

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

CRIMINAL APPEAL NO. 657 OF 2012

Shaikh Aslam Shaikh Mohammadali .. Appellant
Age. 37 years, Occ. Labour,
R/o. Partur, Tq. Partur,
Dist. Jalna.

Versus

The State of Maharashtra .. Respondent

Mr. Joydeep Chatterji, Advocate for the appellant.
Mrs. R.K. Ladda, A.P.P. for respondent/State.

**CORAM : A.V.NIRGUDE &
INDIRA K.JAIN, JJ.
DATED : 25.02.2016**

ORAL JUDGMENT [PER : A.V. NIRGUDE, J.] :-

1] This appeal challenges judgment and order dated 29.10.2012 passed by the Sessions Judge, Jalna, in Sessions Case No.140 of 2011 in which the appellant/accused has been convicted for offence punishable under section 302 of the Indian Penal Code and was sentenced to suffer life imprisonment and to pay a fine of Rs.10,000/- with a default.

2] It was alleged by the prosecution that the appellant/accused set one Syed Sadiq on fire on 26.05.2011 at about 10.30 p.m. and caused serious injuries to him which were likely to cause death. Sadiq was hospitalized, but subsequently succumbed to his injuries on 05.06.2011.

Unfortunately, the dead body was not subjected to atopsy examination immediately after the death. Therefore, on 20.07.2011, the dead body was exhumed and was subjected to post mortem examination. The prosecution examined in all fourteen witnesses. There is no eye-witness to this incident. The prosecution mostly depended on dying declarations made by victim Sadiq either to his relatives or to Police and other officials from time to time.

3] P.W.14 is important prosecution witness. He is Police Head Constable- Shriram who stated that he was on duty as Police Head Constable in Police Chowky attached to Civil Hospital, Jalna. On 28.05.2011, he received phone call from Kadim Jalna Police Station. He learnt from this telephone that one Syed Sadiq residing within local limits of Partur Police Station was admitted in burnt condition in Civil Hospital, Jalna. He therefore went to the ward and after getting medical opinion about the suitability of the victim to record his statement, he recorded Sadiq's statement. Sadiq told him that the incident took place on 26.05.2011 at about 10.30 p.m. He said that while he was standing in front of house of one Saberabi, accused/appellant came there, demanded money and when he refused to pay, appellant/accused poured kerosene on his person and set him on fire. Through his deposition he proved dying declaration which is at Exhibit-51. This dying declaration was sent to Police Station and the same was utilized as a complaint.

4] P.W.8 Police Inspector Ganesh deposed that on receipt of dying declaration he registered offence under Section 307 of the Indian Penal Code

and handed over investigation to one Police Inspector Shri Shaikh.

5] P.W.13 is P.S.I. Shaikh who deposed that he received investigation of this case and thereafter he proceeded to record statement of witnesses. He also went to the hospital and recorded one more dying declaration of victim Sadiq. This time also Sadiq confirmed that he was set on fire by the appellant /accused. He gave details of the incident that on 26.05.2011 he was standing in front of house of Sabera. Appellant/accused came there and after pouring kerosene on his person, set him on fire. The dying declaration reveals that during the incident Sadiq raised alarm and Saberabi came to help him. She doused fire, took him to the house, and then went to inform the incident to his parents. He further revealed that his parents came at about 04.00 a.m. during the night and they took him to hospital.

6] PW 13 further stated that thereafter he recorded statements of parents of victim Sadiq. He also took steps for preparing sketch of the scene of occurrence. On 23.6.2011 he received injury certificate from the Medical Officer of Partur Rural Hospital. On that day he learnt that Sadiq had died. He received death certificate issued by Partur Municipal Council. He thereafter recorded supplementary statements of parents and brother of the deceased. On 1.7.2011 he added offence punishable under Section 302 of the Indian Penal Code to the case and thereafter could trace the accused. He arrested him. He then stated that on 1.7.2011 the accused produced a plastic can and a match box from his house which was seized under a panchanama under Section 27 of the Indian Evidence Act. He also seized

clothes of accused.

7] On 5.7.2011 he requested the learned Judicial Magistrate, First Class, Partur for recording statement of Saberabi under Section 164 of Criminal Procedure Code and such statement was recorded on 25.7.2011. He stated that Saberabi was not available earlier because she had left Partur because of fear of accused.

