

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.42 OF 2019

The State of Maharashtra,
Through the Police Inspector,
City Chowk Police Station,
Aurangabad,
Tq. & Dist. Aurangabad.

.. Appellant

Versus

1. Gautam Kachru Pagare
Age: Major, Occu.: Service,
R/o. Radhaswami Colony,
Jatwada Road, Aurangabad.

2. Rahul Nivrutti Wagh,
Age: Major, Occu.: Mason,
R/o. Harshnagar, Aurangabad.

3. Shaikh Afroj @ Guddu Maheboob,
Age: 35 years, Occu.: Business,
R/o. Harshnagar, Aurangabad.

4. Madhukar Dagadu Chandne
(Abated)

.. Respondents

...

Mr. A. M. Phule, Advocate for the appellant.

...

**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 21st April, 2023

ORDER :- (Per Smt. Vibha Kankanwadi, J.)

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file an appeal

challenging the judgment and order dated 04.12.2018 passed by the learned Sessions Judge, Aurangabad in Sessions Case No.347 of 2011; thereby convicting the respondents from the offences punishable under Sections 302, 452, 354, 201, 506 read with Section 34 of Indian Penal Code.

2. Heard learned APP Mr. A. M. Phule for the appellant – State. With the able assistance of learned APP, we have gone through the record, which was before the learned Trial Judge.

3. We are considering the submissions on the point whether leave can be granted to file the appeal.

4. The prosecution story in short is that one Raju Lahanu Gaikwad was residing in a rented premises along with his wife and son. The landlord was one Gautam Pagare i.e. accused No.1 and he was asking Raju that they should vacate the premises. When Raju was in house around 9.00 to 9.30 p.m. on 07.05.2011, accused No.1 and one Guddu, whose full name he was not knowing, entered the house with Rahul Wagh i.e. accused No.2. Accused started saying that they should vacate the premises. Raju got frightened. Accused had told him that accused No.4 has sent them. Then accused No.1 poured kerosene on the person of Raju. Accused No.2 shut his mouth and accused No.3 by igniting the match stick threw it on the person of

Raju, thereby setting him ablaze. They also threatened that if he discloses their name, then he would be killed and then they left the house by latching it from outside. Raju had sustained burn injuries to his stomach, back, both hands, face, head and chest. He has stated that all of them had tried to commit his murder. When this kind of dying declaration was recorded by Police Head Constable Sasane, when Raju was admitted in GHATI Hospital; on the basis of said statement, First Information Report vide Section 154 of the Code of Criminal Procedure, came to be registered and offence vide Crime No.128 of 2011 was registered for the offence punishable under Section 307, 452, 506 read with Section 34 of Indian Penal Code. The panchanama of the spot was carried out and certain articles were seized. Statements of witnesses were recorded and a letter was also given in the meantime on 08.05.2011 to the Special Judicial Magistrate to record the dying declaration of Raju. Accordingly, such dying declaration was got recorded. Raju succumbed to the injuries at about 11.04 hours on 09.05.2011. Inquest panchanama was executed with the help of two panchas and the dead body was sent for autopsy. After collecting the postmortem report and recording statements of witnesses as well as arresting the accused; charge-sheet was filed before the learned Judicial Magistrate First Class, Aurangabad.

5. After the committal of the case, charge came to be framed for the offences punishable under Sections 302, 452, 342, 506, 201 read with Section 34 of Indian Penal Code. Trial was conducted when accused persons pleaded not guilty. Prosecution has examined in all nine witnesses to bring home the guilt of the accused. After hearing both sides and perusing the evidence on record, the learned Trial Court has acquitted all the accused persons. During the course of the trial itself, original accused No.4 expired and, therefore, the trial stood abated against him.

6. Perusal of the evidence would show that the case of the prosecution is based on two written dying declarations and two oral dying declarations. Definitely oral dying declarations are weak kind of evidence and, therefore, much reliance can be placed on the written dying declarations, if it inspires confidence and has been recorded with due procedure. Dying Declarations Exhibit-60 and Exhibit-71 have been tried to be got proved through P.W.3 Macchindra Sasane and P.W.6 Pralhad Ghule, the Special Judicial Magistrate. Here, in this case, the medical officer has not been examined, who had given the endorsement. In ***Laxman Vs. State of Maharashtra, [AIR 2002 SC 2973 : 2002 6 SCC 710]*** the Constitution Bench of the Hon'ble Supreme Court held that, having endorsement by a medical expert is not a compulsion, but it is a rule of caution.

