Bombay High Court
Dadu Maruti Gaikwad vs The State Of Maharashtra on 20 January, 1997
Author: V Sahai
Bench: V Sahai, R Desai
JUDGMENT Vishnu Sahai, J.

1. By means of this appeal, the appellant has challenged the judgment and order dated 30-12-1983 passed by II Extra Additional Sessions Judge, Satara in Sessions Case No. 33 of 1983, convicting and sentencing him to undergo imprisonment for life under section 302 I.P.C.

2. The deceased Shalan was the wife of the appellant. The evidence is that they were married about 11/2 years prior to the incident. It is alleged that the usual quarrels which take place between husband and wife also used to take place between them.

On 6-9-1982, at about 7 a.m. the appellant got up from his sleep and after answering the call of nature, asked Shalan to cook rice. At about 10 a.m. when he returned back from the locality, he censured her for cooking rice and began to assault her. Meanwhile, his sisters-in-law Chandrabhaga Gaikwad, P.W. 3 and Malan Gaikwad, P.W. 5 intervened but, he also assaulted them. Consequently, both of them went away. Thereafter, the appellant again beat Shalan. He took a sickle which was in his hut and thereafter inflicted a solitary blow with it on Shalan's person. As a result thereof, she became unconscious.

3. After the incident, Chandrabhaga and Malan took Shalan in a S.T. bus to the dispensary of Dr. Shrikrishna Garud, P.W. 2 in Wai, Satara. The evidence of Dr. Garud P.W. 2 is that at 12.30 p.m. he medically examined Shalan and found on her person a cavity deep injury of the dimensions of 3" x 1/2" situated between 8th and 9th ribs.

Dr. Garud opined that the said injury had been inflicted within 6 hours and was attributable to a sharp cutting instrument. On being shown the sickle (Article No. 1, he stated that it could be caused by it.

4. Since the condition of Shalan was precarious, Dr. Garud advised that she be shifted to Civil Hospital, Satara. However, the evidence is that instead she was shifted to the hospital of Dr. Suresh Karale, P.W. 4 in Wai, itself. Evidence of Dr. Karale is that the same day at 3 p.m. Shalan was admitted in his hospital. He found that she had sustained a sutured wound 3" in length between the 8th and 9th ribs.

It is said that in the mean time, P.W. 7 Mahalu Gaikwad and P.W. 8 Chima Kurhade, the uncle and father of Shalan respectively, reached Dr. Karale's Hospital and Shalan told them that the appellant had stabbed her.

5. Evidence of Dr. Karale is that he immediately informed the Wai Police Station. Evidence of PHC Waman Sakte, P.W. 12 is that at about 4.30 p.m. on 6-9-1982, he received a phone message from Dr. Karale that a women by the name of Shalan was admitted in his hospital. At that time, no other head

constable was present at Wai Police Station. Evidence of PHC Sakte is that between 5 p.m. to 6 p.m. PHC Pawar P.W. 13 came and he directed him to go to Dr. Karale's Hospital and record an F.I.R.

6. Evidence of PHC Pawar, P.W. 13 is that on the instructions of PHC Sakte, he went to Dr. Karale's Hospital and there recorded Shalan's F.I.R. In the said F.I.R., Shalan stated that the appellant had inflicted a solitary sickle blow on her person.

PHC Pawar stated that Shalan was in a fit mental condition and when he recorded her statement, the Medical Officer Dr. Karale was present. He also stated that the doctor has put his signatures on the F.I.R..

Evidence of PHC Sakte is that at about 7.15 p.m. PHC Pawar, returned with the F.I.R. On the basis of the F.I.R., PHC Sakte registered C.R. No. 87 of 1982. The F.I.R. is at Exh 48.

6A. Evidence of PHC Sakte further is that he sent a yadi to the Tahsildar and Executive Magistrate, to record the dying declaration of Shalan.

7. P.W. 11 Balasaheb Gandhale, the Tahsildar and Executive Magistrate stated that on 6-9-1982, he had received a yadi of PSO of Wai Police Station for recording the dying declaration of Shalan. He further stated that between 8.30 p.m. to 9 p.m. he went to Dr. Karale's clinic in Wai. He found a women Shalan in a tempo on the verge of being removed to Civil Hospital, Satara. His evidence is to the effect that he obtained a certificate from Dr. Karale about the condition of Shalan since he wanted to record her statement. The said certificate is Exhibit 42 and was given by Dr. Karale at 9 p.m. It reads:

"This is to certify that Mrs. Shalan Dada Gaikwad (Res. of Bavdhan age 19 years) is fully conscious and in a position to give the statement."