8] Thereafter he stated that he also obtained permission to exhume the corpse of the deceased. On 20.7.2011 he exhumed the corpse of Sadiq and sent it for postmortem examination. In cross-examination this witness admitted that the scene of occurrence situated in Indiranagar was a thickly populated area. He stated that it is a slum area. He also stated that in front of Saberabi's house there is a road. He denied possibility of nearby residents using side road for sleeping due to summer season. He admitted that he did not record statement of any eye witness. He also admitted that he did not find out as to whether the accused had purchased kerosene used for committing the offence. The cross-examiner suggested to him that the incident as narrated in the dying declaration did not take place in front of Saberabi's house.

9] The next important witness of the prosecution is PW 12 Azaroddin. He disclosed that police officer Shri Shaikh of Partur police station called him for panchanama purpose on 27.5.2011. They went in front of house of Saberabi in Indiranagar. The place of incident was in between

Saberabi's house and the compound wall. He also noticed that there was a half burnt plastic bag of fertilizers lying on the spot. There was also a melted plastic drops and a burnt piece of shirt. The panchanama was prepared. This panchanama is at Exh.54. (It must be noted that on 27.5.2011 no offence was registered at Partur police station. This panchanama was made because there was a station diary entry No. 147 of 2011 of 27.5.2011. This panchanama was prepared by one H.H.Shaikh, Head Constable B. No. 388 of Partur police station. This Head Constable, however, did not come before court as witness.)

10] Next two important witnesses are P.W.3 & 4. They are parents of victim Sadiq. They stated that during the night between 26 & 27 May, 2011, they learnt that their son Sadiq got injured due to burning etc. They met their son and took him to hospital. After they brought him to hospital, their son Sadiq disclosed to them that it was appellant/accused who had set him on fire after altercation in front of Saberabi's house. These two witnesses further stated that at the instructions of the medical officer of Partur Civil Hospital they brought their son Sadiq to Civil Hospital, Jalna. Thereafter they asked him as to how he got burnt. They learnt from victim Sadiq that it was appellant Aslam who had poured kerosene on his person and had burnt him. They stated that on 4.6.2011 the Medical Officer of Jalna Civil Hospital suggested to them that Sadiq should be shifted to Ghati Hospital, Aurangabad. They took discharge and brought Sadiq back to Partur at their house. Witness No.3 the father of the deceased stated that he did not have money and therefore he was collecting money for treatment of his son Sadiq.

He had planned to take Sadiq to Aurangabad on the next day, but next morning Sadiq passed away. Both these witnesses (parents of Sadiq) stated that after Sadiq's death they did not inform police about it. They buried Sadiq at Partur. Death certificate of Sadiq is on record. It mentions that the parents of Sadiq made an affidavit in respect of Sadiq's death and reported the death to Municipal Council. The death certificate was prepared by Municipal Council, Partur on 6.6.2011. During cross-examination of these witnesses a suggestion was given that the dying declaration was tutored and was as per the idea of Saberabi. This suggestion is significant because witness no.3 admitted that his son Sadiq used to reside with Saberabi as her husband though they were not married.

11] P.W.6 is Dr. Santosh of Rural Hospital, Partur, who deposed that on 27th May, 2011 at about 4.00 a.m. (early morning) the victim was brought to his hospital by his parents and upon examination he found that the victim had suffered about 59% burns. This witness stated that medical treatment was given to the victim. He then sent the injured to Civil Hospital, Jalna.

12] P.W.4-Pradipsingh Thakur is Executive Magistrate who recorded dying declaration of Sadiq on 30.5.2011. Even this time Sadiq reiterated that it was appellant/accused who had set him on fire in front of Saberabi's house at about 10.30 p.m. on 26.5.2011.

13] The learned Judge of the lower court believed the prosecution case which is mainly based on oral as well as written dying declarations. The

learned counsel for the appellant asserted that except the dying declarations there is no circumstance against his client, and therefore, he would try to show that the dying declaration is not trustworthy. Indeed, if the dying declaration is disbelieved, the entire prosecution case would fail. The question, therefore, before us is whether we should believe the dying declarations.

14] As said above, there are three dying declarations and two oral dying declarations. All these dying declarations are recorded more than 24 hours after the incident. The first dying declaration recorded by PHC Shriram Pandit PW 14 was recorded on 28.5.2011 at 9.30 a.m. Thereafter second dying declaration was recorded by PW 13 PSI Shaikh Ibrahim on 29.5.2011 at 5.40 p.m.. The third dying declaration was recorded by PW 5 Pradipsing Thakur on 30.5.2011 at 1.30 p.m. All these dying declarations are almost similar. They inculcate the appellant/accused being the perpetrator. The oral dying declarations are also significant. They were heard by PWs 3 and 4 soon after the victim was brought to Jalna Civil Hospital. According to them they heard the dying declarations of the victim on 27.5.2011 early morning. Even PW 6 Dr. Santosh Kale who had seen the victim on 27.5.2011 at 4.15 a.m. early morning, stated that the patient was able to give statement even when he examined him and though he was in critical condition this witness did not state that the patient or his relatives gave him history of assault as cause of injuries. What is pertinent to note here is that the reluctance of PWs 3 and 4 to take the case further even after hearing the dying declaration of their son about history of assault by appellant/accused Aslam. They could

