

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

...

CRIMINAL APPEAL NO. 325/2013

* State of Maharashtra
Through the Police Station Officer
Nandgaon-Khandeshwar
Dist. Amravati. .. **..APPELLANT**

v e r s u s

- 1) Pravin Shridhar Gajbhiye
Aged about 30 years
- 2) Sau.Malti Shankarrao Gajbhiye
Aged about 45 years
- 3) Sau.Mankarna Shridhar Gajbhiye
aged about 50 years
(Appeal is abated as against
Respondent no.3 as per
Court's order dated 18.7.2018)
- 4) Sau. Mina Nandu Meshram
aged about 35 years
All R/o Rajura Tq.Chandur Railway
Dist. Amravati. ..

RESPONDENTS

.....
Mr. A.D. Sonak, Additional Public Prosecutor for appellant-State
Mr. N.V. Fulzele, Advocate for respondents/accused
.....

**CORAM: P.N. DESHMUKH &
MRS.SWAPNA JOSHI, JJ.
DATED: 27.11.2018**

JUDGMENT: (PER MRS.SWAPNA JOSHI, J.)

1. The instant Appeal has been preferred by State challenging the

judgment and order dated 17th October 2012, delivered by learned Additional Sessions Judge, Amravati in Sessions Trial No. 80/2008 acquitting the respondents (hereinafter referred to as "*the accused*") of the offences punishable under section 302 r/ws. 34 of the Indian Penal Code.

2. The prosecution case can be summarized as under :

Smt. Sheela Dilip Pohankar (*deceased*), was working for *Darubandi Samiti*," Rajur, Tq. Chandur Railway, Dist. Amravati. Original A-4-Meena Mehsram was dealing with the business of selling liquor at home. There used to be some dispute between deceased-Sheela and A4-Meena. On 16.2.2008 at about 9.000am, A3-Mankarna (*since dead*) pushed the mother of deceased-Sheela who was returning from field. Commotion took place between the accused and deceased on this count. It is the case of the prosecution on the same day at about 11.00 am, when Sheela was sitting in the courtyard of her house, suddenly A1-Pravin and A2-Malti caught hold of deceased Sheela, whereas A4-Meena poured kerosene on the person of Sheela and A3-Mankarna set her ablaze, on the count that Sheela was having an illicit relations with some persons. At the relevant time, brother of Sheela, namely, Premdas Waghmare (PW7) arrived at the place of the incident and took Sheela to the hospital. On the way to the hospital, Sheela informed about the said incident to her brother. After admitting Sheela in the hospital, the Executive Magistrate recorded her dying declaration, after making enquiry with the Medical Officer about the fitness of Sheela to give her statement. On the basis of the said dying declaration, offence came to

be registered vide Crime No.23/2008. On 17.2.2008, Sheela succumbed to her injuries. The Investigating Officer, PW8-Mahadeo Tijare visited the place of the incident and recorded the spot panchnama. He took charge of the articles lying on the spot, viz, burnt pieces of saree, kerosene can, matchstick and kerosene oil from the ground absorbed in a cotton swab under panchnama (Exh.35). PW8 then recorded the statements of the witnesses. PW8 sent all the seized articles to the Chemical Analyser's office for its analysis and secured the CA report (Exh.59). After completion of investigation, PW8 filed the charge-sheet. The case was committed to the Court of Sessions. On analysis of the evidence on record and hearing both sides, the learned trial Judge acquitted the accused. The said judgment and order is impugned in the present Appeal.

3. Mr. A.D. Sonak, learned APP for appellant-State vociferously contended that the impugned order is illegal and perverse inasmuch as the learned trial Judge has not considered the dying declaration recorded by the Executive Magistrate and even the oral dying declaration made by the deceased before the relevant witnesses. He further submitted that the learned trial Judge has not considered the evidence in its right perspective and as such, the impugned judgment is erroneous and it be set aside and the accused are liable for conviction.

4. *Per contra*, Shri N.V.Fulzele, learned counsel for the accused supported the impugned judgment and canvassed that since the oral as well as

written dying declarations were replete with lacunae and since the physical and mental fitness of the deceased was not ascertained by the Executive Magistrate, the learned trial Judge has considered the said aspect and rightly acquitted the accused. It is further stated that even the version of oral as well as dying declaration is inconsistent, and therefore the learned trial Judge has rightly discarded the said evidence. It is stated that the prosecution has failed to examine the material witness i.e. mother of the deceased, who accompanied with Sheela for a considerable time and carried her daughter to hospital and hence the learned trial Judge has rightly acquitted the accused.

