Raju Devade vs State Of Maharashtra on 29 June, 2016

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Bench: Ashok Bhushan, Abhay Manohar Sapre

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1012 OF 2008

RAJU DEVADE ... APPELLANT

VERSUS

STATE OF MAHARASHTRA ... RESPONDNET

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed by the appellant against the judgment of the High Court of Bombay dated 13.04.2007, dismissing the appeal filed by the appellant against the judgment of the Sessions Judge. The Sessions Judge had convicted the appellant for an offence under Section 302 IPC and sentenced him to undergo life imprisonment.

2. The prosecution case in nutshell is, Baby a girl of 18 years was residing at Mehkar with her parents, sister and brother. On 04.03.1989 in late evening, she was alone at house. Her parents had gone out and her brother and sister had gone to watch an evening movie. At about 9.30 pm when her brother Dilawarsha returned to the house from movie, he saw Baby in flames in bushes near the house. Dilawarsha used a quilt to put off the fire and thereafter on a push-cart took Baby to Rural Hospital, Mehkar. There being no doctor available, waterman Narayan Mahure and maid-servant Smt. Magar took the Baby in the hospital and cleaned her wounds and administered I. V. saline.

3. Police Sub-Inspector Meghrajani immediately came to the hospital and met the Baby. Baby gave a statement before the police Sub-Inspector that she was having a love affair with one Raju who was residing nearby. She was pregnant, she had pregnancy of two months but the same was aborted. She asked Raju to marry her. At 9.00 pm she saw Raju in the bye-lane by side of her house. On seeing him she again asked him to marry her. Raju poured kerosene on her person and then set her on fire with a burning match- stick. Police Sub-Inspector recorded the oral statement on which left thumb impression of Baby was also put.

4. On the basis of the above oral statement, a case No. 63/89 was registered for an offence punishable under Section 307 IPC. On a requisition sent by Police Sub-Inspector one Ramesh Giri the Executive Magistrate, Mehkar came to the Rural Hospital and in the presence of two employees of the Rural Hospital Narayan Mahure and Smt. Magar recorded the dying declaration of the Baby. Baby had also put her thumb impression on the dying declaration.

5. The Executive Magistrate sealed the dying declaration and sent it to the police. After recording the dying declaration Baby was shifted to the District Hospital, Buldhana. On 05.03.1989 one another Executive Magistrate, namely, Narayan Tandale came to hospital and recorded a dying declaration in his own words. In the statement it was noted that due to burns thumb impression could not be put by Baby.

6. On 9.03.1989 Baby died in the hospital. On the same day one doctor, Ashok Surushe, Medical Officer conducted autopsy on the dead body. The criminal case was converted under Section 302 IPC. Accused was put on trial before the Sessions Judge. Prosecution produced seven witnesses and certain documentary evidences. On behalf of the defence only one witness, Shri Narayan Tandale Naib Tehsildar/Executive Magistrate was produced.

7. Learned Sessions Judge after hearing the parties and considering the entire evidence on record found that it was accused who had put the deceased on fire. The statement of Baby recorded by the Police Sub- Inspector was treated as dying declaration. Dying declaration recorded by Mr. Ramesh Giri Naib Tehsildar/Executive Magistrate on 04.03.1989 was found acceptable. Sessions Judge rejected the dying declaration recorded on 05.03.1989 by Shri Narayan Tandale. The case put up by the defence that death took place on account of chimney (kerosene lamp) falling on the Baby while she was sleeping and death was by accident, was not accepted.

8. An appeal was filed by the accused before the High Court. After elaborately considering the submission and the grounds raised in appeal, the High Court maintained the conviction. Aggrieved by the judgment, this appeal has been filed.

9. We have heard the learned counsel for the parties and perused the record. Learned counsel for the appellant in support of the appeal contends that there being three dying declarations on the record, it was unsafe for courts below to rely on the first two dying declaration. The third dying declaration which was recorded by the Executive Magistrate which also had certificate of doctor ought to have been relied by the courts below wherein the victim had exonerated the accused from any role and it was stated by the victim that she caught fire from chimney (burning lamp) which was hanging against the wall.

10. It is submitted that when there is inconsistency between the two dying declarations as a rule of caution the court has to take the dying declaration with caution and in view of the third dying declaration recorded on 05.03.1989 the prosecution theory falls on the ground.

11. It is further submitted that the oral evidence of PW 4 Dilawarsha was relied, which contained the contradictions and omissions. The Dilawarsha being brother of the victim was terribly interested

witness. The victim Baby was not able to give the surname of the accused. Neither in the statement of the Dilawarsha nor in the dying declaration of the deceased anywhere accused has been named. Also there is no independent witness to show that accused had any connection with the said Baby. The truth is that deceased Baby was sleeping in her house, a chimney (kerosene lamp) hanging against wall fell on the Baby as a result of which she caught fire, thus the case was one of the accidental death.

12. PW 5 S. K. Manwar did not support the panchnama of the spot. As per the dying declaration of Baby, she was married to the accused four/five months before whereas PW 4 Dilawarsha has stated that accused was not married with Baby.

13. Learned counsel appearing for the State has supported the judgment of the High Court as well as of the Sessions Judge. It is submitted that courts have not committed any error in relying on the dying declaration. For relying on the first two dying declarations of deceased cogent reasons have been given by the learned Sessions Judge and the High Court. There were valid reasons for not accepting the third dying declaration recorded on 05.03.1989.

14. Learned counsel for the parties has also placed reliance on the judgments of this court which shall be referred to hereinafter.

15. The present is the case where both the Sessions Judge and the High Court have relied on the dying declaration made by the victim. It has come in the statement of the PW 4 that when he returned from the movie alongwith his younger sister at about 9.30 pm, he heard the cries of his sister, he put off the fire by using the quilt which was lying there for drying. He on a push-cart took Baby to the Rural Hospital.

16. The Police Sub-Inspector Meghrajani arrived at the hospital immediately and met the victim and took her oral statement. In the oral statement which was duly signed by victim, she clearly stated that it was Raju the accused who poured kerosene on her and set her on fire with a burning match-stick. Police Inspector had already sent a requisition to the Executive Magistrate before going to the Rural Hospital and an Executive Magistrate Ramesh Giri on same day at about 11.30 pm recorded the dying declaration. Dying declaration is in question answer form and answers were recorded in own language of Baby. The doctor being unavailable, both the employees of the Rural Hospital were present and in their presence the dying declaration was recorded by the Executive Magistrate Giri.

17. Sometime after recording the dying declaration, the Baby was shifted to district hospital, Buldhana. On 05.03.1989 another Executive Magistrate DW 1 came and recorded the dying declaration. The dying declaration recorded by Shri N. P. Tandale as is clear from his statement made before the court that dying declaration was recorded in his own words by Shri Tandale and was not in question answer form. The dying declaration recorded by Shri Tandale also does not bear the thumb impression of the deceased. It was mentioned in the dying declaration that thumb is sustaining burns and hence thumb impression cannot be obtained. In the dying declaration which was given to Shri Tandale, deceased is claimed to have said that when she was sleeping in the house

chimney (kerosene lamp) which was hanging against the wall fell on her body as a result of which she caught fire. She shouted and her brother came and extinguished the fire.

18. After examining the entire evidence on record, the cogent reasons were given by learned Sessions Judge for not accepting the dying declaration recorded by Shri Tandale. It is useful to refer the observations made by the learned Sessions Judge at para 28 of the judgment. It is to the following effect:

> "The circumstances brought on record also do not indicate statement recorded by Shri Tandale might be true. I have already pointed out that Dilawarsha and Rani had gone to cinema show. Mother of Baby had gone to her mother, while father of Baby was not at home. The time was only 9 pm. It was not time for had especially when other family members were not at home. Them why Baby should go to bed so early and how the accident should take place. Furthermore, the evidence brought on record indicates that Baby was outside her house near the bushes. The statement recorded by Shri Tandale indicates that she was inside the house when her brother put off the fire. This circumstance also indicates that Shri Tandale has recorded the statement as per his own whims and not as per the statement made by Baby. No reliance can be placed on evidence of Shri Tandale and Ex. 59 cannot be treated as dying declaration of Baby. It has to be discarded."

19. Before we proceed further it is relevant to refer to principles enunciated by this court with regard to a case where there is more than one dying declaration. Learned counsel for the appellant has relied on judgment of this court in Bhupan versus State of Madhya Pradesh, 2002 (2) SCC 556.

20. In the above case, there was only one dying declaration in which name of the appellant was mentioned with wrong caste. The court convicted the accused rejecting of almost all evidences produced by prosecution, however, reliance was placed on the said dying declaration only against the appellant exonerating all other accused. The court held that the dying declaration as it was, there being difference as to the description of assailant which creates doubt on the identification of the assailant hence it was not safe to rely on the said dying declaration.

21. In the above case following reasons were given by the court for not placing reliance on the dying declaration.

"If, as a matter of fact, the deceased knew the appellant then he would not have committed the mistake of mentioning the wrong caste which throws an element of doubt about his knowledge as to the possibility of the deceased having identified the appellant. In this regard, learned counsel for the appellant placed reliance on the judgment of this Court in the case of Bholaprasad v. State of Maharashtra1 wherein in a similar case of identification by a region from where the accused came, this Court held that the difference pointed out as to the description of the assailant was a material difference casting doubt on the identification of the assailant. Therefore, we are of the considered opinion that it is not safe to rely on this dying declaration to base a conviction, if this piece of evidence is eschewed from consideration, then the mere fact of the prosecution having recovered a

sword at the instance of the appellant, on facts and circumstances of this case, would not permit us to base a conviction under Section 302 IPC in the background of the fact that almost all other evidences produced by the prosecution are disbelieved by the courts below."

22. In the facts of the above case, the court has observed that it is not safe to rely on the dying declaration which caused doubts on the identity of the accused. Thus above case, in no manner, helps the appellant.

23. Another case which is relevant is State of Punjab versus Parveen Kumar, 2005 (9) SCC 769. The test for relying on a dying declaration in a case where there is more than one dying declaration has clearly been laid down by this court in para 10 following was observed:

> "The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declarations. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested."

24. An elaborate consideration of whole issue in context of multiple dying declarations was examined by this court in Sudhakar versus State of Madhya Pradesh, 2012 (7) SCC 569. In para 1 of the judgment this court noted the issue. Following was observed in para 1:

> "An important question of criminal jurisprudence as to in a case of multiple variable dying declarations, which of the dying declarations would be taken into consideration by the court, what principles shall guide the judicial discretion of the court or whether such contradictory dying declarations would unexceptionally result in prejudice to the case of the prosecution, arises in the present case."

25. In the above case the accused was married to deceased Ratanmala. Prosecution case was that on 25.7.1995 there was heated arguments between husband and wife and the accused poured kerosene on her and put her ablaze by lighting match-stick. People living nearby came to the house, seeing the smoke and finding Ratanmala in burning condition took her to the hospital.

26. The Naib Tehsildar DW 1 recorded the first dying declaration at 04.35 pm on same day. In the first dying declaration, she did not implicate her husband but in second and third dying declaration, which were also recorded on the same day she clearly stated that accused poured kerosene on her and sat her on fire. The accused was convicted under Section 302 Cr. P.C., he in his statement under Section 313 Cr. P.C. stated that his wife Ratanmala died in a fire accident. In the above context, this court proceeded to examine the test in case of multiple dying declarations. It is useful to refer to para 21, 22 & 23:

"21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the court in such matters." "22. In Lakhan this Court provided clarity, not only to the law of dying declarations, but also to the question as to which of the dying declarations has to be preferably relied upon by the court in deciding the question of guilt of the accused under the offence with which he is charged. The facts of that case were quite similar, if not identical to the facts of the present case. In that case also, the deceased was burnt by pouring kerosene oil and was brought to the hospital by the accused therein and his family members. The deceased had made two different dying declarations, which were mutually at variance. The Court held as under:

(SCC pp. 518-19 & 522-24, paras 9-10, 23-24, 26 & 30) "9. The doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means 'a man will not meet his Maker with a lie in his mouth'. The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as 'the Evidence Act') as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants.

Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon." "The second dying declaration was recorded by Shri Damodar Prasad Mahure, Assistant Sub-Inspector of Police (PW 19). He was directed by the Superintendent of Police on telephone to record the statement of the deceased, who had been admitted in the hospital. In that statement, she had stated as under:

> 'On Sunday, in the morning, at about 5.30 a.m., my husband Lakhan poured the kerosene oil from a container on my head as a result of which kerosene oil spread over my entire body and that he (Lakhan) put my sari afire with the help of a chimney, due to which I got burnt.' She had also deposed that she had written a letter to her parents requesting them to fetch her from the matrimonial home as her husband and in-laws were harassing her. The said dying declaration was recorded after getting a certificate from the doctor stating that she was in a fit physical and mental condition to give the statement." "As per the injury report and the medical evidence it remains fully proved that the deceased had the injuries on the upper part of her body. The doctor, who had examined her at the time of admission in hospital, deposed that she had burn injuries on her head, face, chest, neck, back, abdomen, left arm, hand, right arm, part of buttocks and some part of both the thighs. The deceased was 65% burnt. At the time of admission, the smell of kerosene was coming from her body." * * * "Undoubtedly, the first dying declaration had been recorded by the Executive Magistrate, Smt Madhu Nahar (DW 1), immediately after admission of the deceased Savita in the hospital and the doctor had certified that she was in a fit condition of health to make the declaration. However, as she had been brought to the hospital by her father-in-law and mother-in-law and the medical report does not support her first dying declaration, the trial court and the High Court have rightly discarded the same." * * * "Thus, in view of the above, we reach the following inescapable conclusions on the questions of fact:
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> (c) The second dying declaration was recorded by a police officer on the instruction of the Superintendent of Police after getting a certificate of fitness from the doctor, which is corroborated by the medical evidence and is free from any suspicious circumstances. More so, it stands corroborated by the oral declaration made by the deceased to her parents, Phool Singh (PW 1), father and Sushila (PW 3), mother." "23. In Nallam Veera Stayanandam v. Public Prosecutor this Court, while declining to accept the findings of the trial court, held that the trial court had erred because in the case of multiple dying declarations, each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more

than one dying declaration, it is the duty of the court to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs."