Since the dying declaration recorded by the Tahsildar Magistrate is the sheet-anchor of the prosecution evidence, we are extracting it verbatim. The said dying declaration which is in question and answer form reads thus:-

Dying declaration S.C.No.33/83 Proved and exhibited.

12-12-83 S/d A.V.Karnik II,E.A.S.J.

Que : What is your name?

Ans : Shalan Que : Full name Ans : Shalan Dada Gaikwad Que : What is your husband's name?

Ans : Dada Que : What is age?

Ans : 19 Que : Who has beaten you?

Ans : Husband Que : When beaten?

Ans : At 10 Oclock Que : By what means beaten?

Ans : Sickle Que : At what village?

Ans : Bavdhan Que : Why beaten?

Ans : On account of cooking. He said me, first cook rice. Then he came from v

Then beaten me.

Que : Do you wish to say anything else?

Ans : Now I am unable to speak, I am illegible.

Que : Have you answered at your own accord, which I have questioned you?

Ans : No, what happened has been told.

Que : Is all that true what you have replied?

Ans: : No. I have given in writing the St. is true and correct and I have put

Time : At 9 at night.

LTM Shalan Dada Gaikwad.

Place:

Mr.. Dr. Karale's Hospital at Wai Municipality. Wai

dt: 6-9-82.

I have recorded her St. on 6-9-82 at about 9 p.m. at Wai and signed on it.

S/d B.K. Gondhale,

EM & Tahsil, Wai"

According to the prosecution, Shalan was shifted to Civil Hospital, Satara the same nigh

8. The autopsy on the dead body of Shalan was conducted by Dr. Avinash Ashtikar, P.W. 9, the Medical Officer of Civil Hospital, Satara. On the corpse, the doctor found the following external injuries:-

1. Operated wound over right paramedial about 5" in length, vertically.

2. Two separate wounds over both abdominal flanks for drainage tube, about 1/2" each.

3. Incised wound which was already stiched. This wound was about 2" in length over the right hypochondric area, obliquely situated.

Dr. Ashtikar opined that the first two injuries were a result of surgery and third was a ante-mortem injury. He also opined that the said injury could be caused by the sickle shown to him and was sufficient in the ordinary course of nature to cause death.

9. Investigation of the case was conducted by P.W. 13 PHC Pawar. The evidence is that on 7-9-1982, he prepared the panchanama of the scene of the incident and on 9-9-1982, in the presence of public panch, on the pointing out of the appellant, from the northern thatched wall of the hut of the appellant in Bavdhan, a sickle was recovered.

On 10-9-1982, the investigation was handed over to PSI Ghadge.

After completion of the investigation the appellant was charge-sheeted.

10. The case was committed to the Court of sessions in the usual manner. In the trial Court, the appellant was charged under section 302 I.P.C. and pleaded not guilty. The defence suggestion was that as a consequence of Shalan having fallen on a chisel or a sharped stone had sustained injuries which proved to be fatal. It is significant to point out that in defence, one witness namely Maruti Gaikwad D.W. 1, the father of the appellant was examined with the object of showing that he was of a tender age.

During the trial, the prosecution in all examined as many as 14 witnesses. It also tendered two dying declarations:

(a) that recorded by P.W. 11 Balasaheb Gandhale, Tahsildar and Executive Magistrate (Exh 43).

(b) F.I.R. of the victim (Exh 48) recorded by the PHC Pawar.

After recording the evidence adduced by the prosecution, statement of the appellant under section 313 Cr. P C., and hearing the learned Counsel for the parties, the learned trial Judge concluded that the prosecution had proved its case beyond reasonable doubt and consequently, convicted and sentenced the appellant in the manner stated in para 1.

11. We have heard Ms. Shirley Mazerollo for the appellant and Mr. S.R. Borulkar, Additional Public Prosecutor for the State of Maharashtra. We have also perused the depositions of the prosecution witnesses, the statement of the victim recorded by the Tahsildar Executive Magistrate and the F.I.R., both of which were tendered in evidence as dying declaration; statement of the appellant recorded under section 313 Cr.P.C., and the impugned Judgment. After giving our anxious consideration to the matter, we feel that this appeal deserves to be allowed in part. In our Judgment, instead of section 302 I.P.C., the appellant deserves to be convicted under section 304 Part II I.P.C.

12. In the instant case, there are three dying declarations, which in our judgment, bring home the guilt of the appellant beyond reasonable doubt.

First is the oral declaration deposed to by Malan Gaikwad, P.W. 7 and P.W. 8 Chima Kurhade uncle and father of the deceased respectively. The said dying declarations are said to have been made to them by Shalan in Dr. Karale's Hospital at Wai where they reached on receiving the news that she had been admitted. Their evidence is that Shalan told them that the appellant had stabbed her. Apart from assailing the said dying declarations, as having been deposed to by two highly interested witnesses Ms. Shirley Mazerello, Counsel for the appellant could point out no other flaw. The said submission of Ms. Mazerello will not come in our way of placing reliance on the oral dying declarations because, the law requires that the evidence of an interested person has only to be evaluated with caution and not mechanically rejected. We have exercised that caution in evaluating the testimony of both the witnesses and we find it reliable. Consequently, we placed reliance on the oral dying declarations deposed to by them.

12A. To our consternation, the learned trial Judge has made no reference to the evidence of the two oral dying declarations in the impugned judgment, and he has laboured under the impression that in the instant case there were only two dying declarations namely those in the form of F.I.R. and the statement of the victim recorded by the Tahsildar Executive Magistrate. We wish that the trial Judge should have been more careful.

13. We next come to the F.I.R. The evidence is that on 6-9-1982, at about 4.30 p.m. a telephone message was given by Dr. Karale to H.C. Waman Satke of Wai Police Station to the effect that Shalan had been admitted in his hospital. Pursuant to the said information, PHC Pawar was sent to the hospital. PHC Pawar recorded the F.I.R. per the dictation of Shalan at the said hospital in the presence of Dr. Karale . The F.I.R. bears the signature of Dr. Karale. The prosecution case which we have given out (in para 2 of our judgment) in respect of the main incident is based on the recitals contained in the F.I.R.. In brief, the F.I.R. reads that on 6-9-1982, at about 7-7.30 A.M. after answering the call of nature, the appellant told Shalan to make rice and at about 10 a.m. when he returned to the house, he reprimanded her for making it. A quarrel took place between him and her on this issue. He also assaulted her. His sisters-in-law Chandrabhaga and Malan intervened He also

assaulted them. Thereafter, he took out a sickle from the hut and inflicted a solitary blow with the same on her.

13A. We have no hesitation in observing that the averment in the F.I.R. to the effect that prior to inflicting a sickle blow on Shalan, the appellant assaulted her, is doubtful. The consistent medical evidence is that Shalan had sustained a solitary injury of the dimensions of 3" x 11/2 x cavity deep, between the 8th and 9th ribs attributable to a sickle. It reveals no other injury on her person. Had Shalan been assaulted by the appellant prior to his inflicting a solitary sickle blow on her, the two medical witnesses would have found some other injury/injuries, on her person.

13B. But this does not mean that no reliance can be placed on the residual portion of the F.I.R. The same can be relied upon for the principle falsus uno falsus omnibus is not to be applied by us while evaluating evidence. We have to make every endeavour to separate truth from falsehood or to put in the time-honoured way the grain from the chaff only if it fails would the principle apply. The grain is that :- (a) on the date of the incident at about 10 A.M. a quarrel had taken place between the appellant and the deceased on the issue of cooking the rice; and (b) the said quarrel culminated in the appellant inflicting a solitary sickle- blow on her person.

Not only (a) and (b) are to be found in the dying declaration recorded by the Tahsilder Executive Magistrate but, the evidence of the medical witnesses is consistent on the point that the injuries of the deceased were attributable to the sickle shown to them. We accept the said grain. and brush aside the story of the appellant assaulting Shalan prior to his inflicting a sickle blow on her as chaff.

