Sudhakar & Anr vs State Of Maharashtra on 17 July, 2000

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Author: Shivaraj V. Patil

Bench: Shivaraj V. Patil

PETITIONER:
SUDHAKAR & ANR.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT: 17/07/2000

BENCH:
G.B. Pattanaik, J. R.P. Sethi, J. & Shivaraj V. Patil, J

JUDGMENT:

SETHI, J.

L....I.....T.....T.....T.....T.....T.....T..J Ms.Rakhi, a young girl of about 20 years of age was working as teacher in Zila Parishad Primary School at Banegaon, Maharashtra at a monthly salary of Rs.300/-. The appellant No.1 was the Headmaster and appellant No.2 was a co-teacher in the same school. On one unfortunate morning of Saturday, the 9th of July, 1994 Ms.Rakhi went to her school in the morning as usual. When the school was closed at about 120 Clock in the afternoon and all students had gone back to their homes, the appellants came in the room where Rakhi was sitting and closed the door and windows of the room. She was forcibly subjected to sexual intercourse by

the appellants and her wailing cries did not have any effect upon them. She was thus subjected to gang-rape by the appellants. After the incident Ms.Rakhi went to her house and narrated the incident to her mother Padmabai, brother Prakash and uncle Balasaheb @ Balaji. The incident was also narrated to the father of the prosecutrix who came back home after two-three days. The matter was reported to the police on 20th July, 1994. PW15 API Laxman Wadje incharge police station Pathri recorded the statement of the prosecutrix and on that basis Crime Report No.100/94 was registered. Petticoat of the prosecutrix and the metal bangles which she was wearing at the time of occurrence were seized. After preparation of Panchanama, the seized articles were sent to the Chemical Analyser for his report. On 6.8.1994 statements of two child witnesses, namely, Dnyaeshwar Mujmul and Dnyaneshwar Adhav were recorded under Section 164 of the Criminal Procedure Code before the Special Executive Magistrate. Ms.Rakshi was taken for medical examination to Dr.Gauri Rathod, PW1 who reported that the prosecutrix had been subjected to sexual intercourse in the recent past. On completion of the investigation the charge- sheet was filed against both the appellants in the court of Judicial Magistrate, First Class, Pathri, who committed them to the Court of Sessions Judge to stand their trial for the offences under Section 376 read with Section 34 of the Indian Penal Code. After the matter was reported to the police, the prosecutrix was sent to stay with her married sister Saraswatibai PW14 as it was found that she had lost her equilibrium of mind and was mentally upset. Having failed to withstand the humiliation to which she was subjected to on account of rape committed by the appellants, Ms.Rakhi is stated to have committed suicide on 22nd December, 1994 at about 10.30 p.m. at the house of her sister Saraswatibai. Autopsy was conducted on the same date and the cause of death was reported as poisoning. In view of the subsequent development additional charge under Section 306 read with Section 34 IPC was added against the appellants on 8.5.1995. Both the accused pleaded not guilty and claimed to be tried. The prosecution examined 18 witnesses. However, at the trial except PW1 Gauri Rathod, PW2 Padmabai, PW3 Gangadhar, PW12 Dr.Anandgaonkar, PW13 Sanjay Deshpande, PW14 Saraswatibai and PW15 ASI Wadje, the other witnesses turned hostile. The Trial Judge of the Sessions Court, however, vide his judgment dated 12.7.1995 in Sessions Case No.135/94 convicted the appellants under Section 376(2)(g) read with Section 34 of the IPC and sentenced each one of them to suffer rigorous imprisonment of seven years and to pay fine of Rs.1,000/- each, in default of payment of fine, the appellants were directed to suffer further rigorous imprisonment for three months. The appellants were also convicted and sentenced for the offences punishable under Section 306 read with Section 34 IPC and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.500/- each, in default of payment of fine, they were to suffer rigorous imprisonment for one month more. Both these sentences were directed to run concurrently. Criminal appeal filed by the appellants was dismissed vide the order impugned in this appeal. Not satisfied with the findings of the Courts below the appellants have preferred the present appeal with prayer for setting aside their conviction and sentence and acquitting them of the charges. Learned counsel appearing for the appellants has submitted that though apparently the nature of the crime appears to be heinous, yet, in the circumstances of the case the appellants cannot be convicted and sentenced as according to him the prosecution has miserably failed to place any legal evidence against them. It is contended that the evidence relied upon by the courts below is inadmissible in evidence. The prosecution is stated to have failed to explain the delay in lodging the First Information Report and getting the prosecutrix medically examined. It is submitted that in the absence of exact cause of death of Ms.Rakhi the appellants could not be held guilty for the