have stated to the police or to the Medical Officer at Civil Hospital, Jalna that their son was assaulted. No doubt, they were more concerned with the treatment of their son, none-the-less if their son was subjected to assault this could be the next important priority for them. The Medical Officers, who treated Sadiq at Civil Hospital, Jalna probably did not know that this was a case of assault, else they would have certainly informed about it to PW 14 PHC Pandit who was posted at Police Chowky of Civil Hospital, Jalna. So the parents and relatives of the victim and the Medical Officer treating Sadiq at Civil Hospital were not apparently eager to report this incident/MLC to police. The question is how PHC PW 14 Pandit learnt about admission of victim Sadiq in the Hospital. He stated that on 28.5.2011 in the morning he received a telephone call from his police station. From this call, he learnt that Partur police station had made a phone call to his police station about burn case of Sadiq who was admitted to Civil Hospital, Jalna and that he should go and inquire. It is only because of this information PW 14 Pandit went near the victim. Had this not been informed to him he would not have learnt about the admission of victim in the hospital and the incident would have gone unnoticed for few more days.

15] Let us now find out as to why Partur police station made a phone call about this case to Kadim Jalna police station. This has not been answered by prosecution side at all. No one from Partur police station came forward as a prosecution witness. As noted above, Partur police station arranged to record scene of occurrence panchanama on 27.5.2011 in front of Saberabi's house even though no offence was registered by them. It,

therefore, appears to us that police of Partur police station some how learnt that Sadiq sustained injuries by burning and the incident had taken place in front of Saberabi's house in Indiranagar. At that time, no offence was registered even death had not occurred by then. We fail to know as to why such panchanama was recorded by H.H.Shaikh, PHC. As said above, no one came forward from Partur police station to explain these circumstance. The circumstance would not support the prosecution case. It was not reported to be a case of assault. At the time of recording scene of occurrence panchanama the police did not know that there was an assault. The contents of panchanama do not indicate that this was a case of assault. From these circumstances we came to the conclusion that dying declaration is a planted piece and was invented rather belatedly.

16] The second shortcoming of the prosecution case which would damage the prosecution case is the fact that Saberabi is not examined as prosecution witness, though her statement under Section 164 of the Criminal Procedure Code was recorded. A judicial note can be taken of the fact that since the investigating officer thought that Saberabi was an important witness her statement was recorded under Section 164 of the Criminal Procedure Code. A special care was taken for recording her statement and yet she was not brought before the court. This witness was important also because she could have thrown relevant light on the incident which occurred in front of her house. According to one of the dying declarations Saberabi was present in the house at the time of incident. According to the dying declaration appellant/accused came to the spot, had an altercation with the victim and

then poured kerosene on his person and set him on fire. If this could happen in front of house near public road the victim would raise alarm and it would be heard by number of persons. A judicial note also can be taken of the fact that the incident took place at about 10.30 p.m. on 26.5.2011 which is peak of the summer season. Most of the people during this time would come out in the night to sleep on pavements. This was a locality of poor people. If such a ghastly incident takes place at such an hour when most of the people would be awake, they would come to see the incident and they would help the victim. Even Saberabi who was inside her house could have come out hearing alarm. We are inclined to hold that the victim ought to have raised alarm after sustaining burn injuries.

17] The other improbable part of the prosecution case is that the victim did practically nothing during the incident. He did not resist the assault. It is indicated that he meekly allowed himself to be subjected to such a ghastly attack. He did not try to run away. He did not raise alarm. He did not seek any help from neighbourhood. All these aspects of the prosecution case are rather suspicious. We are, therefore, of the view that the prosecution case would fail because the dying declarations are not trustworthy. The appeal, therefore, succeeds.

18] Hence, we pass the following order.

[i] Criminal Appeal No. 657 of 2012 is allowed.

[ii] The judgment and order dated 29.10.2012, passed by the learned Sessions Judge, Jalna, in Sessions Case No. 140 of 2011 convicting the

appellant/accused for offence punishable under Section 302 of the Indian Penal Code is set aside.

[iii] The accused/appellant is acquitted of the offence with which he was charged.

(iv) The appellant/accused be released forthwith if not required in any case.

[v] Fine amount, if any paid, shall be refunded to the appellant.

[INDIRA K.JAIN, J.]

[A.V.NIRGUDE, J.]