

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

CRIMINAL APPEAL NO. 484 OF 2016

1. Ravi s/o Pandurang Gaikwad,
Age : 32 years, Occu.: Labour,
R/o. Sambhaji Colony, N-6/E-16/3,
CIDCO, Aurangabad, Taluka and
District Aurangabad.
2. Kailas s/o Pandurang Gaikwad,
Age : 34 years,
R/o. As above.
3. Kantabai w/o Pandurang Gaikwad,
Age : 32 years, Occu.: Household,
R/o. As above.
4. Vinod s/o Bhimrao Magare,
Age : 40 years, Occu.: Painting work,
R/o. House No. 5-19-55, Sabji Mandi,
Aurangabad, Taluka and District
Aurangabad.

... APPELLANTS
(Orig. accused
Nos. 1,2,4 & 5)

VERSUS

The State of Maharashtra
through the Police Inspector,
CIDCO Police Station, Aurangabad,
Taluka and District Aurangabad.

... RESPONDENT

...

Mr. N. S. Kadarale, Advocate for the appellants
Mr. R. B. Bagul, APP for the respondent/State

**CORAM : R. G. AVACHAT &
R. M. JOSHI, JJ.
RESERVED ON : 20TH DECEMBER, 2022
PRONOUNCED ON: 23RD DECEMBER, 2022**

JUDGMENT (PER- R. M. JOSHI, J.):-

1. Appellants are in-law of deceased Ajay who died on 03/06/2011 after sustaining burn injuries on 31/05/2011. Appellants/accused being aggrieved by the judgment and order dated 25/07/2016 passed by Additional Sessions Judge, Aurangabad in Sessions Case No. 327 of 2011 convicting them for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code have preferred this appeal under Section 374 of the Code of Criminal Procedure.

2. On 01/06/2011 PSI Shinde attached to the CIDCO Police Station, Aurangabad recorded statement of Ajay while he was admitted in Ghati Hospital wherein he gave account as to how he sustained burn injuries. On the basis of the said statement offence came to be registered against appellants and other accused vide Crime No. 216/2011. According to Ajay (deceased) on 31/05/2011 at about 10.00 am he had quarrel with his wife and in that regard she had lodged complaint

against him with police. At about 8.30 pm when he was in the house with his wife his brother-in-law Kailas, Ravi, mother-in-law Kantabai and co-brother-in-law Vinod came to his house and his mother-in-law started abusing him for the reason as to why he is troubling her daughter. Brother-in-law and co-brother-in-law started assaulting him. Suddenly someone poured kerosene from behind on his person and Vinod by lighting matchstick set him on fire. He came out of the house raising shouts and neighbouring shopkeeper doused fire with water and shawl. According to him his father-in-law came to the spot after about 10 minutes and did nothing. Thereafter his parents-in-law and wife admitted him at MJM Hospital and after preliminary treatment he was taken to Ghati Hospital for further treatment.

3. After offence came to be registered investigation was done by PSI Shinde. He gave requisition to Special Judicial Magistrate for recording statement of Ajay while he was admitted in Ashwini Hospital. Accordingly statement came to be recorded on 03/06/2011. Police visited spot of the incident and panchnama was drawn. Statements of witnesses were recorded.

Seized muddemal from the spot was sent to the Chemical Analyzer for examination. On completion of investigation charge-sheet came to be filed. As appellants and co-accused abjured charge they were put on trial which culminated into conviction of all accused except wife of deceased. No appeal is preferred by State against said acquittal.

4. Prosecution has examined in all 9 witnesses to prove the guilt of the accused. In short evidence can be summarized as follows. Prosecution has sought to prove homicidal death of deceased by examining. Dr. Wakde (PW-8) who conducted autopsy on the dead body of Ajay. According to him the cause of death was "septic shock due to burns". Prosecution seeks aid of two written statements (Exhibits 58 & 77) made by Ajay which after his death are considered as dying declaration. PSI Shinde (PW-9) deposed about he recording statement (Exhibit 77) as per say of deceased and at that time according to him he was in condition to make valid statement. Similarly statement dated 03/06/2011 made by Ajay at Exhibit 58 is sought to be proved through Pralhad Ghule (PW-3) who is Special Judicial Magistrate.

