

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.360 OF 2013
ALONGWITH
CRIMINAL APPLICATION NO.162 OF 2015**

Arun Laxman Hiray,	]
Age: 45 years, Occ: Nil,	]
R/o: Bharat Nagar, Manmad,	]
Tal: Nandgaon, Dist: Nashik	]
At present: Nashik Central Prison	]..Appellant/Applicant (Org. Accused)

Versus

The State of Maharashtra,	]
At the instance of Manmad City	]
Police Station, Tal: Nandgaon,	]
Dist: Nashik	]..Respondent

Mr. Vikas Khanolkar, Advocate for the Appellant/Applicant.
Mrs. M. M. Deshmukh, APP for the Respondent - State.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 7th AUGUST, 2018**

ORAL JUDGMENT (Per B. R. Gavai, J)

1] Being aggrieved by the judgment and order dated 22nd February 2013 passed by the learned Additional Sessions Judge, Malegaon in Sessions Case No.106 of 2008, thereby convicting the Appellant for the offence punishable under Section 302 of Indian Penal Code ("IPC" for short) and sentencing him to suffer rigorous

imprisonment for life and to pay fine of Rs.2000/- and in default of payment of fine, to suffer rigorous imprisonment for four months, the Appellant has approached this Court.

2] The prosecution case in brief as could be gathered from the material placed on record is thus :-

The deceased Taibai Hiray was wife of the present Appellant. The marriage of the Appellant with the deceased was solemnized about 15 years prior to the date of the incident. They were blessed with three children. On the fateful day of the incident, only deceased, Appellant and their son Pratham were in the house. The other two children had gone to the village. It is the prosecution case that the Appellant was addicted to consume liquor. On 22nd February 2008 at around 11:30 p.m., he came to house after consuming liquor and quarreled with the deceased. It is further the prosecution case that in the said quarrel, he poured kerosene on the person of the deceased from the stove which was lying in the house and set her on fire. The deceased sustained around 83% burns. Initially, she was taken to Government Hospital, Manmad, from

there she was shifted to Civil Hospital, Nashik in the same night.

3] On the basis of the statement of the accused, initially First Information Report came to be lodged for the offence punishable under Section 304 of IPC. However, during treatment, the deceased succumbed to the injuries on 25th February 2008. On her death, the offence came to be converted to the one under Section 302 of IPC. After death of the deceased, postmortem came to be conducted. At the conclusion of the trial, charge-sheet came to be filed in the court of learned JMFC, Manmad. Since the case was exclusively triable by the learned Sessions Judge, the same was committed to the learned Sessions Judge. The charges came to be framed against the Appellant. The Appellant/Accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned Additional Sessions Judge, Malegaon passed the order of conviction as aforesaid. Being aggrieved thereby, the present Appeal.

4] Mr. Vikas Khanolkar, learned counsel for the Appellant submitted that PW-2 – Prakash Nikale (Special Executive

Magistrate), so also PW-8 – Dr. Vinod Pavaskar, who has given certification with regard to the fitness of the deceased to make a statement, do not depose about the mental fitness of the deceased to make a dying declaration. He further submits that there are inconsistencies in the evidence of PW-2 - Prakash Nikale and PW-8 – Dr. Vinod Pavaskar. Learned counsel therefore submits that the conviction based only on the basis of two dying declarations, would not be sustainable. He further submits that though the Investigating Officer has recorded the statement of son of the Appellant and the deceased, namely Pratham, who was also in the house has not been examined as witness. He therefore submits that withholding of independent witness casts doubt with regard to the genuineness of the prosecution case.

5] Mrs. M. M. Deshmukh, learned APP appearing on behalf of the prosecution submits that both the dying declarations recorded by the PW-2 – Prakash Nikale (Special Executive Magistrate) as well as PW-7 – Arun Marwadi (ASI) are consistent. Learned APP relying on the various judgments of the Hon'ble Apex Court submits that the conviction could be based solely on the basis of dying

declarations, when said dying declarations are trustworthy, reliable and cogent. Learned APP therefore submits that there is no merit in the Appeal and the same deserves to be dismissed.

6] With the assistance of the learned APP and the learned counsel for the Appellant, we have scrutinized the evidence on record.

7] Undisputedly, in the present case, the conviction is recorded by the learned Sessions Judge solely on the basis of dying declarations of the deceased. No doubt that as held by Their Lordships in the catena of cases, if the dying declaration is found to be trustworthy, reliable and cogent, the conviction solely on the basis of the the same could also be sustained.

8] The Constitution Bench of Their Lordships of the Hon'ble Apex Court in the case of Laxman Vs. State of Maharashtra¹ have held that it is not necessary in each and every case, there has to be a certification by the doctor to the effect that the deceased was in fit

¹ (2002) 6 SCC 710.

state of mind to make a statement. It has further been held by Their Lordships that where eye witnesses say that deceased was in fit and conscious state of mind to make a declaration, the medical opinion will not prevail. It has been held by Their Lordships that since the accused has no power of cross-examination, the Courts insist that the dying declaration should be of such a nature which inspires confidence in the mind of the Court regarding its truthfulness and correctness. It has been held that 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. In the light of these guiding principles, we will have to examine the dying declarations in the present case.

9] In so far as the dying declaration below Exh.18 is concerned, the same is recorded by PW-2 – Prakash Nikale, who at the relevant time was working as Special Executive Magistrate. He states that when he was called upon to record the dying declaration, he had requested Dr. Pavaskar to give certificate as to whether the patient was in a condition to make a statement. He states that the doctor examined the burnt patient and accordingly made an

endorsement on the top of the paper that she was in a position to give statement. He further submits that he also satisfied himself that she was in a position to give statement. Thereafter taking necessary precautions like sending relatives outside etc. they recorded her statement. No doubt that in the dying declaration recorded by this witness, the deceased states that she had quarreled with her husband, who was under the influence of liquor. He poured the kerosene on her person and set her on fire. In reply to question No.6 as to who had extinguished the fire and who brought her in the hospital, she replied that her husband Arun extinguished the fire and she was brought in the hospital by a neighbour Ahire. It could thus be seen that though in the dying declaration below Exh.18, the present Appellant is implicated, the only endorsement by the Medical Officer is that the patient is in conscious state to give statement. There is no certificate that she was in mentally fit state of mind to give statement. At the end of the dying declaration also similar endorsement "the patient was in conscious state to give valid statement" is recorded.

10] It is also relevant to refer to the evidence of PW-8 – Dr.

Vinod Pavaskar, who has examined the deceased prior and after the statement was recorded. He also states in his examination-in-chief that he found that the patient was conscious to give statement. However, he has categorically admitted in his cross-examination as under :-

“It is true that there is difference in consciousness and general mental alertness. It is correct to say that the conscious patient may mentally alert or not alert.”

It could thus be seen that there is no clear evidence as to whether the deceased was in fit state of mind to give declaration. There is one another reason, which casts doubt with regard to the genuineness of the said declaration, where PW-2 – Prakash Nikale (Special Executive Magistrate) states in his evidence that at the time of recording of statement, he told the doctor to go out of the room and accordingly doctor left there from. PW-8 – Dr. Vinod Pavaskar in his evidence denies that at the time of recording of statement by Special Executive Magistrate, he was told to go out.

11] In so far as declaration recorded by PW-7 – Arun Marwadi (ASI) is concerned, there are various lacunae in the said

declaration. There is no endorsement as to when the recording of the said dying declaration commenced and as to when it ended. We are of the considered view that it will not be safe to rest the conviction solely on the basis of the aforesaid dying declarations.

12] It is further to be noted that though PW-1 – Chahabai Panpatil has stated in her examination-in-chief that the Appellant used to ill-treat deceased and that he used to consume liquor, these are omissions in her statement recorded under Section 161 Cr.P.C. The said omissions and contradictions are duly proved in the evidence of Investigating Officer.

13] It is further to be noted that the Appellant has also examined Dr. Shailendra Patil as DW-1. He has deposed that the Appellant had suffered deep burn injuries to the extent of 10%. The Appellant in the statement under Section 313 Cr.P.C. has given written explanation. He has stated that on the date of incident, his wife and son were inside the house. He was sitting outside the house. He heard cries of his wife from the house. He rushed inside the house and found that his wife was in flames. He lifted the quilt

from the house and tried to extinguish the fire. While doing so, he also suffered burn injuries on his both hands, stomach as well as knees. Neighbours took him and his wife to the hospital at Manmad and thereafter to Civil Hospital at Nashik. He was thereafter shifted to Cooper Hospital, Juhu and after his treatment was over, he had surrendered himself before the Police. In the light of the burn injuries sustained by the accused, the explanation given by him cannot be said to be improbable. It is further pertinent to note that at the time of the incident, son of the Appellant and the deceased, namely Pratham was in the house. The Police have also recorded his statement. Had he been examined, he would have thrown light on the real genesis of the incident. It is to be noted that he was aged about 9 years at the time of the incident and as such, could have thrown light on the incident. However, for the reasons best known to the prosecution, he has not been examined.

14] In that view of the matter, we find that since the conviction is solely based on the dying declarations, which are not free from doubt and that since the explanation given by the Appellant cannot be said to be improbable, the Appellant is entitled

to the benefit of doubt. The Appeal therefore deserves to be allowed.

15] In the result, we pass the following order.

ORDER

- I] The Criminal Appeal No.360 of 2013 is allowed.
- II] The order of conviction and sentence recorded by learned Additional Sessions Judge, Malegaon in judgment and order dated 22nd February 2013 in Sessions Case No.106 of 2008 is quashed and set aside.
- III] The Appellant is acquitted of the charges charged with.
- IV] The Appellant is directed to set at liberty forthwith, if not required in any other case.

V] In view of disposal of Criminal Appeal No.360 of 2013, Criminal Application No.162 of 2015 does not survive and accordingly stands disposed of.

Balaji
Govindrao
Panchal

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[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]