commission of the crime punishable under Section 306 IPC. It is not disputed that the prosecutrix reported the matter at the police station Pathri on 20th July, 1994 admittedly after about 11 days from the day of occurrence. It is also not disputed that the statement of the prosecutrix could not be recorded before any Judicial Magistrate or the Criminal Court. It is, however, not denied that her statement Exhibit 59 was recorded by PW15 on 20th July, 1994 in which she had narrated the whole incident and explained the delay for not lodging the report earlier. The courts below have relied upon the aforesaid statement treating as dying declaration being admissible in evidence under Section 32 of the Evidence Act. Admissibility of the statement of Ms.Rakhi is of paramount importance for deciding the present appeal. If the statement is held to be admissible in evidence, being the dying declaration of Ms.Rakhi, the appellants may not escape of their liability to conviction and sentence as there exists other corroborative evidence against them. However, if the aforesaid report/statement is not admissible in evidence, the appellants may be entitled to all consequential legal benefits. In that event the offence of rape may not be held to have been proved against them and if rape is not proved, the appellants cannot be held responsible for the commission of the offence under Section 306 of the IPC. Section 32 of the Evidence Act is an exception to the general rule of exclusion of the hearsy evidence. Statement of a witness, written or verbal, of relevant facts made by a person who is dead or cannot be found or who has become incapable of giving evidence or whose attendance cannot procured without an amount of delay or expense, are deemed relevant facts under the circumstances specified in Sub- sections 1 to 8. Sub-section (1) of Section 32 with which we are concerned, provides that when the statement is made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, being relevant fact, is admissible in evidence. Such statements are commonly known as dying declarations. Such statements are admitted in evidence on the principle of necessity. In case of homicidal deaths, statements made by the deceased is admissible only to the extent of proving the cause and circumstances of his death. To attract the provisions of Section 32 for the purposes of admissibility of the statement of a deceased, it has to be proved that: (a) The statement sought to be admitted was made by a person who is dead or who cannot be found or whose attendance cannot be procured without an amount of delay and expense or is incapable of giving evidence. (b) Such statement should have been made under any of the circumstances specified in sub-sections 1 to 8 of Section 32 of the Evidence Act. As distinguished from the English Law Section 32 does not require that such a statement should have been made in expectation of death. Statement of the victim who is dead is admissible in so far as it refers to cause of his death or as to any circumstances of the transaction which resulted in his death. The words "as to any of the circumstances of the transaction which resulted in his death" appearing in Section 32 must have some proximate relation to the actual occurrence. In other words the statement of the deceased relating to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. Due weight is required to be given to a dying declaration keeping in view the legal maxim "Nemo moriturus praesumitur mentire" i.e. a man will not meet his Maker with a lie in his mouth. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of a statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement. However, in cases where the original recorded dying declaration is proved to have been lost and not available, the prosecution is entitled to give secondary evidence thereof. In this case the statement of the prosecutrix Exhibit

P-59 does not directly state any fact regarding the cause of her death. At the most it could be stretched to say referring to "circumstances of the transaction"

> resulting in her death. The phrase "circumstances of the transaction" were considered and explained in Pakala Narayana Swami v. Emperor [AIR 1939 PC 47]: "The circumstances must be circumstances of the transaction:
>
> general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular persons, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that coveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence: though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that "the circumstances" are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that "the cause of (the declarant's) death comes into question".