5. As far as the dying declaration is concerned, it is well-settled that conviction can be based on the sole dying declaration of the deceased if the dying declaration is found to be consistent, coherent and made in a conscious state of mind. Time and again, the Hon'ble Apex Court has laid down guidelines to follow while recording the dying declaration. It is expected that the Courts should be extremely careful when they deal with the dying declaration as the maker thereof is not available for cross-examination which poses a great difficulty to the accused person. The Court has to examine the dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the Investigating agency who may be interested in the success of investigation or who may be negligent while recording the dying declaration. It is also well settled that when there are more than

one dying declarations, it should not be that the dying declaration which supports the prosecution case alone can be accepted while innocuous dying declarations have to be rejected. While recording the dying declaration the Court has to see that, (i) the examination of the patient by the doctor is conducted, before recording of his statement and a certificate is obtained from the Doctor that the person is in a sound mental state to give statement; (ii) the presence of the doctor near the patient during recording of the statement; (iii) the relatives of the patient should not be near the patient and if at all present should be removed from that place where the statement of the patient is being recorded so that the patient should be in a position to make voluntary statement, free from any influence or any tutoring ; (iv) after recording the statement it should be read over to that person and the contents thereof should be explained. There should be confirmation from that person that the statement is correctly recorded and it has true sense. No such guidelines are followed in the instant case.

6. In order to consider the rival contentions of both sides, it would be appropriate to go through the evidence led by the prosecution, more particularly, the testimony of PW4-Dilip Pohankar, PW7-Premdas Waghmare and PW1-Subhash Gedam; and on the point of oral dying declaration the testimony of PW6-Dilip Lahane, Naib Tahsildar and Executive Magistrate, who recorded the dying declaration of deceased-Sheela along with the testimony of PW8-Mahadeo Tijare, the investigating Officer and PW9-Dr.Varsha Rode and PW10-Dr.Lalitkumar Kose, the Medical officers.

7. It is not seriously disputed that deceased-Sheela died an unnatural death. The *post-mortem* report reveals the cause of death as “shock due to 100% extensive burns”. The testimony of Dr. Varsha Rode (PW9), who is the Medical officer and conducted the post-mortem, noticed the following injuries on external examination :-

- i) Burn injuries to head, neck and face 9%
 - ii) Both upper limbs 18%
 - iii) Both lower limbs 36%
 - iv) Chest and abdomen 18%
 - v) back and buttocks 18%
 - vi) Private parts 1%
- Total 100%

8. PW9 prepared the autopsy vide Exh. 62. According to her, the injuries were sufficient to cause death. The spot panchnama reveals plastic can which was empty kerosene can and one used matchstick. It further reveals that the incident had taken place in front of her house. Thus, it is not seriously disputed that Sheela died a unnatural death.

9. The prosecution case hinges on oral as well as written dying declarations. The testimony of PW6-Dilip Lahane, Executive Magistrate, indicates that on 16.2.2008 between 2 and 2.45 pm, he received a requisition from Irvin Hospital

to record the dying declaration of Sheela Dilip Pohankar who had received burn injuries. On reaching the hospital, the Medical Officer examined Sheela and issued certificate of fitness to give her statement. PW6 then recorded the statement of Sheela, who stated that she was sitting in the courtyard of her house. At about 11.am A1-Pravin and A2-Malti arrived there and caught hold of her hand. A4-Meena poured kerosene on her person and A3-Marnkarna ignited the matchstick and set her on fire. All of them said that Sheela was having relations with somebody else. PW6 recorded the dying declaration of Sheela as per her version vide Exh.44. He obtained the thumb impression of Sheela on the said dying declaration. According to PW6, the Medical Officer was present while he recorded the statement of Sheela. The Medical Officer examined her and accordingly issued the medical certificate.

10. In the cross-examination of PW6, it is noticed that the he had taken a blank proforma with him while recording the dying declaration of Sheela. In the said proforma, PW6 had written his name by striking the name of one V.G.Patil at two places. According to PW6, he reached the Ward at about 3.00pm, and started recording the dying declaration at about 3.15pm. PW6 admitted that it was printed in the form that the patient is conscious. It is further noticed that it was not mentioned as to whom the thumb impression belongs.

