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

CRIMINAL APPEAL NO. 328 OF 2000

State of Maharashtra

...Appellant
(Orig. Complainant)

Versus

1. Arun Balkrishna Mhatre,
Age 37 years,
R/o. Nagaon, Tal. Alibag,
Dist. Raigad

2. Nandkumar Balaram Mayekar,
Age 40 years,
R/o. Nagaon, Tal. Alibag,
Dist. Raigad.

...Respondents
(Ori. Accused Nos. 1 & 2)

.....
Mr.A.R.Patil, APP for the Appellant-State.
None for the Respondents.

.....

**CORAM : PRASANNA.B.VARALE &
V.G. BISHT, JJ.**

DATE : 29TH SEPTEMBER, 2020

JUDGMENT (PER: V.G.BISHT, J.)

1. This appeal is filed by the State challenging the judgment and order of acquittal dated 8th February, 2000 passed in Sessions Case No. 10 of 1996 by learned Additional Sessions Judge, Raigad, Alibag for the offence punishable under Section 302 read with 34 of the Indian Penal Code, 1860 (for short "IPC").

2. Narrated in nutshell, the prosecution case is that, Anil Chitnis (deceased) was an Editor of a newspaper by name "Thingí". On 28th September, 1995 Alibag police received a telephonic message at about 16.35 hours from Police Constable Salvi, Buckle No. 1894 from Civil Hospital, Alibag that the deceased was admitted in the hospital in an injured condition. Thereafter, PSI Mahaldar (PW-1) reached the hospital and after ascertaining the physical condition of the deceased, recorded the statement of deceased.

3. The prosecution then contends that from the statement so recorded by PW-1, it revealed that the deceased was assaulted by the respondents - accused on his chest and abdomen by means of an instrument like 'gupti' on the ground that the deceased used to make complaints to police about them. On the basis of said statement of deceased, Crime No. 96 of 1995 under Section 302 read with 34 of IPC came to be registered by Alibag Police Station, Raigad.

4. It further appears from the record that a further statement of deceased on the request of PW-1 came to be recorded by Executive Magistrate Mr. Eknath Patil. The investigation was then handed over to PSI Bagave (PW-7). PSI Bagave visited the place of occurrence and prepared spot panchnama and recorded statements of some of the witnesses. He also drew inquest panchnama, seized various articles from the spot including sickle and forwarded those articles to the Forensic

Science Laboratory, collected report of Forensic Science Laboratory and after completion of investigation, chargesheeted the respondents -accused under Section 302 read with 34 of IPC and committed the case to the Court of Sessions, Alibag at Raigad.

5. To substantiate the charge against the respondents-accused, the prosecution has examined as many as seven witnesses and exhibited number of documents. The respondents-accused were questioned under Section 313 of the Code of Criminal Procedure, 1973 (for short “the Cr.PC”) about the incriminating evidence and circumstances and they denied all of them as false.

6. Mr. Patil, learned APP for the appellant -State, submitted that the prosecution case is based on three dying declarations, which are consistent with each other and this being so the learned trial Court wrongly rejected those dying declarations. The learned APP then submitted that the learned trial Court ought to have relied upon dying declaration recorded by the Executive Magistrate. According to him, since the learned trial Court has failed to appreciate the whole evidence on record in proper perspective, leading to an erroneous acquittal of the respondents -accused, the impugned judgment and order of acquittal needs to be set aside.

7. When the matter was called out, none appeared for the respondents-accused.

8. At the very outset, we note here that the postmortem report (Exh.37) is duly admitted in evidence by the defence during the course of trial. Probably this may be the reason for non-examination of the Medical Officer, who prepared postmortem report of the deceased. It seems that the opinion as to probable cause of death was reserved by the concerned Medical Officer, who performed the autopsy, pending reports of histopathology and neuropathology. However, those Medical Officers did find the evidence of fracture skull bone (head injury).

9. It is further seen from the record that deceased succumbed to the injury during the course of treatment. Although the final opinion as to cause of death is not discernible from the record but it seems that there is no dispute from the side of defence that the deceased succumbed to the injuries because of head injury found on his person.