The satisfaction of the person who is taking down the dying declaration regarding the fitness of the maker of the statement would be sufficient to consider the proof of dying declaration. It appears from the impugned judgment that Exhibit-60 has been disbelieved by the learned Trial Judge on the following grounds :-

- (i) The satisfaction by maker regarding mental fitness of deceased Raju to give statement at the relevant time has not been recorded by P.W.3 Macchindra. It was necessary in view of the fact that there was no endorsement by medical expert.
- (ii) P.W.3 Macchindra has recorded the summary of the narration of the circumstances of Raju at the end of Dying Declaration Exhibit-60.
- (iii) There was no identification of the toe impression on the dying declaration Exhibit-60.
- (iv) Exhibit-60 is also silent on the point that P.W.3 has not explained that he has read over the contents of dying declaration and they are admitted by the maker.
- (v) P.W.3 Macchindra in his testimony has stated that he had obtained the thumb impression of deceased on Exhibit-60, whereas Exhibit-60 actually bears the toe impression of left leg.
- (vi) The contents of Exhibit-60 were not corroborated by other evidence, as it was allegedly told

that the accused persons had taken undue advantage of absence of electricity supply and set him to fire.

(vii) The circumstances mentioned are not corroborating to the testimony of P.W.2 Ganesh and P.W.5 Syed ali.

(viii) Here, it has come on record that at the time of admission, Raju himself had given admission to the medical officer that Raju himself had set to fire due to anger.

7. Dying declaration Exhibit-71 has been disbelieved by the learned Trial Judge on following grounds :-

(i) Testimony of P.W.6 Pralhad would also state that the medical officer had examined deceased and given the endorsement, yet the medical officer has not been examined.

(ii) Exhibit-71 does not give specific role to each of the accused.

(iii) The contents of dying declaration are very cryptic.

(iv) Neither P.W.6 Pralhad, nor P.W.3 Macchindra have stated as to why impression of left toe was obtained.

(v) Exhibit-71 is also silent on the point as to what was the reason for the proposed accused to commit

crime. In Exhibit-71 it is specifically stated that why the incident occurred, then he stated that it is because of house.

(vi) There is absolutely no mention that the rented premises were belonging to accused No.1 and he was insisting for vacating the premises.

(viii) Another fact to be noted from Exhibit-60 is that the intention behind the act was that accused No.1 – owner was insisting deceased and his family to vacate the premises. Then in the said circumstance, how accused No.4 was related to the building/premises, is a question. Accused Nos.1 and 4 do not appear closely related to each other.

Therefore, the Dying Declarations Exhibit-60 and 71 have been rightly disbelieved by the Trial Court.

8. Turning to the oral dying declaration which was allegedly given to P.W.2 Ganesh – son of deceased when he was in the house and P.W.1 Jyoti – wife of deceased at GHATI Hospital, the oral dying declarations are disbelieved on the point that there are material omissions in the testimony of P.W.2 Ganesh and P.W.5 Sayyad Alim. Alim's presence has not been told by Ganesh. Further the latch was from outside and still P.W.2 Ganesh says that he waited for the response from his father to open the door. Testimony of P.W.2

Ganesh does not inspire confidence, as it is also the prosecution story that when deceased was taken to GHATI Hospital, deceased himself had told history to the medical officer and in that oral dying declaration to medical officer (history at the time of admission), Raju had told that on account of dispute connecting with the vacating of the premises, he had put himself to fire i.e. tried to commit suicide by burning. Now, this medical history given by deceased to the medical officer is a big hurdle for the prosecution story and the said hurdle has not been cleared by P.W.1 Jyoti. The role played by P.W.2 is questionable. He says that a boy informed him about his father catching fire. The said boy has not been examined for the reasons best known to the prosecution. But when P.W.2 Ganesh went to his house, he states that there was latch from outside, yet before entering to house, he waited for the response from the father. In the given circumstance, the son would have immediately open the door from the outside and then went inside to extinguish the fire, but to the utter surprise P.W.2 has not done any such act. He says that he waited for the response and then opened the latch from outside.

9. The oral dying declaration to P.W.1 Jyoti is also discarded by the learned Trial Judge taking into consideration the contradictions in the testimony of P.W.3 and P.W.1. As per the testimony of P.W.2 Ganesh, he had stated that they were residing in the said tenanted

premises three years prior to the incident, whereas as per the testimony of P.W.1 Jyoti they were residing in the tenanted premises 22 years prior to the incident. It is further hard to believe that accused Nos.2 and 3 assisted or aided accused No.1 in executing his plan when they themselves had no motive as against the deceased.

10. Though it appears that Raju died because of the burn injuries, it has not been proved that the present accused persons are the author of the crime.

11. The learned Trial Judge has rightly acquitted the accused, as the evidence so adduced by the prosecution was not at all sufficient to prove the guilt of the accused. No interference is required. The application stands rejected at the threshold.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm