

Bombay High Court

Sanjay S/O. Dadarao Babar vs The State Of Maharashtra Thr. The ... on 5 December, 2017

Bench: Ravi K. Deshpande

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THE HIGH COURT OF JUDICATURE AT BOMBAY  
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 91 OF 2017

Sanjay S/o Dadarao Babar  
Aged 42 years, Occ. labour,  
R/o. Takli Talao, Tq. Khamgaon,  
District Buldhana.

VERSUS

The State of Maharashtra,  
Through the Police Station Officer,  
Police Station, Pimpalgaon Raja, Tq.  
Pimpalgaon Raja, District Buldhana.

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Shri N. A. Badar, Advocate for the appellant  
Mrs. M. H. Deshmukh, Additional Public Prosecutor for the respondent  
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CORAM : R. K. DESHPANDE AND  
M. G. GIRATKAR, JJ.

Date of reserving the judgment : 22/11/2017.

Date of pronouncing the judgment : 05/12/2017 Judgment (Per : M.G. Giratkar, J) The appellant was charge-sheeted for committing murder of his wife before the Additional Sessions Judge, Khamgaon, District Buldana. The appellant is convicted for the offence punishable under Section 302 of the Indian Penal Code vide judgment dated 5-11-2016 by 2 jg.apel.91.17.odt the Additional Sessions Judge, Khamgaon. The appellant is sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 5,000/- in default to suffer simple imprisonment for 15 days. The appellant has challenged the judgment of conviction in the present appeal.

2. The case of the prosecution against the appellant in short is as under.

(i) On 2-10-2014, Police Head Constable Chaudhary (P.W. 1), Police Station, Pimpalgaon Raja received telephonic message that at New Village Takli Talao, one Laxmi Sanjay Babar was injured due to burn. He along with staff rushed there. He found one lady lying in burn/ injured condition. With the help of villagers, they brought injured up to Village Bhalegaon in auto-rickshaw. They had already called an ambulance. The said ambulance met on the road near Bhalegaon. They shifted injured in the ambulance and taken her to Civil Hospital, Khamgaon. During the journey from

Bhalegaon to Khamgaon, P.W. 1 enquired injured/burn patient about the incident. She told that "her husband Sanjay Babar demanded money from her for gambling. But she refused. The accused got annoyed. He took lamp (chimney) of kerosene. He poured kerosene on her person and thereafter set her on 3 jg.apéal.91.17.odt fire by a match stick." After admitting injured in the hospital, he requested Executive Magistrate to record her dying declaration. Executive Magistrate recorded dying declaration. He received dying declaration, went to Police Station, Pimpalgaon Raja and registered crime for the offence punishable under Section 307 of the Indian Penal Code against the accused.

(ii) A.P.I. Vanjari (P.W. 7) investigated the crime. He arrested accused, visited the spot of incident, prepared spot panchanama, Exhibit 19, recorded statements of witnesses those who extinguished the fire of victim. Thereafter he went to Civil Hospital, Khamgaon on 8-10-2014 and recorded statement of victim/dying declaration (Exhibit 65). Injured Laxmi died on 10-11-2014. Postmortem was conducted by Dr. Morey (P.W. 8). Offence punishable under Section 302 of the Indian Penal Code was added and after complete investigation, filed the charge-sheet against the appellant before the Judicial Magistrate First Class. The same was committed for trial to the Court of Sessions, Khamgaon.

(iii) Charge was framed by the trial Court at Exhibit 7. The appellant pleaded not guilty and claimed to be tried. The prosecution has 4 jg.apéal.91.17.odt examined following 8 witnesses.