10. In this case, there are two dying declarations on record, one recorded by PW-1 PSI which has also been made basis of FIR and the other by the Executive Magistrate. It is well settled that a “dying declaration”, which is the statement of the deceased prior to death, with regard to the cause of his/ her death need not be in any particular form.

11. There can be no doubt that conviction can be based solely on a dying declaration. This proposition finds support from the judgment of Hon'ble Apex Court in **Ramavati Devi Versus State of Bihar**¹. Of course, for conviction to be based on only on uncorroborated dying declaration, the Court must satisfy itself that, what is stated in dying declaration, is unalloyed truth and that it is absolutely safe to act upon it. The Court is obliged to satisfy itself that the dying declaration is of such a nature as to inspire confidence of its correctness. The Court must carefully examine whether the deceased was in a fit state of mind and health to narrate distinctly and accurately what exactly had happened to him/ her.

12. We wish to scan and scrutinize two dying declarations in the present case one by one.

13. PW-1 Abdul Latif Abbas Mahaldar states in his evidence (Exh. 14) that on 28th September, 1995 he was on duty as PSI at Alibag police station. One Head Constable Jadhav, Buckle No. 962 being PSO informed that one Anil Chitnis (deceased) was admitted in hospital in injured state. Therefore, he went to the hospital. He met Dr. Arun Gavali (PW-2) and expressed his wish to record the statement of injured. Dr. Gavali told him that Anil Chitnis is in a position to talk and he may record his statement. He thereafter went to the deceased who disclosed his name as Anil Chitnis. When this witness asked him as to how he sustained injuries, the

¹ AIR 1983 SC 164

deceased told him that on 28th September, 1995, both the accused had assaulted him over his stomach and face at Nagaon Bunder on the ground that he (deceased) was making complaints to police about them. He also told the names of assailants as Arun Balkrishna Mhatre (A-1) and Nandu @ Nandkumar Mayekar (A-2). He accordingly recorded his statement and obtained his signature. While he was recording the statement, Dr. Gavali was treating the deceased. He also obtained signature of Dr. Gavali on the statement in token of the fitness of the injured to make statement. He then proved the statement of deceased at Exh. 15.

14. It is his further evidence that after recording the statement, he issued a letter to the Executive Magistrate (PW-6) with a request to record dying declaration of the deceased. The evidence of this witness further shows that after having recorded the statement of deceased, the deceased made some signs by waving his hands and therefore, he asked him whether he wanted to state anything else and handed over to him a pen and piece of paper. The deceased wrote something on that piece of paper. Dr. Gavali was also present there and put his signature. He then proved the piece of paper at Exh. 16.

15. PW-1 then went to the police station and registered crime on the basis of the statement made to him by deceased and then handed over further investigation to PSI Bagave (PW-7).

16. One does not get much prescience to note from the testimony of this witness that not only he recorded the statement at Exhibits 15 and 16 at the instance of deceased but also requisitioned the services of the Executive Magistrate for the same purpose i.e., recording of dying declaration.

17. We also note from the evidence of this witness that after having satisfied himself from Dr. Gavali that the deceased was in a position to speak, he ventured to record his statement (Exh. 15) wherein, according to this witness, the deceased revealed the names of the assailants and the reason behind the assault. What is worrisome here is the evidence of PW-2 -Medical Officer about the health status of deceased at the relevant time.

18. PW-2 Dr.Ajit Eknath Gavali has deposed (Exh. 17) in paragraph 2 of his examination-in-chief that the injured was unable to speak because of the injury sustained by him.

19. We would like to put it on record and which is an admitted position also that the deceased had one cut injury which extended from the left ear lobule to the right cheek and the length of injury was about 22 cm. This further gets strengthened in the light of evidence of PW-2 Medical Officer wherein he clearly states in his cross-examination at paragraph 5

that injury No.10 i.e., incised wound began from the left ear lobule and was extending upto right cheek. The Medical Officer also admits in the same paragraph that lower jaw of the injured was cut due to injury No.10 and was almost hanging and, therefore, the deceased was unable to speak.