11. Careful scrutiny of the testimony of Medical Officer, it is noticed that the Medical Officer has not taken pains to satisfy himself that the patient is mentally

and physically fit to give her statement, prior to and after concluding the recording of dying declaration of Sheela and accordingly issue certificate. Significantly, the Medical Officer has signed on the printed form where it is stated that the patient is conscious. The said *factum* goes to the root of the case and creates a serious doubt about the physical and mental fitness of Sheela to give her statement, particularly when she received 100 percent burn injuries. Similarly, it is also not clear as to how the Medical officer has obtained the thumb impression of Shela on the dying declaration when the thumb was burnt to the hilt. The post mortem report shows the burn injuries of 18 per cent to the upper limbs. In these circumstances, it is doubtful whether thumb impression which is shown in the dying declaration (Exh.44) is of deceased Sheela.

12. It is worthwhile to note that as per version of PW6 the requisition was received by him at 2.45 pm. In this context, the testimony of Medical Officer PW10-Dr.Lalit Kose in cross-examination shows that he received the requisition for examination at about 3.15pm. The medical certificate issued by the Medical officer (Exh.68) stating about the fitness of the Sheela to give her statement shows the timing as 3.10 pm, meaning thereby that the Medical officer examined the patient prior to recording of her dying declaration at 3.10 pm, which was concluded at 3.40 pm. In these circumstances, it is not clear when the requisition was made to PW10 at 3.15 pm, then how the Medical officer PW10 has issued the certificate regarding the fitness of Sheela at 3.10 pm. which means that even prior to issuing the requisition to PW6 to record the dying declaration of Sheela, the Medical officer PW10 has issued the

medical certificate about the fitness of Sheela particularly when according to PW6 he had reached the hospital at 3.00pm and started recording the dying declaration at 3.15 pm. There is discrepancy in the timings by the Executive Magistrate and the Medical Officer prior to recording of the alleged dying declaration of Sheela. It is thus clear that unless the Executive Magistrate reaches the hospital and receives the requisition, it is not possible for the Medical Officer to issue the medical certificate in respect of Sheela prior to the requisition made by Executive Magistrate, to record the dying declaration of the patient. In the aforesaid circumstances, the dying declaration recorded by PW6 becomes doubtful document and does not inspire confidence. It is pertinent to note that there is no certificate of the medical officer that the patient was physically and mentally fit to give her statement particularly when she received 100 per cent burn injuries. In this context useful reference can be made to the case law:

13. In this context, it would be advantageous to refer to the judgment on the point of fitness of the person making the dying declaration, in the case of Manik Vanaji Gawali vs.State of Maharashtra; reported in 2013 CRI.L.J. 972, more particularly para nos.31 reads thus:

“31. Whether a declarant is in fit state of mind is a question of fact. That fact is to be proved by the person who has received, listened, drawn memorandum or leaves in his memory. He has to prove the fact of state of health and mind of the declarant. Whenever such person proves that the declarant was in fit state of mind, it is his own opinion based on judgment as to said state derived from facts.”

14. The Division Bench of this Court, in the case of Manohar Landge vs. State of Maharashtra, reported in 2000(2) Mh.L.J. page 3, has held that the doctor must state about general physical condition of patient before stating, whether patient was physically and mentally fit to give statement and that evidence can be brought on record by producing relevant case papers. In the case of Kanchy Ramchander vs. State of A.P. reported in 1995 Supp (4) SCC 118, it has been held that dying declaration if found to be true and free from embellishment then it is sufficient for recording conviction. The prosecution must prove that the deceased was in proper mental condition to make the dying declaration. The failure of the prosecution to establish that the deceased, before she made the dying declaration, was in proper mental condition to make the dying declaration detracts materially from the reliability of the dying declaration and it would not be safe to rely upon it.

15. As far as the oral dying declaration is concerned, the deposition of PW4-Dilip Pohankar, who is the husband of Sheela, shows that on 16.2.2008 at about 8.am he had gone for work. At that time, his cousin brother Naresh Pohankar came to call him to home. On arrival, he saw people gathered near his house. He came to know that his wife had received burn injuries. PW4 therefore took Sheela to Irvin Hospital at Amravati. They reached the Hospital at about 3.00 pm. On making an enquiry with Sheela as to how she received the burn injuries, he informed that four persons have set her on fire, viz. A4-Meena A1-Pravin A2-Malti and A3-Mankarna.

Sheela further informed that there was a quarrel with the wife of Pravin, namely, Sheetal Gajbhiye, account of money. PW4 admitted that he had not lodged the report on the date of the incident or on the next day. According to him, his statement was recorded by the police on the next day. He further clarified that he had lodged the written complaint in the Police Station. The testimony of PW4 shows that he had not reported the incident to the police on the date of the incident. It further shows that his wife informed him that all the accused persons had set her ablaze. No specific roles of the accused were mentioned by Sheela to PW4.

