

State of Maharashtra Vs. Manohar

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Court : Mumbai

Decided On : Oct-20-2004

Reported in : I(2005)DMC816

Judge : P.S. Brahme and ;B.R. Gawai, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 32, 302 and 307

Appeal No. : Criminal Appeal No. 139 of 1992

Appellant : State of Maharashtra

Respondent : Manohar

Advocate for Def. : K.V. Sirpurkar, Adv.

Advocate for Pet/Ap. : Mandpe, A.P.P.

Disposition : Appeal dismissed

Judgement :

P.S. Brahme, J.

1. Heard Mr. Mandpe, learned A.P.P. and Mrs. Sirpurkar, learned Counsel for the respondent-accused.

2. This criminal appeal is against the order passed by the Additional Sessions Judge, Amravati on 30.12.1991 in Sessions Case No. 169 of 1987, whereunder the respondent/original accused Manohar s/o Mukindrao Tayade came to be acquitted of the offence under Section 302 of the Indian Penal Code.

3. The prosecution case, in brief, is that deceased Shobha, the victim in this case, was married to respondent Manohar and she was residing with him till the date of occurrence i.e., 6.6.1987. She co-habitated with the respondent and there are two female issues of the wedlock. It is admitted that the victim used to get attacks of epilepsy. It appears that the relations between the accused and his wife Shobha were not cordial. However, the cause for disharmony between them is not borne out on the evidence on record. On the day of occurrence, at about 5.00 p.m., after the accused returned from his duty (he was working as a driver on a jeep in the Collector Office), he at once lifted a can containing kerosene and poured the same on the person of the deceased and set her on fire with the lighted matchstick and then went away. Shobha sustained burn injuries. One Kisan Wankhade (P.W. 1), who was sitting in the courtyard of one Uttamrao Tayade, heard cries and shouts of Samaratabai, wife of brother of the accused, who was going running by the road saying that the house of accused was burning. Kisan, therefore, went running to the house of accused and saw deceased Shobha burning. One Shamrao Tayade and witness Kisanrao extinguished the fire. In the meantime, the accused and his brother Motiram returned home. They brought deceased Shobha by an auto-rickshaw to the General Hospital, Amravati where she was admitted in the Burn Ward of Irwin Hospital.

4. In the hospital, Nagorao Gaikwad (P.W. 7), who was the Naib-Tahsildar, on receiving requisition from Police Station, Rajapeth arrived in the hospital for recording dying declaration of Shobha. He asked the Medical Officer Dr. Kiran Wathodkar (P.W. 4), who was in the ward to examine Shobha, to ascertain whether she was conscious and fit to make statement. Accordingly, Dr. Kiran examined the victim and issued certificate (Exh. 22) that she was conscious to give statement. Then Nagorao recorded the statement of victim wherein she disclosed that in the evening after her husband returned home, he set her on fire by pouring kerosene on her person. Then Dr. Kiran examined Shobha and found

that she was conscious when statement was made by her and, accordingly, he issued certificate (Exh. 23). The dying declaration (Exh. 20) is relied upon by prosecution as in that the victim has put entire blame on her husband for setting her on fire and, consequently, her sustaining burn injuries. On the basis of that dying declaration, Crime No. 498 of 1987, under Section 307 of the Indian Penal Code came to be registered against the accused. The investigation was conducted by Police Inspector Arvind Pande (P.W. 6). On the same day, at about 10.15 p.m. victim Shobha died in the hospital. Dr. Chhagan Bonde (P.W. 2) carried out autopsy on the dead body and prepared post-mortem notes (Exh. 14). He opined that the victim died due to shock on account of burn injuries sustained. Consequently, the offence was altered to that under Section 302 of the Indian Penal Code. The Investigating Officer visited the place of occurrence and drew spot Panchanama (Exh. 9). After completing investigation, charge-sheet was filed in the Court of the Judicial Magistrate, First Class, Amravati, who committed the case to the Court of Session.

5. Before the Sessions Court, the accused pleaded not guilty to the charge (Exh. 4) and claimed to be tried. According to him, his relations with deceased Shobha were cordial. He contended that she was suffering from epilepsy. He also contended that one Shamrao Netanrao, cousin of deceased Shobha, was not on good terms with him. He specifically contended that he was not present in the house at the time when Shobha caught fire and suffered burn injuries. According to him, when he went to the General Hospital, Amravati, he saw Shamrao in the Burn Ward. He further contended that he tried to talk with his wife Shobha, but she could not talk as she was unconscious. According to him, he has been falsely implicated in this case at the instance of said Shamrao.