The death referred to in Section 32(1) of the Evidence Act includes suicidal besides homicidal death. Fazal Ali, J. in Sharad Birdhichand Sarda v. State of Maharashtra [1984 (4) SCC 116] after referring to the decisions of this Court in Hanumant v. State of Madhya Pradesh [1952 SCR 1091], Dharambir Singh vs. State of Punjab[Criminal Appeal No.98 of 1958, decided on November 4, 1958], Ratan Gond v. State of Bihar [1959 SCR 1336], Pakala Narayana Swami (supra), Shiv Kumar v. State of Uttar Pradesh [Criminal Appeal No.55 of 1966, decided on July 29, 1966], Mahnohar Lal v. State of Punjab[1981 Cri.LJ 1373 (P&H)] and other cases, held: "We fully agree with the above observations made by the learned Judges. In Protima Dutta v. State [1977 (81) Cal WN 713] while relying on Hanumant Case the Calcutta High Court has clearly pointed out the nature and limits of the doctrine of proximity and has observed that in some cases where there is a sustained cruelty, the proximate may extend even to a period of three years. In this connection, the high Court observed thus:

> The 'transaction' in this case is systematic ill- treatment for years since the marriage of Sumana and incitement to end her life. Circumstances of the transaction include evidence of cruelty which produces a state of mind favourable to suicide. Although that would not by itself be sufficient unless there was evidence of incitement to end her life it would be relevant as evidence.

This observation taken as a whole would, in my view, imply that the time factor is not always a criterion in determining whether the piece of evidence is properly included within 'circumstances of transaction'...'In that case the allegation was that there was sustained cruelty extending over a period of three years interspersed with exhortation to the victim to end her life'. His Lordship further observed and held that the evidence of cruelty was one continuous chain, several links of which were touched up by the exhortations to die. 'Thus evidence of cruelty, ill-treatment and exhortation to end her life adduced in the case must be held admissible, together with the statement of Nilima (who committed suicide) in that regard which related to circumstances terminating in suicide'.

Similarly, in Onkar v. State of Madhya Pradesh [1974 Cri.LJ 1200] while following the decision of the Privy Council in Pakala Narayana Swami case, the Madhya Pradesh High Court has explained the nature of the circumstances contemplated by Section 32 of the Evidence Act thus:

The circumstances must have some proximate relation to the actual occurrence and they can only include the acts done when and where the death was caused....Thus a statement merely suggesting motive for a crime cannot be admitted in evidence unless it is so intimately connected with the transaction itself as to be a circumstance of the transaction. In the instant case evidence has been led about statements made by the deceased long before this incident which may suggest motive for the crime.

In Allijan Munshi v. State [AIR 1960 Bom 290] the Bombay High Court has taken a similar view.

In Chinnavalayan v. State of Madras [1959 Mad LJ 246] two eminent Judges of the Madras High Court while dealing with the connotation of the word 'circumstances' observed thus:

The special circumstances permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstances permitted to transgress the distance factor is, for example, a case of decoying with intent to murder. This is because the natural meaning of the words, according to their Lordships, do not convey any of the limitations such as (1) that the statement must be made after the transaction has taken place, (2) that the person making it must be at any rate near death, (3) that the circumstances can only include acts done when and where the death was caused. But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

Before closing this chapter we might state that the Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English Law where only the statements which directly relate to the cause of death are admissible. The second part of clause (1) of Section 32, viz., "the circumstances of the

transaction which resulted in his death, in cases in which the cause of that person's death comes into question" is not to be found in the English Law. This distinction has been clearly pointed out in the case of Rajindra Kumar v. State [AIR 1960 Punj 310] where the following observations were made:

Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead,....are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to why of the circumstances of the transaction which resulted in his death... It is well settled by now that there is difference between the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death.

In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death.

Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

(1) Section 32 is an exception of the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and- dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is year another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross- examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

In Ratan Singh vs. State of Himachal Pradesh [1997 (4) SCC 161] this Court held that the expression "circumstances of transaction which resulted in his death" mean that there need not necessarily be a direct nexus between the circumstances and death. Even distant circumstance can become admissible if it has nexus with the transaction which resulted in death. Relying upon Sharad Birdhichand Sarda's case (supra) the Court held that: "It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death."

In Najjam Faraghi @ Nijjam Faruqui v. State of West Bengal [1998 (2) SCC 45] this Court held that the death of declarant long after making the dying declaration did not mean that such a statement lost its value merely because the person making the statement lived for a longer time than expected. But to make the statement admissible, it has to be shown that the statement made was the cause of the death or with respect to the circumstances of the transaction which resulted in his death. The facts mentioned in the statement are, however, required to be shown connected with the cause of the death whether directly or indirectly. Rejecting the contention that as the injuries caused as mentioned in the dying declaration were indirectly responsible for the cause of death, the statement of the deceased could not be admitted in evidence, this Court in G.S. Walia v. State of Punjab [1998 (5) SCC 150] held:

"Therefore, there is no substance in the contention raised by Mr.U.R. Lalit that the injuries were only directly responsible for causing death of Balwant Singh and as his death cannot be said to have been caused due to the injuries caused, the statement made by him would not fall within Section 32 of the Indian Evidence Act. In view of

> our finding on this point the decision in Imperatrix v. Rudra, [ILR (1900) 25 Bom 45: 2 Bom LR 331], Abdul Gani Bandukchi v. Emperor [AIR 1943 Cal 465:47 CWN 332:45 Cril.LJ 71], Mallappa Shivlingappa Chanagi, Re [AIR 1962 Mys 82: (1962) 1 Cri.LJ 619] and Moti Singh v. State of U.P. [AIR 1964 SC 900: (1964) 1 Cri.LJ 727] relied upon by Mr.Lalit are of no help to him. In all these cases, the court had held that there was no evidence or that the evidence led was insufficient to prove that the deceased had died as a result of injuries caused to him. As the statement of Balwant Singh related to the cause of his death it was admissible in evidence under Section 32 and the High Court was in error in holding otherwise."

In the light of the legal position noticed hereinabove, let us examine the statement of deceased prosecutrix Exhibit@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ P-59 to decide whether such a statement can be admitted in@@ JJJJJJJJJJJJJJ evidence, relied upon and made a basis for conviction and sentence of the accused. In that statement, admittedly recorded after 11 days of the day of occurrence, she had stated: "I am serving in Balwade of Banegaon from 2.2.92 as a teacher. The name of my mother is Padmabai and my father is Gangadharrao. I have one brother namely Prakash and four sisters. I am living with my brother Prakash at Banegon and my father and mother are living at Mazalgaon and my mother had come to Banegaon before 15 days.

In Banegaon the classes of Zila Parishad Primary School are held up to 4th Class from the Balwadi. There are two teachers in our school namely (1) Sudhakar Gndapin Bhujbal (2) Bhaskar Babwrao Kedre and I am working as a Balwadi Teacher getting Rs.300/- per month. The timing of our school is from 9.00 to 16.00' O Clock but the Balwade classes work from 9.00 to 12.00' O clock. The headmaster of our school is Sudhakar Bhujbal.

Eversince I have joined my service Sudhakar Bhujbal and Bhaskar Kedre are teasing me. Sudhakar Bhujbal always says that your sari looks very nice will you come to see the picture with me? That by asking this they try to talk with me. Before six months Sudhakar Bhujbal had touched my cheek and waist. I was afraid at that time. But due to the fear of defamation I did not tell anything to any person and because of it they had been adoring to proceed.