Prosecution has also examined Dr. Yelikar (PW-1) who claims to have been present at the time of recording of this statement at Ashwini Hospital. Prosecution has further examined Narsing Sangwe (PW-6) who is neighbouring shopkeeper and saw Ajay coming out of the house in flames and he along with others extinguishing the same. Ashok Gawale (PW-4) father of deceased was examined in order to prove incriminating oral dying declaration made to him by Ajay while he was in hospital.

5. Learned Advocate for the appellants submitted that dying declarations (Exhibit 58 and 77) are not consistent interse as well as oral dying declaration on material aspects. Thus, they are not reliable to place reliance and hold appellants guilty of any offence. He also argued that prosecution has failed to examine Medical officer who allegedly gave endorsement about condition of the patient when PSI Shinde recorded statement (Exhibit 77). With the help of evidence of Narsing (PW-6) and Akash Sabale (PW-5) it is sought to be argued that involvement of the appellants herein is completely ruled out in the incident in which Ajay sustained burn. According to him evidence of Akash

(PW-5) read with evidence of father of deceased suggest that it is a possible case of self immolation. He placed reliance on following judgments:

(i) Mohan Lal and Ors. Vs. State of Haryana, 2007 STPL 5136 SC

(ii) Shaikah Bakshu and ors. Vs. State of Maharashtra, 2007 STPL 12639 SC

(iii) Uttam Vs. State of Maharashtra, 2022 STPL 7440 SC

(iv) Sultan Vs. State of Karnataka, 2022 STPL 10524 SC

(v) Smt. Rashida Abdul Gani Khairadi Vs. The State of Maharashtra, 2014 All MR (Cri) 244

6. Learned APP strenuously urged that conviction can be based upon dying declaration and there is no reason for discarding dying declarations recorded by Police Officer and Special Judicial Magistrate, as minor discrepancies therein are not enough to disbelieve them. With regard to the oral dying declaration made to father of the deceased it is submitted that except for the statement that accused caught hold of him rest of the declaration is consistent with written dying declaration. He further sought to argue that evidence of Narsing (PW-6) does not indicate that appellants were not at home because during in the intermittent period he went to his house to bring shawl and

therefore probably he could not see appellants coming out of the house of the deceased. He also submitted that testimony of Akash (PW-5) is wholly unreliable being hostile witness and therefore cannot be taken into consideration to extend any benefit thereof to the appellants.

7. Law on the point of dying declaration is settled to the effect that if the same is found voluntary reliable and trustworthy, conviction can be based upon it even without any further corroboration. For accepting any dying declaration as voluntary, it must be shown by prosecution that at the time of making of statement patient was conscious and oriented. That statement made is voluntary and element of tutoring is absent. That after recording statement it is read over and made understood to maker before obtaining signature or thumb or any other mark thereon.

8. At the out set it must be recorded that statement of Ajay was recorded after 12 hours of incident and after 10 hours of his admission in Ghati Hospital and there is inordinate delay in

recording his statement. Dying declaration (Exhibit 77) is recorded at 8.00 a.m. by PSI Shinde, whereas the MLC is recorded at No. 14931/AZI, dtd. 31/05/2011 at 22.36 hours. As per testimony of Police Head Constable Dattatraya Gavai (PW-7) he went to Ghati Hospital and called upon Medical Officer to opine about the health status of the patient. The said requisition (Exhibit 68) indicates that it was given at 00.05 hours and an endorsement is made thereon by the Medical Officer about fitness of the patient to give statement. He however claims that since it was a complicated case he did not record statement of patient and called PSI to the hospital. The witness is Head Constable and obviously must have put in number of years of Police service. He does not take any entry in official record mentioning reason for not recording statement of the patient and hence his explanation for the first time before the Court that since he found the case to be complicated he did not record statement is an afterthought. In view of this, there creeps in a doubt as to whether any other statement was made by Ajay to the Head Constable and the same is suppressed. Be as it may it is a matter of record that statement of the patient though he

was in fit condition to make a valid statement was recorded only after 10 hours of registration of MLC. Absence of any plausible explanation for not recording the statement of patient for such long period, makes us to consider the evidence led by prosecution with greater scrutiny.

9. Out of two written dying declarations in the instant case, as far as dying declaration (Exhibit 77) recorded by PSI Shinde is concerned, the doctor who had examined the patient is not called to depose before the Court. In the cross-examination it is admitted by PSI Shinde that the endorsement of the Medical Officer was obtained after recording of the statement. The said endorsement is claimed to have been made at 8.45 am. i.e. after recording was over. Thus, there is no concrete evidence to show that before and during entire time of recording of statement, Ajay was conscious and oriented. It is further admitted by PSI Shinde that father of injured was present near him. It is sought to be argued on behalf of prosecution that there is no further cross-examination in order to indicate that father was present at the time of recording of statement or was

merely present in Hospital. However, the burden is entirely on prosecution and it is duty of prosecution to lead evidence eliminating possibility of presence of relative at the time of recording of statement by leading positive evidence. It was hence obligatory on part of PSI Shinde to clarify that at the time of recording of statement no relative including father of deceased was present near to him at time of actual recording of statement, which evidence is absent herein. Thus, there always remain a chance of tutoring, more particularly in view of the fact that Ajay neither to the shopkeepers nor to the Doctors at MGM hospital and Ghati hospital makes statement about he being set on fire.

10. In so far as the statement recorded at Exhibit 58 by Mr. P. B. Ghule (Special Judicial Magistrate) is concerned, he claims that it was recorded in Ashwini Hospital after ascertaining fitness of patient and the same was read over to him before obtaining impression of toe on statement. The said statement however shows correction in date. Apparently, date of 01/06/2011 has been changed to 03/06/2011. Similarly in

answer to question No. 4 (unnumbered in the statement), there is addition of the words "at approximately 8.00 pm". So also the impression of toe obtained of the patient is appearing on the part of statement and note above which is endorsement about left leg toe impression is made in such manner that it appears to have been inserted subsequently. The corrections made and endorsement of toe impression are not appearing to have been done in normal flow/course of writing. It is argued on behalf of the prosecution that there is initial on the correction of the date and ordinarily corrections can be required and on that count statement cannot be disbelieved. Such submission may be accepted in appropriate case but herein we are not inclined to be with learned APP, for the reason that, it has come in evidence of. Special Judicial Magistrate when he accepts that on 01/06/2011 at about 5.00 pm he had been Ghati hospital for recording statement of Ajay, but since patient was shifted to another hospital he could not record statement, the requisition (Exh. 47) is dated 01/06/2011 which was given for recording statement in Ghati hospital is used to record statement by correcting the date from "1 to 3". Concession can be given to him that same

requisition is used for recording statement on 03/06/2011 but in that event too, there is no justification for mentioning date 01/06/2011 on statement. This shows that on 01/06/2011 itself when this witness had been to Ghati hospital he started recording statement even before meeting patient and the same paper is used on 03/06/2011.

11. Not only that there is apparent subsequent insertion of words in Exhibit 58 but evidence of Special Judicial Magistrate is also not found convincing and worthy to place reliance. He claims that on 03/06/2011 at about 11.50 am he received requisition from PSI Shinde for recording dying declaration of Ajay. He claims that after the receipt of the said letter he went to Ashwini hospital. In the cross-examination however he admits that the said requisition was not given to him in advance but was given at Ashwini hospital. Moreover, there is no endorsement of the Medical Officer on Exhibit 58 to show that in his presence the statement of Ajay was recorded by Special Judicial Magistrate. Though prosecution has examined Dr. Yelikar (PW-1) who states that before recording statement of Ajay he

examined him and found him in the fit condition to record his statement. This endorsement is made on Exhibit 47. There is no explanation forthcoming from Special Judicial Magistrate as to what prevented him from obtaining the endorsement of Medical Officer on Exhibit 58 i.e. statement and what made him to get the same on Exhibit 47 i.e. requisition.

12. It is a settled position of law that there can be multiple dying declarations and unless they are inconsistent on material aspect cannot be disbelieved. Herein this case in the written dying declarations (Exhibit 58 and 77) Ajay does not claim that he being caught hold by any of the accused and thereafter kerosene being poured on his person before setting him ablaze. In the statement made to his father altogether different version of the incident is given by stating that the accused caught hold of his hands and thereafter the accused pouring of kerosene and setting him on fire took place. We find that the said statement materially changes the nature of incident in which Ajay sustained burns as compared to the statement Exhibits 58 and 77.