6. At the trial, prosecution examined Kisan Wankhade (P.W. 1), Dr. Chhagan Bonde (P.W. 2), Naib-Tahsildar Nagorao Gaikwad (P.W. 3), Dr. Kiran Wathodkar (P.W. 4) and P.S.I. Pande (P.W. 6). As stated earlier, the only evidence on which prosecution could lay its hands was that of dying declaration (Exh. 20) recorded by the Naib-Tahsildar after the victim was examined by Dr. Kiran. It is, however, very pertinent to note that the defence examined one Panchfulabai (D.W. 1) as witness, who happened to be the mother of prosecutrix, who supported the contention of

defence and stated with emphasis that the relations between the accused and her daughter Shobha were cordial. The Trial Court, accepting the version of defence witness and discarding the prosecution evidence regarding the dying declaration (Exh. 20), finding it to be not trustworthy and reliable, held that prosecution has failed to prove that the victim was done to death by the accused by setting her on fire. Consequently, the respondent-accused came to be acquitted and hence, this trial.

7. Mr. Mandpe, the learned A.P.P. vehemently submitted that the Trial Court has committed gross error in discarding the evidence of witnesses Nagorao and Dr. Kiran who recorded the dying declaration. (Exh. 20) of the deceased. He submitted that the evidence of Dr. Kiran who examined the deceased and found to be conscious and fit to make statement, thus itself lends assurance to truthfulness of contents of the dying declaration (Exh. 20). He also pointed out from the spot Panchanama that the place where the victim was sent on fire was having stint of kerosene, as also the pieces of clothes were having smell of kerosene. He submitted with emphasis that this circumstance totally rules out the possibility of accidental death. The respondent was very much in the house when the victim caught fire. But he has not given any explanation as to why she caught fire. The possibility of victim having died accidental death is totally ruled out. There was no reason to doubt credibility of witness Nagorao and Dr. Kiran, who were admittedly independent persons. He, therefore, urged that the finding recorded by the Trial Court is perverse and, as such, the appeal be allowed and the respondent-accused be convicted for the offence.

8. As against this, Mrs. K.V. Sirpurkar, learned Counsel for the respondent-accused submitted that the view taken by the Trial Court in acquitting the accused is based on the sound reasoning and after proper appreciation of evidence. So this being an appeal against acquittal, no interference by the High Court is permissible when the view taken by the Trial Court is reasonable.

9. After perusal of the judgment of the Trial Court, we have found that authenticity of the certificate issued by Dr. Kiran is doubted. The Trial Court has given reasons for the same. In the first place, the certificate issued by the doctor is in the

prescribed form. In his evidence, he has stated that he was throughout present in the ward while the statement of deceased Shobha was being recorded and that, after her statement was finally recorded, he gave certificate (Exh. 23) that she was conscious and able to give statement throughout the time her statement was being recorded. It is also in the evidence of Dr. Kiran that he paid visit to her when patient was admitted in the burn ward and she gave history as to the incident that happened and he took note of that by his own hand in the bed head ticket, registered No. 11682, page No. 5. He noted therein that 99% burns were found on the person of patient Shobha.

10. The Naib-Tahsildar in his evidence stated that he went to the hospital and found the injured and then asked the Medical Officer to certify whether she was conscious and able to make statement and then after the Medical Officer examined her and certified so, he recorded the statement which is dying declaration (Exh. 20). In his evidence, he has in fact stated as to what was disclosed to him by the victim about the incident which he has taken down in writing in the dying declaration (Ex. 20).

11. It is admitted that deceased Shobha was admitted to the Outdoor Patient Department (O.P.D.) of General Hospital, Amravati. As could be seen from the bed head ticket (Exh. 24), she died on the same day at about 10.15 p.m. In the bed head ticket (Exh. 24) at two places, it is mentioned in Marathi language that the patient Shobha was stated to be in serious condition and that the general condition of the patient was not good. Her dying declaration was recorded at about 6.40 p.m. on 6.6.1987. Dr. Chhagan Bonde (P.W. 2), who carried out autopsy on the dead body and prepared post-mortem report (Exh. 14), has mentioned that the victim had sustained 95% burns. This fact is not challenged by the defence. It is also evident from Column No. 17 of the post-mortem report (Exh. 14), that total burns were about 95% and that too, of the second degree. This goes to show that victim Shobha had sustained and suffered severe burns which further goes to show that she could not have been in a fit state of mind and health to give statement.