20. This being a very clear and emerging picture as to the inability of deceased to communicate, the so called statement allegedly given by deceased and as recorded by PW-1 with the help and endorsement of the Medical officer is quite susceptible to all sorts of suspicion. There is endorsement on Exhibit 15 which reads that, the patient was conscious and the statement was recorded in the presence of Medical Officer. This endorsement in the light of admission given by the Medical Officer could not have come on Exhibit 15 by any stretch of imagination. The whole document, we are sorry to note, is nothing but is concoction of highest order, if we may say so in the light of chief and cross-examination of the Medical Officer.

21. Exhibit 15 shows that the alleged signature of deceased as marked by letter "A". It also shows an angular line marked by letter "B" which is above the signature of deceased. The cross-examination of this witness shows that line above the signature of deceased was drawn by him when this witness asked him to sign the statement and deceased drew the line

before putting his signature. The learned trial Court has rightly questioned about putting of signature of the deceased on Exhibit 15 when the deceased was able to draw only one angular line marked by letter “B” when the deceased was firstly asked to put his signature on the so called dying declaration. It is further rightly observed by the learned trial Court that the prosecution was not able to explain as to how signature marked “A” appeared after drawing of the angular line.

22. Needless to say the very circumstance that initially the injured-deceased was unable to sign and therefore, he could draw only an angular line was indicative of the fact that the deceased was unable to put his signature.

23. Further, Exhibit 15 shows that the alleged signature of deceased was below the signature of this witness which is again rightly questioned by the learned trial Court. In an ordinary course, the signature of declarant should have been either of the above of the person in whose presence the declaration is recorded or at least parallel to it. This ambiguity is also not cleared by the prosecution. For all these reasons, this statement (Exh. 15) is seriously questioned and rightly so by the learned trial Court.

24. We have already pointed out that another document at Exh. 16 was also recorded by this witness at the instance of deceased. A careful

scrutiny of Exhibit 16 would show the name of Arun Balkrishna Mhatre at the top followed by surname Mhatre in a faint ink. After leaving some space, again the surname Mhatre is written and immediately below it is the name of village Nagaon. Again thereafter is the name of Arun Balkrishna Mhatre and below that the surname Mayekar is written, and parallel to name of Mayekar the word gupti is written in cross direction.

25. A nagging question, which springs up in our mind is, what was the pressing necessity of writing the names of these persons when admittedly in Exhibit 15 the names of assailants were allegedly revealed by deceased. If both these documents are read in conjunction then Exhibit 16 loses its value and if Exhibit 16 is read in isolation then it nowhere suggests clearly and categorically that these persons were the assailants.

26. Reading Exhibit 16 independently does not in any manner explain the circumstances leading to the death of deceased or for that matter indicating the cause of his death. In our considered opinion, the learned trial Court rightly discarded Exhibit 16.

27. This brings us to the second dying declaration.

28. PW-6 Eknath Krishna Patil states in his evidence (Exh. 31) that at the relevant time he was working as Tahsildar, Alibag and was also designated as Executive Magistrate. On 28th September, 1995 he received

a letter (Exh. 32) from Sr. PSI Alibag. He then went to Civil Hospital and introduced himself to the Doctor and told him that he wanted to record the statement of injured. He also asked Doctor whether the injured was able to make statement. Doctor, on his part, told him that the patient had injury on his jaw and therefore, was unable to speak but would be able to reply the questions in writing.

29. According to this witness, after obtaining endorsement of Dr. Gavali, he asked the deceased about his name by writing a question to that effect. As the police paper showed his name as Anil Vasant Chitnis, he confirmed it from the deceased in the affirmative. He then wrote next question as to who assaulted him, to which the deceased gave answer by writing "Arun Balkrishna Mhatre, Sarpanch Nagaon. He then again wrote a question as to by what instrument he was assaulted and the injured wrote word "*Guptine*".

