

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

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CRIMINAL APEAL NO. 457/2012

Santosh Nanasaheb Dhaneshwar
age 25 years, Occ. Agri.
R/o Ashok Nagar, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar.

.. Appellant/
Orig Accused no.1.

Versus

The State of Maharashtra
(Copy to be served on Public
Prosecutor, High Court of Judicature
of Bombay, Bench at Aurangabad.)

Respondent.

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Mr. R.N.Dhorde Senior Counsel I/b Mr. V.R.Dhorde Advocate for
applicant.

Mr. M.M.Nerlikar APP for Respondent State.

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WITH

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CRIMINAL APPLICATION NO. 4175 OF 2012

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The State of Maharashtra,
through PSI Shrirampur City
Police Station Shrirampur,
District Ahmednagar.

..Applicant..
(orig complainant)

Versus

1.Sherya @ Sharad Kacharu Jadhav,
age 25 years, Occ. Agri,
R/o Ashok Nagar, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar.

2.Balasaheb Shankar Kale,
age 46 years, Occ. Service,
R/o Nipani Wadgaon,
Tq. Shrirampur, Dist Ahmednagar.

Respondents
(orig accused no.2 and 3)

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APP for Applicant : Mr. M.M.Neralikar
Advocates for Respondent 2 : Mr.R.H.Dahat a/w Monica R.
Dahat.

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CORAM : S V GANGAPURWALA & V.K. JADHAV, JJ.**Dated: November 16, 2015**

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ORAL JUDGMENT :- (Per S.V.Gangapurwala, J.)

1. Accused No.1 Santosh Nanasaheb Dhaneshwar, accused No.2 Sherya @ Sharad Kachru Jadhav and accused No.3 Balasaheb Shankar Kale are prosecuted for offences punishable under sections 302, 452 read with section 34 of the Indian Penal Code.

2. The Sessions Court acquitted accused nos. 2 and 3 and convicted accused no.1 for an offence punishable under section 302 of Indian Penal Code and sentenced accused no.1 to suffer imprisonment for life, and also directed him to pay fine of Rs.1,000/- (Rs. One thousand), in default to suffer S.I. for one month.

3. Criminal Appeal No.457/2012 is filed by the accused no.1 assailing his conviction, whereas Criminal Application No.4175/2012 is filed by the State of Maharashtra seeking leave to file appeal against acquittal of accused nos. 2 and 3.

4. We have heard the Criminal Appeal filed by the accused no.1 and application seeking leave to file appeal by

the State at length.

5. Mr. R.N.Dhorde, the learned senior counsel appearing for accused no.1 submits that the accused were charged for an offence punishable u/s 302, 452 read with section 34 of the Indian Penal Code on account of death of Bharati Amar Pimpale. The learned senior counsel submits that, the case revolves around dying declarations and evidence of PW 5 Pandurang Kale. There are two dying declarations. Both the dying declarations are inconsistent with each other. Even, PW 5 Pandurang Kale who is cousin brother of the deceased Bharti has not corroborated the said dying declarations. The learned senior counsel submits that dying declaration Exh.49 is recorded by the Investigating Officer at about 12.45 midnight and another dying declaration Exh.36 is recorded by the Aval Karkun of the Tahsil Office at about 15.55. Both are recorded on the same date. In the dying declaration Exh.49 the deceased specifically states that she was sitting in her house alongwith Shivaji Narsing Jadhav and her two children. At that time, accused nos. 1 and 2 came at her place and demanded the amount taken by the deceased from one Balasaheb Shankar Kale. Thereafter, immediately accused no.1 took kerosene can which was lying below the cot and put said kerosene on the person of the

deceased and ignited it with the match stick, whereas in the second dying declaration Exh.36 presence of the persons as referred in dying declaration Exh.49 is nowhere stated. On the contrary, it is stated by the deceased that the match stick was thrown on the ground and because of the kerosene on the floor her saree caught fire. Second dying declaration is contrary to the earlier dying declaration. Nor the presence of the persons is stated in the second dying declaration.

6. According to the learned senior counsel, even evidence of the Aval Karkun, who recorded dying declaration Exh.36 is perused, it goes to show that for a long time the deceased had kept mum before stating anything. According to the learned senior counsel both the dying declarations do not go hand in hand. In the dying declaration Exh.49 the deceased had stated that Shivaji Narsing Rathod had put blanket on her person and had doused the flame. There is no corroboration to the same. PW 5 Pandurang Kale who is examined, he specifically rules out the presence of Shivaji Narsing Rathod. He specifically states that Shivaji Rathod was not present at all.

7. The learned senior counsel submits that when there are multiple dying declarations which are not consistent with

each other, same cannot be relied without corroboration. The learned senior counsel relies on the judgment of the Apex Court in case of **Samadhan Dhudaka Koli Vs. State of Maharashtra reported in 2009 ALL MR (Cri) 229 (S.C.)**, so also on the judgment of the Apex Court in case of **Vallabhaneni Venkateshwara Rao Vs. State of Andhra Pradesh reported in (2009) 6 Supreme Court Cases 484**. The learned senior counsel further submits that even according to the dying declaration Exh.49 Shivaji Narsing Jadhav was present in the house alongwith children of the deceased, however, said Shivaji Jadhav has not been examined nor children have been examined. Shivaji Jadhav was also named as witness, but, still he was not examined. Adverse inference deserves to be drawn for non examination of the material witnesses. Learned counsel relies on the judgment of the Apex Court in a case of Vallabhaneni referred supra.

8. The learned senior counsel further submits that accused no.1 himself sustained burn injuries while trying to douse the fire. He was also admitted in the same hospital as that of the deceased for almost one month. Prosecution has not been in a position to give any explanation for the same.