12. As against that, Dr. Kiran in his cross-examination stated that patient Shobha was comfortable. He denied that severe pains on account of burns makes the patient restless, groaning and crying. As against that, witness Gaikwad has clearly stated in his cross-examination that the patient was suffering from pains and she was groaning in pain. In such a situation, the claim of witness Dr. Kiran about consciousness and fitness of victim Shobha to make statement becomes doubtful. Therefore, there is reason to say that Dr. Kiran very casually gave certificates (Exh. 22 and 23) stating therein about consciousness and fitness of deceased Shobha. Witness Gaikwad has proved the documents Exhs. 19 and 22. In his cross-examination, he has stated that he cannot say if the portion at the top appearing in Exh. 19 was typed by him or not. He has also stated that before going to the hospital, the typed portion was already got typed with regard to fitness of the patient to make statement. It is admitted that the Medical Officer Dr. Kiran did not give separate and independent certificate as to fitness of victim Shobha. Dr. Kiran has stated in his evidence that if a patient having burns is referred to them, they examine him and come to the independent conclusion and in that case, the certificate is issued by the Medical Officer in his own hand. Dr. Kiran did not know as to who typed the first certificate Exh. 22. Therefore, it is left in the realm of mystery as to who and when typed the certificate Exh. 22. The natural corollary of this is that Dr. Kiran had very casual approach in giving the certificate Exh. 22.

13. It is pertinent to note that Dr. Kiran in his cross-examination has clearly stated that he was supposed to make endorsement that the statement of the patient was being recorded in his presence. This shows that he was aware of significance of making such an endorsement which itself gives authenticity to the certification made by the doctor. However, in the practice, so far as the case at hand is concerned, Dr. Kiran admitted did not make endorsement to that effect. It was his duty to verify by putting some questions to the witnesses in order to ascertain whether the patient is well-oriented and conscious to make statement. In that regard, Dr. Kiran in his cross-examination stated that he put the questions to the victim orally. He has not made any record in that regard. He does not remember what were the questions put by him and what were the replies given by the patient to the questions. Therefore, the manner in which certificates (Exh. 22 and 23) have been prepared, goes to show that Dr. Kiran acted recklessly and in a very

casual manner, though the matter was very serious.

14. Witness Gaikwad has stated in his cross-examination that the Medical Officer quickly examined the patient and noted the pulse rate and on the basis of that, he issued certificate. In such a state of things, merely by observing the pulse rate of a patient, one can certainly not be in position to certify that the patient was well-oriented and conscious to make statement.

15. In this context, it is quite proper to bear in mind the observations reported in 1989 Current Criminal Cases 189, Shrikrushna v. State of Maharashtra. It is observed as under:

'As a matter of 'act, the physiological symptoms disclosed by the heartbeats and the pulse rate only could satisfy an expert about the receptivity of the individual and nothing more. Similarly, asking the name to the person would merely show that the patient is receptive. What the doctor had to satisfy himself was whether the patient was in a rational state of mind so as to make a rational and logical disclosure of the evidence. This opinion becomes important particularly in view of the fact that the patient had suffered 100 per cent burns of second degree and that she was unconscious when brought to the hospital. There is absolutely no evidence to show that Dr. 'Deshmukh had practised means to ascertain not only the respectively but also the faculty of reasoning of the deceased.'

16. In the instant case, according to witness Gaikwad, the Medical Officer only noted pulse rate of patient Shobha. Therefore, as observed above, on the basis of such opinion as to noting down of the pulse rate, it cannot be said clinchingly that the patient was conscious and fit to make statement and it is much more so when, admittedly, the patient Shobha had sustained 99% burns and she as conscious.