16. The evidence of PW7-Premdas Waghmare, who is the brother of Sheela, shows that at about 3.30pm, he reached Irvin Hospital at Armavati on receipt of message that Sheela had received injuries. On enquiry, Sheela informed that she has set on fire by all the accused by pouring kerosene on her person. Thus, as per PW7 all the accused persons had poured kerosene and set her on fire. According to PW 7 he informed the incident to the Police on 20th, although the police visited his village on 17th, 18th and 19th February, 2008. It is not clear as to why PW7 has not informed about Sheela making statement before him involving all the accused persons on the same and why he had kept mum for three days. The said conduct of PW7 makes his testimony doubtful.

17. Now coming to the testimony of PW1-Subhash Gedam, it shows that on the date of incident at about 9.00 am, he proceeded to his field by carrying his

bullocks for grazing. At that time, A3-Mankarna was bringing the mother of deceased-Sheela by pushing her. PW1 left his bullocks and returned home. He heard commotion that Sheela got burnt, so he rushed to the post and found that Sheela was lying on the road in a burnt condition. Her mother came afterwards and put a blanket on Sheela. According to PW1, on making enquiry, Sheela told him that she was set on fire by accused persons by pouring kerosene. She told him that A1-Pravin and A2-Malti caught hold of her and A4-Meena and A3-Mankarna poured kerosene on her and set her on fire. PW1 accompanied Sheela to the hospital in an auto-rickshaw and, Sheela told him that Pravin Malti Mena and Mankarna set her on fire. The testimony of PW1 thus differs from the testimony of PW7-Premdas and PW4-Dilip as well as the contents in the written dying declaration, inasmuch as PW1 has come up with a new story that Pravin and Malti caught hold of her and accused Meena and Mankarna poured kerosene and set her ablaze. Thus, this discrepancy in the version of PW1 goes to the root of the case and makes the entire case of the prosecution doubtful.

18. Although the testimony of PW1 shows the presence of mother at the place of the incident immediately and mother of Sheela took her to the hospital, it is however not clear as to why the prosecution has not examined the mother of Sheela which, in our considered view, could have thrown light on the aspect of the oral dying declaration and the manner in which the incident had taken place. Non-examination of mother of Sheela is thus fatal to the case of the prosecution. In

view of the facts and circumstances and the inconsistent dying declarations, we are of the view that the prosecution has failed to establish that the accused persons had committed murder of Sheela by setting her ablaze. Even the motive of committing murder of Sheela has not been established by the prosecution. The mother of Sheela would have clarified as to what was the exact motive for the accused persons to commit murder of Sheela. It is well settled that although the patient receives 100 per cent burn injuries, still the patient can give his/or her statement, however, in the case in hand, the Medical Officer has not proved whether Sheela was physically and mentally fit to give her statement when the Executive Magistrate recorded her dying declaration. There is discrepancy in the timings as to when requisition was given to the Executive Magistrate to record the dying declaration of Sheela and when the Medical officer found her fit to give her statement. The learned trial Judge has rightly assessed the evidence led by the prosecution in its proper perspective and has rightly come to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt. Significantly, according to the Investigating Officer the place of incident was inside the house, whereas as per the version of deceased, the incident had taken place in the courtyard. However there is no courtyard to the house of the deceased, inasmuch as directly the road starts from outside the house of deceased. Thus, the place of incident is also doubtful in the instant case.

19. The present Appeal is preferred by State against acquittal. In the case of **Mahendra Pratap Singh vs. State of Uttar Pradesh**, reported in **(2009) 11**

SCC 334, the Hon'ble Apex Court has given a rule of prudence that if on appraisal of evidence and on considering relevant attending circumstances, it is found that two views are possible, one for acquitting accused and other for convicting accused, in such a situation, rule of prudence should guide High Court not to disturb the order of acquittal made by the trial court, unless conclusions of trial court drawn on evidence on record are found to be unreasonable and perverse or unsustainable, High Court should not interfere with the order of acquittal. In the case of Harbeer Singh vs. Sheeshpal and others, reported in (2016) 16 SCC 418, it is observed by the Hon'ble Supreme Court on the same facts that another view could also have been taken on the evidence on record, is not a ground for reversing an order of acquittal. In view of the aforesaid facts and circumstances, no interference is warranted with the order of acquittal. Hence, the following order :

ORDER

Criminal Appeal No.325/2013 is dismissed.

JUDGE

JUDGE