(1) P.W. 1 Shri Gajanan Rambhau Chaudhary (Exhibit 15) (2) P.W. 2 Sopan Pandurang Sawant (Exhibit 18) (3) P.W. 3 Shobhabai Pandurang Sawant (Exhibit 20) (4) P.W. 4 Shri Rajendra Sukhdeo Ingle (Exhibit 23) (5) P.W. 5 Dr. Nilesh Ramesh Tapare (Exhibit 26) (6) P.W. 6 Dr. Riddhi Hatiwala (Exhibit 30) (7) P.W. 7 Shri Panjab Sukdeorao Vanjari (Exhibit 36) and (8) P.W. 8 Dr. Suhas Kashinath Morey (Exhibit 51)

(iv) Learned trial Court come to the conclusion that dying declarations stated by deceased are consistent and, therefore, on the basis of dying declarations, convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code. Being aggrieved by the judgment of conviction, present appeal is filed.

3. Heard learned counsel Shri Badar for the appellant. He has submitted that the dying declarations stated by P.W. 1, recorded by Executive Magistrate (P.W. 4) and dying declaration recorded by A.P.I. Vanjari are contradictory. All dying declarations are not reliable. Not a single independent witness examined by the prosecution. Defence witness no. 2 Subhash Chavre, real son of deceased has stated that his 5 jg.apéal.91.17.odt mother died due to burn injuries while cooking. She was engulfed in fire. At the time of incident, accused was out of village in search of employment. Appellant himself examined and stated that he was out of village at the time of incident.

4. Learned counsel for the appellant placed reliance on the judgment of this Court in the case of Munnabee w/o Shoukat Tadví Vs. State of Maharashtra reported in [2016(5) Mh.L.J.(Cri.) 637]. Learned counsel for the appellant has submitted that dying declarations stated by deceased are not reliable. Trial Court wrongly relied on the dying declarations stated by deceased and wrongly

convicted the appellant, at last, prayed to allow the appeal and the appellant be acquitted.

5. Learned Additional Public Prosecutor Mrs. Deshmukh for the State/respondent has submitted that though there are multiple dying declarations, those are consistent and voluntary. Dying declarations stated by deceased are reliable and, therefore, appellant is rightly convicted by the trial Court. Hence, appeal is liable to be dismissed. In support of her submission, she has pointed out decisions of Hon'ble Supreme Court in the cases of Raju Devade Vs. State of 6 jg.apeal.91.17.odt Maharashtra reported in AIR 2016 SC 3209 and Shudhakar Vs. State of Madhya Pradesh reported in (2012) 7 SCC 569.

6. While convicting the accused only on the basis of dying declaration, Court has to keep in mind the following cardinal principles laid down by the Hon'ble Supreme Court in the case of Khushal Rao vs. State of Bombay reported in AIR 1958 SC 22 :

"In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case."

7. Accused can be convicted only on the basis of dying 7 jg.apeal.91.17.odt declaration provided that it should be truthful and inspire confidence of the Court. If dying declaration creates doubt, then further corroboration is necessary.

8. In the present case, not a single independent witness is examined by the prosecution corroborating the dying declaration stated by deceased Laxmibai. There is no dispute that Laxmibai is second wife of appellant. As per the evidence of P.W. 1 PHC Chaudhary, he received information that one lady was burnt at New Village Takli Talao. Therefore, he along with staff went to the said village. He found Laxmi in injured/burn condition. He taken the injured/deceased to the Civil Hospital, Khamgaon.

9. P.W. 1 has stated that some villagers were with them while taking injured to the Civil Hospital, Khamgaon. He has stated that during the journey, she stated to him that her husband/ appellant

demanded money from her for gambling. She refused. The appellant got annoyed. He took lamp (chimney) of kerosene. Kerosene was poured on her person by the appellant and thereafter set her on fire by a match stick.

