased Rekha in her dying declaration.

16. After taking into consideration the dying declaration (Exh. 37), evidence of Bargat (P.W. 4), evidence of Dr. Dafale (P.W. 1) and post-mortem report, we are of the view that the prosecution has succeeded in proving the fact that burn injuries sustained by the deceased Rekha were caused by the appellant.

17. The next question, which falls for our consideration in the present case, is as to whether the offence committed by the appellant is a murder under Section 300, Indian Penal Code, or a culpable homicide not amounting to murder as defined under Section 304, Part-I or Part-II of Indian Penal Code. In the instant case, the deceased was admitted in the hospital on 18th May, 1993 with 45% of burns and she died after thirty-nine days, i.e., on 26th June, 1993. The opinion of the doctor reflected in Exh. 18 (admitted document) shows that the cause of death was Septicemia due to burns. In the instant case, the evidence of the prosecution is completely silent with regard to the treatment given to the deceased during the course of her stay in the hospital and in absence thereof, it is not known as to whether the proper medical treatment was administered to the deceased when she was alive for thirty-nine days after the incident. Similarly, in the instant case, recitals in the dying declaration show that the appellant on the day of incident was consuming liquor right from the morning and at the relevant time, he rushed towards deceased, poured kerosene on her person and set her on fire. It is, no doubt, true that in the normal set of circumstances, in such a situation, it can safely be inferred that the act is committed with an intention of causing death of the

deceased. However, in the peculiar facts and circumstances of the present case, as referred to hereinabove, it is possible to hold that the deceased did not succumb only due to burn injuries sustained by her and the possibility of death due to Septicame, in absence of any evidence about medical treatment given to the deceased, cannot be ruled out, particularly when the deceased died after thirty-nine days and, therefore, the evidence of the prosecution demonstrates that the appellant has caused burn injuries to the deceased with an intention of causing such bodily injuries as are likely to cause death and the offence committed by the appellant, therefore, would fall within the ambit of provisions of Section 304, Part-I of the Indian Penal Code.

For the reasons stated hereinabove, the appeal is partly allowed. The conviction of the appellant under Section 302 of Indian Penal Code is hereby quashed and set aside. The appellant is convicted for the offence punishable under Section 304, Part-I of Indian Penal Code and is sentenced to suffer rigorous imprisonment for ten years. The sentence of fine imposed by the Trial Court is here by confirmed, however, on default in payment of fine, rigorous imprisonment for six months.

Counsel for the appellant submitted that the appellant is in jail since the date of his arrest, i.e., from 18th May, 1993 till today.

This fact has not been disputed by the Additional Public Prosecutor.

In the circumstances, appellant is directed to be released forthwith, if not required in any other crime, subject to payment of fine.

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