14. We are implicitly satisfied that the dying declaration which is in the form of F.I.R. to the extent mentioned in the preceding paragraph is reliable. There is no infirmity in it which would militate against the meat of the prosecution case. So long as the core of the prosecution case is true, it hardly makes any difference if there are some exagerrations' on its fringes. There was no plausible reason for Shalan to falsely implicate the appellant who was her own husband and that too on a murder charge.

We are not impressed with Ms. Mazerollo's submission that since quarrels used to take place between the deceased and the appellant the latter may have been falsely implicated by her. We have examined the evidence on record and we find that the said quarrels were the usual ones which take place between every couple. There is nothing to indicate that there was no love lust between the appellant and Shalan.

15. In our view, the F.I.R. is sufficient for sustaining the conviction of the appellant.

16. We now take up the dying declaration recorded by P.W. 11 Balasaheb Gandhale, the Tahsildar and Taluka Executive Magistrate. In paragraph 7 of our judgment, we have extracted the said dying declaration in entirety. We find that the same inspires confidence. The evidence of the Taluka Executive Magistrate is that the doctor had testified that the victim was in a fit condition to make a statement and only thereafter he had recorded the dying declaration. Dr. Karale in front of whose hospital, inside a tempo, this dying declaration was recorded has given a certificate (Exhibit 42) at 9

p.m. that the victim was in a fit condition to make the statement.

The said dying declaration clinches the involvement of the appellant as the murderer of the deceased. It shows that he killed her by inflicting a sickle blow on her person as a sequel to the quarrel which had taken place between him and her on the issue of cooking rice. The medical evidence shows sickle injuries on the deceased. In our judgment, unless the dying declaration was voluntarily made by the victim, the Taluka Executive Magistrate would not have falsely stated the deceased made a statement incriminating the appellant in his presence. After all, he had no animous or axe to grind against the appellant. For the same reason Dr. Karale would not have stated that the victim was in a fit condition to make the statement.

Ms. Mazerello could not point out any infirmity in it which could persuade us to reject it.

17. In our view, the dying declaration recorded by the Tahsildar Executive Magistrate inspires implicit confidence.

18. For the said reasons, in our view, the evidence in the form of the three reliable dying declarations is sufficient to clinch the involvement of the appellant in the instant crime. We accept the said evidence.

19. We would straight away like to point out that the defence suggestion referred to in paragraph 10, is a tissue of lies. Not only is it belied by the three dying declarations which we have accepted but, also by the evidence of Dr. Karale P.W. 4 who during cross examination, in paragraph 2, stated "this injury is not possible if a person standing falls on the chisel or a sharp- cutting pointed stone lying vertically on the ground."

Ms. Mazerello strenuously urged that the defence suggestion inspires confidence for two reasons:-

(a) the autopsy surgeon Dr. Ashtikar stated during cross-examination, in paragraph 4, that the injury of the deceased was possible in the manner suggested by defence; and

(b) both Dr. Garud and Dr. Karale have mentioned in the case history that the victim got injured while working on a road.

19A. The learned trial Judge in paragraph 17 of the impugned judgment has rightly rejected this defence. He has observed that Dr. Karale had stated that the relations of the victim had given the case history and not the deceased. The evidence is that Chandrabhaga and Malan, both sisters-in-law of the appellant (wives of his brothers) were present at Dr. Karale's hospital. Naturally, they would have tried to save the appellant. The trial Judge has also not relied upon Dr. Garud's statement because Dr. Ashtikar, P.W. 9 has stated that Shalan had given him the history of assault with a sickle by her husband.

It may be that during cross examination, Dr. Ashtikar admitted of the possibility of the injury being caused in the manner suggested by the defence. But, that does not necessarily mean that the defence

case is true. In fact the position is converse. We are not inclined to accept the defence suggestion for the reasons mentioned above. To repeat, in the absence of any plausible reason for the deceased to falsely implicate the appellant, she would not have falsely nominated the appellant in the three dying declarations if she was accidently injured. Hence, we reject the said suggestion of the defence.