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10. Evidence in respect of oral dying declaration is altogether different than which was recorded by P.W. 4 Executive Magistrate Shri Rajendra Ingle (Exhibit 23). He has stated that on the request of police, he went to Civil Hospital, Khamgaon. He requested Medical Officer to certify about the fitness of patient. After receipt of certificate about the fitness, he started recording dying declaration. Injured stated before him that "on 2-10-2014 at about 10.00 to 11.00 a.m. she was at her residential house. At that time, her husband Sanjay Dadarao Babar accompanied other persons. They were playing cards below a tree. He was asking her for money for that purpose. She was told him that she was not having money, hence unable to give him. At that time her husband got annoyed and picked up a chidi (kerosene lamp) and poured kerosene from it on her person. Thereafter he took fire from the ovan (chul) and ablaze her. Her son, her daughter Asha and son Golya were in the house. They got frightened and shouted and thereby her neighbours came there and poured water on her person and extinguished the fire. Her husband asking money from her. He set her on fire. She has no suspicion against anybody." This dying declaration is at Exhibit 24.

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11. P.W. 7 API Shri Vanjari went to Civil Hospital, Khamgaon on 8-10-2014 and recorded her statement/dying declaration. She has stated before him that "on 2-10-2014 at about 11.00 a.m. her husband Sanjay Babar was playing gambling. He came to her and demanded money. She told that she was not having money. Her husband took out chidi (kerosene lamp) and poured kerosene on her person and set her on fire. That time, her children were present. Villagers extinguished fire."

12. Case of prosecution is solely based on two written dying declarations recorded by P.W. 4 Executive Magistrate and P.W. 7 API Vanjari and oral dying declaration stated by P.W. 1. In the first oral dying declaration stated by P.W. 1, she has stated that her husband poured kerosene and set her on fire by match stick. She has not stated in first oral dying declaration that appellant was playing gambling with others. She has not stated in first dying declaration that villagers extinguished the fire. As per the evidence of P.W. 1 he taken injured/deceased to Civil Hospital, Khamgaon. Villagers were also accompanied them. They travelled firstly by auto-rickshaw and thereafter by ambulance. It is pertinent to note that not a single 10 jg.apcal.91.17.odt independent person, who accompanied them, examined by the prosecution, to corroborate the version of P.W. 1.

13. Evidence of P.W. 4 Executive Magistrate Shri Ingle shows that he went to hospital on 2-10-2014 and recorded dying declaration, Exhibit 24 as stated by deceased. In this dying declaration, deceased has stated that her both sons and daughter were present. In first dying declaration, she has not stated about the presence of her children. Oral dying declarations stated by P.W. 1, written dying declaration, Exhibit 24 recorded by P.W. 4 and Exhibit 65 recorded by P.W. 7 are not consistent. In the first oral dying declaration, she has stated that appellant poured kerosene on her and set her on

fire by match stick. Whereas in Exhibit 24, she has stated that her husband poured kerosene on her person, thereafter taken fire from the ovan (chul) and set her on fire. In the third dying declaration, she has not stated by which means she was set on fire. In Exhibit 65, she has stated that her husband demanded money, when she refused, her husband poured kerosene by taking from the lamp and set her on fire. When there are multiple dying declarations, then it was the duty of the prosecution to examine independent witness. As per evidence on record villagers extinguished 11 jg.apéal.91.17.odt fire. They also accompanied deceased to hospital.

14. P.W. 2 is the panch witness of spot of incident. P.W. 3 Shobhabai Sawant has stated that she came to know about the incident. She heard noise of fire-fire, therefore, she rushed to the crowd. Laxmibai was found there in burn condition but she has not stated anything as to how deceased sustained burn injuries. It was natural for her to enquire from the deceased. Being a villager, she could have enquired from others also, but this witness not stated anything that deceased was burned by her husband.

15. As per the evidence of P.W. 7, Investigating Officer Shri Vanjari, it is clear that during the investigation, he has recorded the statements of villagers who extinguished fire of victim. Therefore, it was for the prosecution to examine any of the witness who extinguished the fire of victim but not a single person was examined by the prosecution. It appears that prosecution has suppressed the material evidence.