On 1.7.94 on Saturday 8/9'O clock in the morning I had gone to my school in a routine way Bhaskar Kedre and Sudhkar Bhujbal had also come to the school. The school was closed at 12'O clock in theafternoon. All the boys and girls had went back to their home. That Bhaskar Kedre had closed the windows of the school and Sudhakar Bhujbal had closed the door and came near to me. Then he had removed his pant. At that time he was wearing ready made underwear. Thereafter Sudhakar Bhujbal had caught hold of me and put me on the ground. And at that time Bhaskar Kedre had hold my hands. I was crying for my mother and trying to get up. But they did not allow me to get up. Sudhakar Bhujbal had removed his under pant and had lifted up my sari and petticot and pressed my breast. After that he has entered his male organ into my vagina and had committed sexual inter course forcibly with me. After that Sudhakar Bhujbal had hold my hands and Bhaskar Kedre had removed his pant. At that time he was earing reddish cotton underwear then he had removed his underwear and caught my both breasts and entered his male organ into my vagina and has committed sexual inter course with me forcibly.

It was 12.30 in the afternoon at that time. Then both of them had worn their pants and went I was crying and went to my house and informed this incident to my mother Padmabai brother Prakash and uncle Balaji. After this they had called my father from Mazalgaon and narrated to him this incident. We had not filed any complaint due to the fear of defamation in the society. Bhaskar Kedre and Sudhakar Bhujbal both of them have done sexual inter course with me on 9.7.94 in the after noon at 12.30. Therefore inquiry should be made against them."

There is no legal evidence on record that the prosecutrix at or about the time of making the statement had@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ disclosed her mind for committing suicide allegedly on@@ JJJJJJJJJJJJJJJJJJJJJJJJJ account of the humiliation to which she was subjected to on account of rape committed on her person. The prosecution evidence does not even disclose the cause of death of the deceased. The circumstances stated in Exhibit P-59 do not suggest that a person making such a statement would, under the normal circumstances, commit suicide after more than five and a half months. The High Court was, therefore, not justified in relying upon Exhibit P-59 as a dying declaration holding it that the said statement was in series of circumstances of the transaction which resulted in the death of the deceased on 21.12.1994. The conviction of the persons accused of offences cannot be based upon conjunctions and suspicions. Statement Exhibit P-59 if not treated as a dying declaration, there is no cogent and reliable evidence which can connect the accused with the commission of the crime. In that event the other arguments advanced on behalf of the appellants assume importance. Other circumstances such as delay in lodging the FIR, medical examination of the prosecutrix, the non examination of material witnesses and turning hostile of witnesses including the Dnyaeshwar Mujmul and Dnyaneshwar Adhav are also required to be taken note of. It has also to be kept in mind that after the incident on 9th July, 1994, the prosecutrix is shown to have attended the school on 10th and 11th July, 1994 as well. Her mother in cross- examination also stated that Ms.Rakhi had told her about the incident only on 12th July, 1994 at about 5.00 p.m. PW3, the father of the prosecutrix deposed in the court that: "Rakhi did not tell me on 17th, 18th, 19th July, 1994 that she wanted to file a complaint. I did not ask Rakhi whatever she wanted to file a criminal complaint. I did not disclose before the police on 20.7.1994 that Rakhi told me that she wanted to file criminal complaint."

We are, therefore, of the opinion that prosecution has failed to prove, beyond reasonable doubt, that the appellants had committed forcible sexual intercourse with Ms.Rakhi on 9.7.1994 under the circumstances as narrated in Exhibit P-59 and relied upon by the courts below. The appellants cannot be convicted and sentenced merely on suspicion. In the absence of the charge being proved under Section 376 IPC, the prosecution could not have asked for conviction of the appellants under Section 306 of the IPC as according to the prosecution it was the commission of the rape on her person which resulted in the suicide of Ms.Rakhi, allegedly on the abetment of the appellants. If the cause for committing suicide is not legally proved, the appellants cannot be held responsible for the abetment of the ultimate offence of suicide. We are, therefore, of the opinion that as the prosecution has failed to prove its case against the appellants beyond all reasonable doubt, they are entitled to acquittal. Before parting with the judgment we would, however, observe that in the present case the investigating as well as the prosecution agency has not acted promptly and diligently as was expected under the circumstances. The appeal is, therefore, allowed and the judgment of the High Court is set aside. The appellants be released forthwith unless required in some other case.