20. The solitary question which remains is as to what is the offence made out. Ms. Mazerello contended that no offence under section 302 I.P.C. was established, and only one under section 304 Part II was made out. On the contrary, Mr. Borulkar, Additional Public Prosecutor contended that in as much as there was a background of sour relationship between the appellant and the deceased and prior to the assault on the deceased, he had quarrelled with her and assaulted her, an offence under section 302 I.P.C. alone is made out. In paragraph 13A of our judgment, we have given our reasons as to why we are not inclined to accept Mr. Borulkar's submission that prior to the appellant inflicting a sickle blow on the deceased, he had also assaulted her. To repeat, our reasoning is that the medical evidence shows that only one injury which was 3" x 1/2" x cavity deep situated between the 8th and 9th ribs attributable to a sickle blow was found on the person of the deceased by the doctor.

21. What appears to us is that on the issue of cooking rice, an altercation took place between the appellant and the deceased in the heat of which, the appellant inflicted a solitary sickle blow on Shalan's person.

Mr. Borulkar, tried to make capital out of the fact that the F.I.R. mentions that the appellant took the sickle from his hut and thereafter, inflicted a solitary blow with the same on Shalan. The fallacy in his submission is that he has overlooked the circumstance that the entire incident which took place in the hut was a part of the same transaction. There was no time for the passions of the appellant to cool down. Since the entire incident took place therein, the appellant must have picked up the sickle from the hut and hence , this circumstance would not aggravate the gravity of the offence committed by him.

22. On the finding recorded by us in the preceding paragraph an offence under section 304 Part II I.P.C. would be made out against the appellant. There is no getting away from the fact that when in the circumstances indicated in paragraph 21, the appellant inflicted a solitary sickle blow on the person of Shalan, he had the knowledge of her death contemplated by clause thirdly of section 299 I.P.C., the breach of which is punishable by Part II of section 304 I.P.C.

23. Our view is fortified by two decisions of the Apex Kulwant Rai. Appellant v. State of Punjab..Respondent, and Jawahar Lal and another..Appellants v. State of Punjab. Respondent.

In (supra) the facts were that a short quarrel between the appellant who was aged about 20 years and the deceased preceded the appellant inflicting a solitary dagger blow on the epigastrium region of the deceased. In such a situation, the Apex Court held that clause thirdly of section 300 I.P.C. will not apply because, bearing in mind the circumstances in which the incident took place, it could not be said that the appellant intended inflicting the injury which he actually inflicted.

In the decision (supra) the facts were that the appellant who was aged about 19 years inflicted a dagger blow on the left side of the chest of the deceased Darshan Singh, to which he succumbed practically immediately. Before the Supreme Court, it was contended on behalf of the State that the act of the accused fell within the ambit of clause thirdly of section 300 I.P.C. The Supreme Court in para 15, repelled the said contention on the ground that if following a trivial dispute, the accused who was aged about 19 years, inflicted a solitary blow with a knife which landed on the chest of the deceased, it could not be said that he intended inflicting the injury which he inflicted within the terms of Clause thirdly of section 300 I.P.C. The Supreme Court observed in the said para thus:-

"Merely because the blow landed on a particular spot on the body, divorced from the circumstances in which the blow was given, it would be hazardous to say that the 1st appellant intended to cause that particular injury."

24. The said decisions are squarely applicable on the facts of this case. The evidence leads to the impression that it was the quarrel which had taken place on the spur of the moment between the appellant and Shalan over the issue of cooking of rice, which instantaneously culminated in the appellant inflicting a solitary sickle blow on her person. Hence, he would be guilty for an offence under section 304 Part II I.P.C. only.

25. The only question which survives is that pertaining to sentence. The evidence is that the appellant was aged about 18 years at the time of the incident. Bearing in mind, this fact and the over all circumstances, in our view the ends of justice would be squarely satisfied if the appellant is sentenced to undergo five years R I for the offence under section 304 Part II I.P.C.

26. In the result, this appeal is partly allowed and partly dismissed.

Although we set aside the conviction of the appellant under section 302 I.P.C. and the sentence of imprisonment for life awarded to him thereunder and acquit him on that count but we find him guilty for an offence punishable under section 304 Part II I.P.C., instead and sentence him to undergo five years RI thereunder. The appellant is on bail. He shall be taken into custody forthwith to serve out his sentence.

Before parting with this judgment, we would like to record our appreciation for the assistance rendered to us by the learned Counsel for the parties, in the disposal of this appeal.

In case an application for a certified copy of this judgment is made, the same shall be issued at an early date.