16. Deceased has sustained 15% burn. It has come in the evidence of Medical Officer that she could have been saved. As per the 12 jg.apéal.91.17.odt dying declaration stated by P.W. 4 Executive Magistrate, her children were present. D.W. 2 is her real son whereas appellant is his step father. D.W. 2 Subhash has stated in his evidence that at the time of incident, his mother was cooking food. She was engulfed in fire and, therefore, sustained injuries. He has further stated that at the time of incident, accused was out of village in search of employment. It was also the defence of appellant that he was out of village at the time of incident.

17. P.W. 3 is the neighbour of deceased. She has not stated about the presence of appellant in the village. Not a single independent witness is examined by the prosecution to corroborate any of the dying declarations. In the case of Munnabee w/o Shoukat Tadví Vs. State of Maharashtra (cited supra), Division Bench of this Court has held as under.

"Conviction of appellant-accused who was second wife for committing murder of first wife of her husband by setting her on fire. Appeal against conviction. Conviction based on multiple dying declarations of victim. Evidentiary value - in case of multiple dying declarations they must be consistent to each other. Said consistency should be in respect of contents, 13 jg.apéal.91.17.odt such as name, number of accused, prelude to incident and incident itself. Prelude to incident as narrated in dying declaration recorded by Police Head Constable is absent in dying declaration recorded by P.W. 1. There is variance in respect of incident. Merely because an act is attributed to accused herein in dying declarations, that does not mean that said dying declarations are liable to be accepted as reliable piece of evidence. No endorsement made by Special

Executive Magistrate that contents of dying declarations were read over to declarant who admitted as true and correct. Conviction and sentence set aside. Appeal allowed."

18. In the present case also, there is also variance in respect of incident merely because act is attributed to accused that does not mean that dying declarations stated by deceased Laxmibai are liable to be accepted and reliable piece of evidence.

19. Learned Additional Public Prosecutor Mrs. Deshmukh has pointed out decision in Shudhakar Vs. State of Madhya Pradesh (cited supra). In the cited decision, it was held by the Hon'ble Supreme Court that :

"..... However, second and third dying declarations, implicating appellant husband, were authentic, voluntary 14 jg.apeal.91.17.odt and duly corroborated by other prosecution witnesses including medical evidence. In the case in hand before us, not a single independent witness is examined by the prosecution. Therefore, cited decision is not applicable in the present case."

20. Learned Additional Public Prosecutor Mrs. Deshmukh further relied on the decision in the case of Raju Devade Vs. State of Maharashtra (cited supra). In the cited decision in para 23, it is observed by the Hon'ble Supreme Court that :

"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."

21. In the present case, in first dying declaration, deceased not stated presence of her children at the time of incident. She has stated 15 jg.apeal.91.17.odt that she was burnt by match stick whereas in the second dying declaration, Exhibit 24, she has stated about presence of children. She has stated that she was burnt by her husband after pouring kerosene and taken fire from ovan (chul) and set her on fire. In third dying declaration, Exhibit 65, she has not stated by what means she was burnt.

22. As per evidence villagers extinguished the fire but not a single witness is examined by the prosecution to corroborate her version. P.W. 3 is the neighbour of deceased. She has not stated anything as to how deceased sustained burn injuries. While convicting the accused only on the basis of dying declaration, the Court has to keep in mind that dead person cannot be called for cross-examination. Therefore, utmost care is required while convicting the accused only on the basis of dying declarations. In the case in hand, there are three dying declarations, one oral dying declaration stated by P.W. 1, second dying declaration recorded by P.W. 4 and third by P.W.7. All the three dying declarations are not consistent. Learned trial Court not taken into consideration

about the inconsistency between the dying declarations stated by deceased and wrongly convicted the appellant. Hence, we are 16 jg.apéal.91.17.odt inclined to allow the appeal and pass the following order.

ORDER

(i) The appeal is allowed.

(ii) The impugned judgment is hereby quashed and set aside.

(iii) Appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code. He be set at liberty if not required in any other crime/case.

(iv) R & P be sent back to the trial Court.

JUDGE

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