

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.710 OF 2002

Radhakisan s/o Dhondiba Bhalekar,
Age-32 years, Occu:Labourer,
R/o-Ranjangaon,
Tq. & Dist-Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr.A.K. Bhosle Advocate for Appellant.
Mr.S.M. Ganachari, A.P.P. for Respondent-State.

...

WITH

CRIMINAL APPEAL NO.100 OF 2003

1) Ramabai w/o Govindrao Shirsath,
Age-50 years, Occu:Labour,
R/o-Ranjangaon,
Tq. & Dist-Aurangabad,

2) Mayabai w/o Ananda Salve,
Age-32 years, Occu:Household,
R/o-As Above.

...APPELLANTS

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr.A.K. Bhosle Advocate h/f. Mr. S.K. Barlota
Advocate for Appellants.

Mr.S.M. Ganachari, A.P.P. for Respondent-State.

...

**CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.**

DATE OF RESERVING JUDGMENT : 23RD FEBRUARY, 2018

DATE OF PRONOUNCING JUDGMENT: 27TH FEBRUARY, 2018

JUDGMENT [PER S.S. SHINDE, J.] :

1. As both these Criminal Appeals are arising out of one and the same Judgment and order passed by the trial Court, both these Appeals are heard together and being decided by this common Judgment.

2. Both these Appeals are directed against the Judgment and order dated 10th December, 2002 passed by the III Ad-hoc Additional Sessions Judge, Aurangabad in Sessions Case No.331 of 2000 thereby convicting accused No.1 - Radhakishan s/o Dhondiba Bhalekar, accused No.2 - Ramabai w/o

Govindrao Shirsat and accused No.3 Mayabai w/o Ananda Salve for the offence punishable under Section 302 read with 34 of the Indian Penal Code (for short "I.P. Code") and sentencing them to undergo imprisonment for life. Accused No.1 is directed to pay fine of Rs.2000/- and in default to undergo three months simple imprisonment. Accused Nos.2 and 3 are directed to pay fine of Rs.500/- each and in default to undergo one month simple imprisonment. Criminal Appeal No.170 of 2002 is filed by accused No.1 - Radhakishan s/o Dhondiba Bhalekar and Criminal Appeal No.100 of 2003 is filed by accused No.2 - Ramabai w/o Govindrao Shirsat and accused No.3 - Mayabai w/o Ananda Salve.

3. The prosecution case, in brief, is as under:-

A) On 7th October, 2000, at 9.00 hours, there was report of MLC No.13084 from Ghati

Hospital to Police Station, Jawaharnagar. It appears that PSI Nikam was directed to inquire and record statement of the injured and accordingly he went to Ghati Hospital and recorded the statement of Shakuntalabai Radhakishan Bhalekar. The said statement was treated as her complaint and on the basis of the same, Crime No.229 of 2000 was registered, under Section 307 read with 34 of the I.P. Code.

B) In the said statement Shakuntalabai has stated that she is staying with her husband, two sons, namely Ajay aged 11 years and Vijay aged 8 years. The husband does agriculture work and deals in plots business. The character of the husband was not good and he was bringing women at home. When she was trying to prohibit, her husband used to beat her. She had told this fact to her parents and brothers and they had persuaded the husband, but his relations with them became strained and they were not allowed to come in the house of her

husband.

C) On 7th October, 2000, at 9.00 a.m., her husband brought one Shirsatbai along with one Mayabai, whose full name was not known to Shakuntalabai. She had asked the husband why those ladies were brought. Whereupon her husband abused her and said that for the earlier night he was in the house of those two ladies and she can do whatever she like. Husband also gave threat that if she came in his way and talks something, he would murder her. Getting annoyed, those two ladies and her husband, poured kerosene on the person of Shakuntalabai and all the three accused threw burning match sticks on her. She shouted, but no one extinguished the fire. The neighbours got knowledge and the husband and the neighbours brought Shakuntalabai in the vehicle of her husband to the hospital.

D) Raghunath Nikam, PSI himself took the

investigation in his hand. He drew the spot panchnama, and plastic can, plastic bottle, one used match stick were attached. He arrested the accused No.1 first, recorded statement of witnesses. He later on arrested accused Nos.2 and 3. On 12th October, 2000 Shakuntalabai expired. Her inquest was drawn, post-mortem notes were collected, crime was converted to offence under Section 302 of the I.P. Code. After completion of investigation, on 13th December, 2000 the charge-sheet was submitted. Learned Judicial Magistrate, First Class, Aurangabad, by his order dated 13th December, 2000, committed the case for trial to the Court of Sessions.