17. Witness Gaikwad in his cross-examination stated that he knew that the statement was required to be read over to the patient. He has admitted that the endorsement to that effect was necessary to be made and further correctness of the statement by the patient is to be proved. He stated that he has read over the statement (Exh. 20) to patient Shobha and she admitted the same to be true and correct. However, he has not made endorsement to that effect on Exh. 20. When

witness Gaikwad was well aware that it was mandatory for the person recording the dying declaration to read over the statement of the patient and to ascertain from the patient that whatever statement was recorded and read over to her was correct and to that effect, endorsement was to be made on the dying declaration, it does not appeal to reasons as to why witness Gaikwad, at the time when he recorded the statement, did not make endorsement to that effect. This shows that even witness Gaikwad, who was undoubtedly responsible Officer, acted recklessly with a very casual approach. The Apex Court and the High Courts time and again observed that when the statement is read out to the victim and it is ascertained from her statement that the statement that was read out to her is correct and true, then making endorsement to that effect on the statement that the signature of the person who has recorded the statement is not a mere formality. In the case at hand, admittedly, witness Gaikwad has not even made such an endorsement on the dying declaration (Exh. 20), though he was well aware of the same. This, in our opinion, brings out inherent infirmity and makes the dying declaration (Exh. 20) doubtful and that is much more so when on the face of it, considering the fact that the victim had suffered 95% burns and her condition was serious, the claim of prosecution witnesses that she was fit to make statement does not seem to be believable. In our opinion, in such a situation, the dying declaration (Exh. 20) though literally it is recorded by witness Nagorao Gaikwad, it does not inspire confidence and cannot be accepted. If that is so, then it has to be said that the Trial Court was justified in rejecting the dying declaration (Exh. 20).

18. Then we take into consideration the evidence of defence witness Panchfulabai w/o Kisanrao Netanrao (D.W. 1) who has candidly stated that the relations between the accused and the victim were cordial. Therefore, there is reason to say that the accused has been falsely implicated by the victim by making a statement in the dying declaration (Exh. 20), which appears to be the outcome of influence by some one who was present at the time when the statement was recorded. We are aware that as the legal position stands, the dying declaration made by the victim is sufficient to base conviction.

19. The Apex Court and the High Courts time and again held that the dying declaration can be the sole basis for conviction. In the decision in II (2003) DMC

220 (SC)=IV (2003) SLT 603=III (2003) CCR 47 (SC)=AIR 2003 SC 2859, P.V. Radhakrishna v. State of Karnataka, the Apex Court observed that Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admissions are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice and secondly, the sense of impending death, which creates a sanction equal to the obligation on oath.

20. The Apex Court further observed thus:

'The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in Court of justice. The principle on which dying declaration is admitted in evidence is indicated in legal maxim 'nemo moriturus proesumitur mentiri'--a man will not meet his maker with a lie in his mouth.'

21. The Apex Court while laying down that the dying declaration can be sole basis for conviction observed 'The situation in which a person is on death bed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be.

22. Therefore, this is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant was given. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly it can base its conviction without any further corroboration. Therefore, it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

23. In the case at hand, as observed earlier, the evidence of Naib-Tahsildar Nagorao Gaikwad (P.W. 3) and that of Medical Officer Dr. Kiran Wathodkar (P.W. 4) on the point of dying declaration (Exh. 20) does not inspire confidence. Having regard to the medical evidence and the fact that the victim had sustained severe burns of about 95% and that her condition was serious, it does not appeal to the reasons that the victim was in a fit state of health and mind to make a declaration, much less the declaration as embodied in Exh. 20. Therefore, as held by the Trial Court the dying declaration (Exh. 20) does not appear to be voluntary and truthful account of the incident given by the victim.

24. The allegation of harassment and cruelty to the victim by the respondent-accused is falsified by the evidence of defence witness Panchfulabai (D.W. 1), who is no one else but the mother of the deceased. She was subjected to cross-examination. But nothing has been elicited in her evidence to discredit her testimony. Therefore, considering the evidence of defence witness Panchfulabai, veracity in the statement (Exh. 20) is impaired. That is one of the reasons why we are not prepared to accept the dying declaration (Exh. 20) as trustworthy and reliable.

25. Therefore, in such a state of evidence, it has to be said that the prosecution has utterly failed to establish that the respondent committed the act of setting on fire the victim. The Trial Court has rightly acquitted the respondent-accused. There

is no reason to interfere with the order of acquittal. Hence, the order.

ORDER

The appeal is dismissed.

The bail bond of accused shall stand cancelled.

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