13. Once the statements of deceased are found to be involuntary, prone to tutoring and not wholly reliable, the conviction cannot be based upon it unless there is other evidence on record to corroborate. In this regard it would be material to refer to the testimony of Narsing (PW-6) who is independent witness. This witness is a shop keeper in the neighborhood of the house of deceased. He claims to have seen Ajay coming out of the house in flames and saw wife of the deceased also coming out of the house and going towards the residence of her parents. He further claimed to have brought shawl and put it on the person of the deceased. According to him parents and brother of wife of the deceased came and took him to hospital. Prosecution has failed to pose further question to this witness as to from where he had seen the parents and brother coming to the spot. In the cross-examination he further stated to have not seen anybody else than the wife of the deceased coming from the house. This witness is not disowned by the prosecution and hence on the basis of his testimony it can be held that only Ajay and his wife were seen coming from the house. There is no other evidence to show that accused were

found in the house or seen going from there.

14. Prosecution witness Akash (PW-5) though is declared hostile but his testimony to the extent reliable and admissible either in favour of prosecution or defence can be certainly considered by the Court. This witness has deposed about deceased being unemployed, addicted to liquor and was frustrated. He also stated about deceased attempting to commit suicide by consuming poison on the date of the incident. There is no cross-examination conducted of this witness after these new facts were brought on record during the cross-examination conducted on behalf of the accused. Even if his testimony is not wholly accepted but we find element of truth in his version in view of evidence of father of the deceased Ashok Gawale (PW-4). In his evidence before the Court he claimed that relation between Ajay and his wife were strained for some reason and she went along with Ajay to stay at her parents home where they had cordial relation for 2-3 months. He does not claim any incident of quarrel or assault by Ajay to his wife. In the cross-examination it admitted that after six months of marriage Ajay

lost his job. From testimony of father of the deceased it can be inferred that deceased along with his wife went to stay at her parents home which indicates cordial relations of deceased with in laws. Evidence of Akash coupled with the fact admitted by father of the deceased shows that deceased had lost job and his wife was working and on that account he was frustrated. There is also suggestion made to the witness about self immolation by the deceased. In the facts of the case the said possibility is not ruled out completely.

15. We find no motive for appellants to kill deceased by setting him on fire. In order to kill Ajay there ought to have been so much strained relationship preceded by incidents of quarrels/disputes. Except for the complaint by wife of Ajay, on the date of incident there is no other material to indicate any serious dispute between them to provide motive to finish Ajay. On the other hand the evidence indicates that on being frustrated a possibility of self infliction of the burn also cannot be ruled out. Doubt in the story of creeps in more particularly in view of delay in recording statement of Ajay.

16. Minute scrutiny of the evidence of prosecution reveals following infirmities:

(i) That statement of Ajay was recorded after 12 hours of the incident and after 10 hours of his admission to Ghati Hospital.

(ii) There is no plausible explanation as to why Police Head Constable Gavai has not recorded statement of the patient at 12 mid night when the patient was found to be in the condition to give valid statement as endorsed by the Medical Officer.

(iii) Father of Ajay was with him and as admitted by PSI Shinde and as such possibility of tutoring is not ruled out.

(iv) Dying declaration (Exhibit 58) recorded by PSI Shinde is not supported by the evidence of Medical Officer in order to show that at the relevant time Ajay was in conscious and oriented stage to give statement.

(v) Statement (Exhibit 77) is found with material alteration and additions and not convincing. There is no endorsement of Medical Officer about mental fitness of Ajay while, and after recording of the statement Special Judicial Magistrate.

(vi) Evidence of Special Judicial Magistrate is not trustworthy.

(vii) There is no concrete evidence on record to hold that

accused were having any motive to set deceased on fire and to kill him.

(viii) There is evidence to suggest that except for wife of deceased no one else was in the house of the deceased at the relevant time.

(ix) Deceased was frustrated on account of his unemployment and attempted to commit suicide and hence they theory of self immolation cannot be completely ruled out.

17. It is settled position of law that the guilt of the accused must be proved behind shadow of reasonable doubt and any genuine doubt creeps in to the case of the prosecution the benefit thereof must go to the accused. In the aforesaid set of facts and evidence on record we do not find that prosecution was able to prove the guilt of the appellants beyond doubt and hence they deserve to be acquitted by extending benefit of doubt. Hence the order.

ORDER

(i) Appeal stands allowed.

(ii) Impugned judgment and order dated 25th July, 2016

in Sessions Case No. 327 of 2011 passed by the Additional Sessions Judge, Aurangabad is set aside.

(iii) Appellants stand acquitted. Appellants be set free forthwith if not required in any other crime.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

ssp