E) A charge under Section 498-A, 302 read with 34 of the I.P. Code was framed against accused No.1 and charge under Section 302 read with 34 was framed against accused Nos.2 and 3, and the same was explained to them. The accused pleaded not guilty and claimed to be

tried. The defence of accused No.1 is that, for grudge with the PSI, he being the social worker, at the instance of his opponents, the false case has been filed.

4. After recording the evidence and conducting full fledged trial, the trial Court convicted accused No.1 - Radhakishan s/o Dhondiba Bhalekar, accused No.2 - Ramabai w/o Govindrao Shirsat and accused No.3 Mayabai w/o Ananda Salve for the offence punishable under Section 302 read with 34 of the I.P. Code and sentenced them to undergo imprisonment for life and to pay fine, as afore-stated. Hence both these Appeals are preferred by accused Nos.1, 2 and 3 challenging the conviction and sentence.

5. Heard learned counsel appearing for the Appellants in both the Appeals. Mr. Bhosale, learned counsel submits that the trial Court has not considered the evidence in its proper

perspective. It is submitted that the trial Court has given much more importance to the suggestions and has held that defence has not given suggestions that incident is either suicidal or accidental. Learned counsel further submits that the prosecution has not proved that accused No.1 was having illicit relations with accused Nos.2 and 3. The Prosecution has failed to establish that accused Nos.2 and 3 were present at the spot when the alleged incident took place. It is submitted that the prosecution has relied upon two dying declarations, one recorded by the Special Executive Magistrate and another recorded by investigating officer, PSI Nikam. Trial Court itself discarded the evidence of Special Executive Magistrate, who turned hostile. It is submitted that the other witnesses to the spot panchnama, neighbours and even the brother of the deceased turned hostile and they did not support the prosecution case. The only evidence against the accused is of the investigating officer, which is

not sufficient to record the conviction. It is submitted that it is highly improbable that all the three accused poured kerosene and all of them threw match stick and set Shakuntalabai on fire. Thus both the dying declarations are unbelievable and far from truth and the same are not corroborated by circumstantial evidence as spot panchnama reveals that only one match stick and only one can was found on the spot. Even though it is alleged in dying declaration that both sons of deceased extinguished the fire, they were not examined by the prosecution. On both the dying declaration there is no endorsement of the doctor that the patient was well oriented and was physically and mentally fit. There is no timing on both the dying declaration as to when the same were recorded, when recording was started and when it was completed. It is admitted position that Shakuntalabai received 92% burns and therefore it goes without saying that she was not conscious and was unable to speak. In support of his

submissions, learned counsel placed reliance upon the exposition of law in the case of Uka Ram vs. State of Rajasthan¹, Panchdeo Singh vs. State of Bihar², Ram Nath Madhoprasad and others vs. State of M.P.³ . Learned counsel submits that Special Executive Magistrate admitted in his examination in chief that he produced Photostat copy of the dying declaration recorded by him and original was not produced by him. Learned counsel submits that when original dying declaration was available, Photostat copy of the same cannot be relied upon. In support of his submissions, he placed reliance upon the exposition of law in the case of Brundaban Moharana and another vs. State of Orissa⁴. Therefore, learned counsel submits that both the Appeals deserve to be allowed.

6. On the other hand, learned A.P.P. submits that though the case of the prosecution is based

1 2001 AIR (SC) 1814

2 2002 AIR (SC) 526

3 1953 AIR (SC) 420

4 (2010) 13 SCC 381

on the circumstantial evidence, the chain of circumstances has been established beyond reasonable doubt by the prosecution. The prosecution has proved that accused No.1 was having illicit relations with accused Nos.2 and 3 and as the deceased Shakuntalabai was opposing for such relations, all the accused in furtherance of their common intention, poured kerosene on the person of Shakuntalabai and set her on fire. He further submits that after considering the entire evidence brought on record the trial Court has convicted all the three accused and the findings recorded by the trial Court are in consonance with the evidence brought on record. He therefore, submits that both the Appeals may be dismissed.

7. Admittedly in the present case there is no eye witness to the incident and the case is based upon the circumstantial evidence. To prove its case, the prosecution has examined five witnesses. PW-1 Sahebrao s/o Anna Ware is a panch

witness to the spot panchnama Exhibit-18. This witness turned hostile and did not support the prosecution and therefore his evidence is not useful to the prosecution case.