30. According to this witness, he intended to ask more questions but the injured made signs with his right hand and stated that he was unable to write further. Thereafter, the Doctor gave endorsement to the effect that because of pains the injured was unable to give further reply in writing. He then proved the statement of deceased at Exh.33.

31. Before we dwell on so called statement at Exh. 33, it is clear from the cross-examination of PW-6 and as also from the statement at Exh. 33

that it nowhere bore signature of the deceased. Similarly, there is no corroboration in support of dying declaration at Exh.33. On the contrary, while Exhibits 15 and 16 show that there were two assailants, Exhibit 33 only spell out the name of only one assailant, namely, Arun Balkrishna Mhatre.

32. Apart from above, Exhibit 33 also does not show or for that matter the evidence of PW-6 does not show that the deceased was in a fit state of mind to give statement. Rather, it would appear that the confusion was writ large.

33. We have reason to opine that because while Exhibits 15 and 16 reveals two names of the assailants, Exhibit 33 is confined to only one assailant.

34. For all these reasons, it cannot be ruled out that the deceased might be mentally and physically in a state of confusion and might well be drawing up his imagination while he was making declaration/ statement. The benefit in such circumstances so accruing must be given to the respondents-accused.

35. Authenticity and reliability of Exhibit 33 can also be seriously questioned in the premise of ocular version of PW-3 Ramchandra Sitaram Athavale.

36. PW-3 states in his evidence (Exh.19) that he is resident of village Nagaon. There is a library by the side of Grampanchayat office. On the day of incident, he was present in the library and was reading paper. He was knowing Anil Chitnis i.e., deceased. There was a meeting in the office of Grampanchayat and deceased had come there on the day of incident. The deceased was there for about 10 to 15 minutes and thereafter he came out of the Grampanchayat office.

37. According to this witness, he thought that the deceased must be going to his house. While he was reading the paper, he casually looked towards the gate and saw that Anil Chitnis (deceased) was lying inside the gate of Grampanchayat with blood on his face. This witness got frightened and went inside the library into the room of librarian.

38. The evidence of this witness simply suggests that there could not have been any better witness than this witness on the point of incident, if any, that had taken place in front of Grampanchayat office as alleged by prosecution. The deceased was very much within the range of eye sight of this witness as he was reading the paper and certainly was in a best position to see the assailants.

39. Surprisingly, his examination-in-chief is totally silent as to the authorship of alleged assault on the person of deceased. If we go through his cross-examination, we find his admission to the fact that he had stated

before police that someone had assaulted Anil Chitnis when he came out of the Grampanchayat office and then fell down.

40. When pricked up further in examination-in-chief as to the authorship, he expressed ignorance as to who were the assailants. His cross-examination, which is quite material and significant, shows that he knows both the accused. Had the accused been assailant as is strikingly tried to be posed and presented by Exhibit 33, this witness definitely would have given the name of accused as an assailant. It further becomes more clearer in the concluding part of his cross-examination when he states that the accused were not the assailants.

41. Nothing is brought on record to show that all of a sudden this witness developed some hostility against the prosecution or had any motive to safeguard the interest of the respondents-accused. We, therefore, find no reason to overlook his testimony.

42. For this reason also it would be quite unsafe to place reliance on dying declaration at Exhibit 33.

43. The above being the nature of evidence and obtaining circumstances the learned trial Court held that prosecution has failed to prove its case beyond reasonable doubt and extended benefit of doubt in favour of the respondents –accused. This finding of the trial Court could

not be said to be perverse. It was based on a proper appreciation of evidence.

44. On perusal of the entire evidence and the law on the subject, we are of the considered view that the trial Court was right in holding that the prosecution has failed to prove its case beyond reasonable doubt and rightly extended benefit of doubt to the respondents –accused.

45. For the aforesaid reasons, we find no merit in the appeal and pass the following order :

ORDER

Criminal Appeal is dismissed.

(V. G. BISHT,J.)

(PRASANNA.B.VARALE, J.)