27. This court had clearly laid down that the each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider the each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs.

28. It is also relevant to refer to judgment of this court in Ranjit Singh and others versus State of Punjab, 2006 (13) SCC 130 wherein this court has clearly laid down that the conviction can be recorded on the basis of the dying declaration alone if the same is wholly reliable. In the event, if there are suspicions as regards to the said dying declaration, the court should look for some corroborating evidences. Court has further observed that in the event of inconsistencies in the dying declarations the court should lean towards the first dying declaration. Following was observed in para 13:

"It is now well settled that conviction can be recorded on the basis of a dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the courts in arriving at the judgment of conviction shall look for some corroborating evidence. It is also well known that in a case where inconsistencies in the dying declarations, in relation to the active role played by one or the other accused persons, exist, the court shall lean more towards the first dying declaration than the second one."

29. Learned counsel for the appellant has also referred to Prem Kumar Gulati versus State of Haryana and another, 2014 (14) SCC 646, to buttress his submission that even if, dying declaration is not in a question answer form same cannot be rejected. In the present case, it is relevant to note that the third dying declaration recorded by Shri Tandale was not in question answer form. It is true that this court in the above case has laid down that merely because dying declaration was not in question answer form sanctity attached to dying declaration cannot be brushed aside nor its reliability can be doubted.

30. The Sessions Judge has rejected the third dying declaration not merely on the ground that it was not recorded in the question answer form but the Sessions Judge has given other valid reasons for not accepting the third dying declaration as has been extracted above.

31. From the evidence on record, it is clear that all the witnesses including PW 1 doctor Ashok Surushe who carried the autopsy of the dead body supported that

> deceased died of burns. The case which was put up by the defence was that the death was on account of the accidental fire which was caught by falling of chimney (burning lamp) on the body of the Baby while she was sleeping in the house.
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> 32. As noted above, within an hour of incident on 04.03.1989 that is as soon as the Baby arrived at the Rural Hospital at about 10/10.30 pm police inspector came and took her oral statement in which she clearly stated that it was Raju who poured kerosene oil on her body and ignited the match-

stick. Baby the deceased in her oral statement as well as in her dying declaration recorded by Shri Ramesh Giri has also stated the motive of the accused.

33. It has come on the evidence of PW 4 Dilawarsha that the Baby, her sister was having a love affair with Raju the accused. She was pregnant and she asked Raju to marry her. On the day of the incident, she met Raju and repeated her request to him to marry her. Raju who was carrying a tin of kerosene then poured kerosene on Baby to finish her since he never wanted to live with Baby and wanted to keep her out from his life.

34. The doctor in her statement has recorded about 72 per cent burns. The theory of burn being caused by chimney (burning lamp) has rightly been rejected by courts below by giving cogent reasons.

35. We are not inclined to take any different view to one which has been taken by both Sessions Judge and the High Court rejecting the case of the defence that it was a case of accidental death caused by falling of the chimney (burning lamp).

36. The dying declaration recorded by Executive Magistrate was witnessed by two employees of the hospital, who were present at the relevant time. There being no certificate of the doctor on 04.03.1989 is of no consequences since it has come in the evidence that doctor was not present at the time when victim was taken to the hospital and there were only two employees i.e. a waterman and a maid-servant who were present in the Rural Hospital and attended the victim. The High Court has expressed its anguish regarding working of the Rural Hospital, Mehkar. High Court was fully justified in expressing its anguish over the working of the Rural Hospital, Mehkar where no trained Para-medical Staff/Medical Staff was available to attend the patient.

37. Thus submission of learned counsel for the appellant that in view of the third dying declaration in which accused was exonerated no reliance could have been placed on dying declaration recorded by Shri Giri the Executive Magistrate, is not acceptable for the reasons as noted above. The court below observed that there was no occasion of implicating the accused by the Police Inspector since there is nothing to indicate that he had any grudge against the accused or even the accused was known to the police inspector.

38. Oral statement of victim was recorded by the police on 04.03.1989 which followed by recording of dying declaration by the Executive Magistrate in which same statement was made by victim

implicating the accused of the crime. In the facts and circumstances of the case the conviction has rightly been recorded relying on the dying declaration of the deceased recorded by Executive Magistrate Giri.

39. The death has been caused by burn injuries, which is proved on record. The theory put up by the defence that it was accidental death having been rightly rejected and the prosecution by cogent evidences having proved the prosecution case both Sessions Judge and the High Court have rightly convicted the accused of offence under Section 302 IPC. We do not see any merit in the appeal. The appeal is dismissed.

.....J. (ABHAY MANOHAR SAPRE) .....J. (ASHOK BHUSHAN) NEW DELHI;

JUNE 29, 2016.