8. PW-2 Ankush s/o Keshavrao Bhise is a Special Executive Magistrate who recorded dying declaration Exhibit-20. He deposed that during relevant time he was appointed as Special Executive Magistrate. He is shown the statement and it was recorded by him. It is the dying declaration of Shakuntalabai Radhakishan dated 7th October, 2000. It was recorded in Ghati Hospital. After taking down the statement he had taken right foot thumb mark of the lady and he had signed it (Exhibit 20). Phule constable from Jawaharnagar police station had given him written letter. Said constable had taken the witness to Ghati Hospital. He further deposed that he went to Burn Ward. He had asked the doctor as to who was the patient and doctor pointed out the patient. He had orally

asked the doctor whether the patient was in a condition to make the statement and doctor gave affirmative reply. The doctor had given it to him in writing also. The said endorsement is on the letter given to him by the police. He has not brought that letter. Then he recorded the statement of the lady. He had given the copy of that statement to head constable Phule and retained original with him which is at his house.

. During the course of cross-examination, PW-2 Ankush stated that the relatives of the patient were sitting by her side. He had asked the relatives to go out. The patient was on saline. He admits that due to pains she was crying. It was happened that when he was putting the questions, she was keeping quiet and giving abrupt reply. Some wording were clear and some were unclear. The constable had given him the information about the incident. What words were not legible on the strength of information I utilized those words. I

had taken only one thumb mark of the lady after recording the statement. After his last question, she had gone in coma.

9. Thus, PW-2 Ankush admitted in his cross-examination that Shakuntalabai was crying because of severe pains, she did not answer the questions put to her promptly, she answered the questions abruptly, some wordings were clear and some were not clear. PW-2 Ankush has not clarified which portion of her dying declaration was clear and audible and which portion of her dying declaration was not audible. He further stated that after he asked last question, the patient has gone in coma. Thus explicit reliance cannot be placed on the oral testimony of this witness.

10. We have carefully perused the dying declaration, Exhibit 20, recorded by PW-2 Ankush. Though PW-2 has deposed that before recording dying declaration, he asked the doctor to examine

whether the patient is well oriented and physically and mentally fit to give dying declaration, there is no such endorsement on the dying declaration Exhibit 20. It is also pertinent to note that in all three thumb impressions are appearing on the dying declaration Exhibit 20.

11. PW-3 Bhikanrao s/o Kondbaji Muneshwar, is neighbour of accused No.1. He also turned hostile and did not support the prosecution. Though he was cross-examined by the learned A.P.P. nothing useful to the prosecution has been elicited from him.

12. PW-4 Bhausahab s/o Gangadhar Bhosle is a brother of deceased Shakuntalabai. Even he did not support the prosecution and turned hostile. Though he was cross-examined at length by the learned A.P.P. with the prior permission of the trial Court, he denied all the suggestions put to him.

13. PW-5 Raghunath s/o Ambuji Nikam, is the investigating officer and he has also recorded second dying declaration Exhibit 27. He deposed that on 7th October, 2000 when he was attached to Jawaharnagar police station, Aurangabad, he was directed to record statement of Shakuntala by visiting Ghati Hospital in the MLC. Accordingly, he went to Ghati Hospital. In writing he requested the doctor to give endorsement whether Shakuntalabai was in a position to make the statement. Examining the patient the doctor endorsed that patient was in a position to make the statement. He disclosed his identity to the patient and as stated by her, recorded her statement. He had taken foot thumb mark of the lady on her statement and he had also signed. He has proved the dying declaration Exhibit-27. He deposed that the very statement was brought to the police station and under the guidance of the superior, crime was registered. He further deposed about the manner in which he has carried out the

investigation.

. PW-5 Nikam further deposed that he had recorded statement of Bhikanrao, PW-3. He further deposed what PW-3 Bhikanrao stated before him. Admittedly, PW-3 Bhikanrao turned hostile and did not support his statement given before the police. PW-5 Nikam further deposed that he had recorded statement of Bhausahab, PW-4 and also deposed what PW-4 stated before him. Admittedly, this witness PW-4 Bhausahab also turned hostile.

. During the course of cross-examination, PW-5 Nikam admitted that he was given the earlier dying declaration and after reading it he had gone to Ghati Hospital to record the statement of the patient. The doctor has given oral permission to record the statement. He was wearing uniform. The lady did not speak in village language. The lady was shouting, crying due to pains. Various questions were put to the lady. He had only taken

down the answers. This witness specifically admits that on the dying declaration no time is given when it was recorded and when it was completed.