The same assumes more importance. The learned senior counsel relies on the judgment of the Apex Court in the case of **Babu Ram and others. Vs. State of Punjab reported in AIR 2008 Supreme Court 1260**, so also the judgment of the Apex Court in a case of **Lakshmi Singh and others Vs. State of Bihar reported in AIR 1976 Supreme Court 2263(1)**.

9. Mr. Neralikar, the learned APP submits that minor variance would not affect veracity of the dying declaration. The inconsistency as is alleged is not major. In both the dying declarations deceased has implicated accused no.1 and has specifically stated that it is the accused no.1 who has poured kerosene on her person. As both the dying declarations are consistent regarding act of the accused no.1, said dying declarations can be relied and can form sole basis for conviction. The learned APP further submits that said dying declarations are also corroborated with the evidence of PW 5 Pandurang Kale, which specifically states that accused nos. 1 and 2 were preventing the deceased from coming out of the house. According to the learned APP even conduct of the accused would be relevant. They were trying to tamper with the evidence.

10. The learned APP relies on the judgment of the Apex Court in a case of **Panneerselvam Vs. State of Tamilnadu reported in (2008) 17 Supreme Court Cases 190**. The learned APP submits that non examination of Shivaji Jadhav (Rathod) would not affect the prosecution's case as the same is proved by the dying declarations.

11. We have gone through the record and proceedings.

12. The case of the prosecution revolves around the dying declarations. The motive alleged by the prosecution is that, the deceased had borrowed Rs.35,000/- from one Balasaheb Shankar Kale and accused nos. 1 and 2 had been to the house of the deceased demanding the payment of the said amount. Accused no.3 is nowhere present on the scene of offence. Even the deceased has not implicated accused no.2 in commission of overt act. Prosecution has not even remotely suggested the relation of accused nos. 1 and 2 with accused no.3. There is absolutely no whisper about it in the whole prosecution's case. There are major inconsistencies in two dying declarations Exh.49 and Exh.36. There cannot be any dispute with the proposition that dying declaration, if reliable, can form the sole basis for conviction. This is a case of multiple dying declarations. If both the dying declarations

are consistent with each other, same certainly can be considered, however, perusal of both the dying declarations, it is manifest that said dying declarations suffer from major infirmities. In the dying declaration Exh.49 the alleged transaction between Balasaheb is said to be with the deceased, whereas in the dying declaration Exh.36 the transaction of Balasaheb was said to be with the husband of the deceased. In dying declaration Exh.49 presence of Shivaji Jadhav (Rathod) and two children of the deceased is specifically stated, whereas in dying declaration Exh.36 presence of these persons i.e. Shivaji Jadhav (Rathod) and children is nowhere mentioned. Dying declaration exh.49 states that accused no.1 had poured kerosene on the person of the deceased and set her on fire, whereas in dying declaration Exh.36 it is stated that accused no.1 had thrown the match stick on the ground and on the ground there was kerosene because of which saree of the deceased caught fire.

13. The corroboration is sought to be made of these two dying declarations by way of an evidence of PW 5 Pandurang. PW 5 Pandurang instead of corroborating the dying declaration has deposed contrary to the contents of the dying declaration. In dying declaration Exh.49 it is specifically stated that Shivaji Jadhav was present in the

house and Shivaji Jadhav had doused the fire. This PW 5 Pandurang specifically states that Shivaji Jadhav was not at all present. These discrepancies go unexplained. In view of the inconsistencies in the dying declarations and so also non corroboration of the same, on the contrary witness examined stating contrary to the contents of the dying declarations, it would be unsafe to convict the accused on the basis of the said dying declarations.

14. There is another facet to the present case. As per dying declaration Exh.49 Shivaji Jadhav (Rathod) was present in the house. Certainly as per dying declarations he was an eye witness to the incident. Said eye witness is not examined. Non examination of the said eye witness would result in lack of corroboration as has been held by the Apex Court in case of Vallabhaineni referred to supra.

15. Even the injuries on the accused no.1 has not been explained by the prosecution. It is a matter of record that, accused no.1 also suffered burn injuries and he was admitted in the hospital for one month i.e. the same hospital where the deceased was admitted. No explanation is coming forth for the burn injuries sustained by accused no.1. In a question under section 313 of Criminal Procedure Code

accused no.1 has explained that while dousing fire on the body of the deceased he sustained burn injuries. No explanation by prosecution to these injuries on the person of the accused would assume more importance as has been held by the Apex Court in a case of Babu Ram referred to supra.

16. The motive alleged for causing murder of the deceased was that, deceased had borrowed Rs.35,000/- from accused no.3 and was not returning the said amount. Accused no.3 was not present at the scene of offence. Prosecution has not even remotely established relation between accused nos. 1 and 2 on one hand and accused no.3 on another.

17. Considering the aforesaid aspects of the matter, conviction of the accused no.1 cannot be sustained. Even in dying declaration accused nos.2 and 3 are not referred by the deceased. No role is attributed to accused nos. 2 and 3. Their acquittal is legal and proper.

18. In the result, Criminal Appeal No.457/2012 is hereby allowed. The judgment and order dated 22.6.2012 passed by the learned Adhoc District Judge-1 and Additional Sessions Judge, Shrirampur in Sessions Case No.38/2009 is hereby

quashed and set aside. The appellant/accused no.1 Santosh Nanasaheb Dhaneshwar is acquitted of the offences punishable under sections 302 and 452 of the Indian Penal Code. He shall be released forthwith if not required in any other offence. Fine amount, if paid, be refunded to him.

19. Criminal Application No.4175/2012 is hereby rejected.

(V.K. JADHAV, J.)

(S V GANGAPURWALA, J.)

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