14. Thus on conjoint reading the evidence of Special Executive Magistrate PW-2 Ankush and investigating officer PW-5 Nikam, it is clear that both of them have not put timings on the dying declarations as when the recording was started and when it was completed. But one thing is clear that first dying declaration was recorded by PW-2 Ankush, Special Executive Magistrate and then second was recorded by investigating officer Nikam. PW-2 Ankush specifically stated in his cross-examination that after last question was put by him, the patient had gone in coma. Thereafter, as per the version of PW-5 Nikam, he has recorded the dying declaration. When PW-2 states that after he recorded dying declaration patient had gone in coma, then it is difficult to believe that thereafter second dying declaration was recorded

by the investigating officer.

15. As stated above, on both the dying declarations there is no endorsement put by the doctor that the patient was well oriented and physically and mentally fit to give such declaration. In this behalf learned counsel appearing for the Appellants has rightly placed reliance on the exposition of law in the case of Panchdeo Singh vs. State of Bihar, cited supra.

Para 11 of the Judgment reads as under:

"11. Before so doing, a look at the decision of this Court in Rosamma (Paparambaka Rosamma and others v. State of A.P., 1999(4) RCR(Cri.) 104 (SC): 1999(7) SCC 695) would be of some relevance wherein this Court observed that where conviction is solely based on the dying declaration there is an obligation on the part of the Court to consider with extreme care and caution both the dying declaration as also the evidence of the witnesses supporting it. In Rosamma (supra) the doctor was also

examined and the doctor appended a certificate at the end of the declaration that the patient is "conscious while recording the statement". It is on this, this Court observed that the question that needs to be considered is as to whether the Magistrate could have come to a definite conclusion that the injured was in a fit state of mind to make the declaration in the absence of a certificate by the doctor certifying the state of the mind that existed before recording the dying declaration and this Court opined that in the absence of a medical certificate that the injured was in a fit state of mind at the time of making that declaration, it would be very risky to accept the subjective satisfaction of the Magistrate, who opined that the injured was in a fit state of mind at the time of making a declaration. In Rosamma (supra) noting of the state of mind of the declarant before making the statement by the doctor has been stated to be an essential requirement for the prosecution to prove - incidentally - mere certification by even a doctor at the end of the declaration that the patient is conscious while recording the statement was stated to be not sufficient - this is so by reason of the factum of the dying

declaration being only the circumstance for conviction and sentence of the accused. Presently, however, there is not even a doctor's certification as regards the state of the condition of the declarant. It is only the Judicial Magistrate, who has stated from the witness box that the declarant was in a fit condition to make the statement and he was otherwise satisfied in regard thereto. The doctor was available since the Magistrate named him as Dr. Raman Shanker Prasad but unfortunately there is neither any certification nor even a signature of the doctor in the declaration.

12. As noticed above, declaration itself can be treated as a substantive piece of evidence and can be the basis of an Order of conviction and sentence without there being any corroboration, provided, however, the same brings forth sense of confidence and trustworthiness in the mind of the Court - why did not the doctor certify the fitness of the person making the statement or even append his signature, there is no answer to the same. The Magistrate also did not recollect as to whether the deceased did put his signature or not but since there is no mention of

"L.T.I." before "Ram Singh" obviously left thumb impression is not there on the dying declaration. This is the declaration which happened to be the only material piece of evidence on the basis of which the trial Court came to a conclusion that the appellant herein ought to be found guilty under Section 302 Indian penal Code warranting sentence of life imprisonment. The decision of this Court in Rosamma (supra) directly runs counter to the judgment under appeal. In our view it is not otherwise a very safe piece of evidence to rely upon for conviction under Section 302 Indian Penal Code. The declaration must be such so as to evoke confidence in the factual context. However, we are unable to record our confidence on such a declaration so as to lend support and concurrence to the judgment under appeal. As noticed above, Rosamma (supra) decides counter and we do record our respectful agreement, apart from being a larger Bench judgment which should act as a binding precedent, with the observations and findings and on the wake of the aforesaid we are of the view that the High Court fell into a manifest error. The judgment under appeal thus cannot be sustained. The appeal is thus allowed. The appellant be released

forthwith, if not wanted in any other case."

16. As stated above, in the present case also there is no eye witness and the case is based on circumstantial evidence. The trial Court has based the conviction on the two dying declarations, one recorded by the Special Executive Magistrate and another recorded by the investigating officer. As observed earlier, on both the dying declarations, there is no endorsement of the doctor certifying that the patient was well oriented and physically and mentally fit to give such declaration. Therefore, it would be unsafe to base the conviction of the Appellants on such dying declarations.

17. If the dying declaration Exhibit 27, recorded by the investigating officer PW-5 Nikam is perused, it starts with the sentence that:-

"समक्ष विचारले वरून लिहून देते की, "

[as asked, I am giving in writing]

. It means that dying declaration was written by the patient herself. Learned A.P.P. submits that by mistake the above-said words were written in the dying declaration. In this respect, reference can be made to the exposition of law by the Supreme Court in the case of Ram nath Madhoprasad and others vs. State of M.P., cited supra, wherein in Para 16 of the Judgment it is held that:

"In the case of a dying declaration where the exact words stated by a deceased matter and are of importance, a suggestion of the kind that the deceased might have said something by a mistake cannot be entertained."

18. Taking overall view of the matter,

admittedly, it is brought on record that Shakuntalai received 92% burns, therefore it is difficult to accept that she was in a position to give dying declaration. The panch to spot panchnama turned hostile and the spot panchnama is not proved. Though it is stated that incident had taken place at 9.00 a.m., the spot panchnama was prepared in the evening. The prosecution has not brought on record any evidence to establish that accused No.1 was having illicit relations with accused Nos.2 and 3. The prosecution has not proved that accused Nos.2 and 3 were present at the spot when the alleged incident took place. Though the contents of the first dying declaration recorded by the Special Executive Magistrate discloses cognizable offence, the said dying declaration was not treated as F.I.R. or no F.I.R. was registered on the basis of said dying declaration. It is only after the second dying declaration was recorded by the investigating officer, the F.I.R. was registered. As observed

earlier, it is stated by the Special Executive Magistrate that after he asked last question, the patient went in coma, and it is a matter of record that investigating officer stated that thereafter he recorded the dying declaration. Learned counsel appearing for the Appellants invites our attention to the post-mortem notes and in particular, column No.20 thereof, wherein it is endorsed that walls of Thorax were partly burnt. Therefore, we find considerable force in the arguments of learned counsel appearing for the Appellant that when Shakuntalabai was admitted in hospital, she was not in a condition to speak and therefore no reliance can be placed on the dying declarations to base the conviction of the Appellants.

19. The Constitution Bench of the Supreme Court in the case of **Laxman V/s State of Maharashtra**⁵ in para no. 3 held thus :-

“... There is no requirement of law that a

5. 2002 Cri.L.J. 4095

dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

Underlines added.

20. In the present case, upon careful perusal of both the dying declarations, it is clear that both, PW-2 Special Executive Magistrate and PW-5 investigating officer who recorded the dying

declarations, have not satisfied themselves, by asking certain questions to the patient, that she was in a fit state of mind to give such declaration. Therefore both the dying declarations are not trustworthy and reliable and conviction cannot be based upon such dying declarations, where there is no corroborative evidence.

21. In the light of discussion in foregoing paragraphs, we are of the considered view that the entire prosecution case rests upon the circumstantial evidence and the evidence brought on record by the prosecution is not cogent, sufficient and convincing so as to prove the offence against the Appellants beyond reasonable doubt. Therefore, an inevitable conclusion is that the Appellants are entitled for the benefit of doubt. Hence, we pass following order:

O R D E R

(I) Both the Criminal Appeals are

allowed.

(II) The impugned Judgment and order dated 10th December, 2002 passed by the III Ad-hoc Additional Sessions Judge, Aurangabad in Sessions Case No.331 of 2000 convicting and sentencing accused No.1 - Radhakishan s/o Dhondiba Bhalekar, accused No.2 - Ramabai w/o Govindrao Shirsat and accused No.3 Mayabai w/o Ananda Salve for the offence punishable under Section 302 read with 34 of the Indian Penal Code, is quashed and set aside.

(III) Appellants - Radhakishan s/o Dhondiba Bhalekar, Ramabai w/o Govindrao Shirsat and Mayabai w/o Ananda Salve are acquitted of the offence punishable under Section 302 read with 34 of the Indian Penal Code. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellants.

(IV) The Appellants are released on bail during the pendency of these

Appeals. The bail bond of the Appellants shall stand cancelled.

(V) Appellants - Radhakishan s/o Dhondiba Bhalekar, Ramabai w/o Govindrao Shirsat and Mayabai w/o Ananda Salve shall furnish the fresh personal bonds of Rs.15,000/- each and surety of like amount each under Section 437-A of the Code of Criminal Procedure, before the concerned trial Court at Aurangabad.

[S.M. GAVHANE, J.]

[S.S. SHINDE, J.]

asb/FEB18