

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

9 APPLICATION FOR LEAVE TO APPEAL BY STATE NO.155 OF 2019

The State of Maharashtra
Through Police Inspector,
Police Station, Karjat,
Tq. Karjat, Dist. Ahmednagar.

... Applicant

... **Versus** ...

1 Shailesh Barku @ Shivaji Adsul,
Age 23 yrs., Occ. Labour,

2 Kisan @ Kishor Chagan Adsul,
Age 22 yrs., Occ. Labour,

Both are r/o Koregaon,
Tq. Karjat, Dist. Ahmednagar.

... Respondents

...

Mrs. V.S. Choudhari, APP for applicant

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CORAM : SMT. VIBHA KANKANWADI
 ABHAY S. WAGHWASE, JJ.

DATE : 20th SEPTEMBER, 2023

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed by the prosecution seeking

leave under Section 378 (1)(b) of the Code of Criminal Procedure, 1973 to file appeal challenging the judgment of acquittal dated 22.02.2019 passed by learned Additional Sessions Judge, Ahmednagar in Sessions Case No.108/2018, thereby acquitting respondents i.e. original accused Nos.1 and 2 from the offence punishable under Sections 302 read with Section 34 of the Indian Penal Code, 1860.

2 Heard learned APP Mrs. V.S. Choudhari for the applicant and with her help we have gone through the record which was available before the learned trial Judge.

3 The record shows that the prosecution had come with a case that deceased Ashwini was aged 20 and was residing at Koregaon, Tq. Karjat, Dist. Ahmednagar with her grandmother and brother Akshay. Her mother was doing labour work at Mumbai. Accused was resident of the same village and same colony. It is alleged that the accused persons used to call deceased on her mobile and used to talk indecently. Around 2.30 p.m. on 24.03.2018 the grandmother of the deceased was sleeping in the back courtyard under a Neem tree in their house and the brother of the deceased had gone to recharge the mobile phone. Deceased was alone. She was standing in veranda of the house. Both the accused came near her house, lighted the

matchstick and put it on the person of deceased. Her nightie caught fire and due to sudden fire she started shouting. The nearby residents rushed to the spot, so also, her brother arrived. They extinguished the fire by putting a quilt around her and took her to Rural Hospital, Karjat. She was then shifted to Civil Hospital, Ahmednagar. After her admission in the said hospital, her dying declaration was recorded by Special Executive Magistrate. Her statement was also recorded by Police Head Constable Mr. Dattatraya Narayan Shirsath, which was then treated as First Information Report. Offence vide Crime No.81/2018 was registered for the offence punishable under Section 307 read with Section 34 of the Indian Penal Code. Deceased succumbed to the injuries on 28.03.2018 and Section 302 of the Indian Penal Code came to be added.

4 The further prosecution story is that the investigation was carried out by PSI Mr. Vasant Bhoje, who had carried out the spot panchnama and recorded the statements of the witnesses. He had seized the clothes and articles from the spot, accused came to be arrested, their CDR was collected and after completion of the investigation charge sheet was filed.

5 After the committal of the case, charge was framed against the

accused persons and after they pleaded not guilty, trial has been conducted. Prosecution has examined in all 10 witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Additional Sessions Judge, Ahmednagar acquitted both the accused on 22.02.2019 from all the charges. Hence, the present application by State.

6 The case of the prosecution is depending on two dying declarations. Though the alleged incident is stated to have taken place in the broad day light in a place which is surrounded by houses; yet, there is no eye witness to the incident. As regards the law in respect of dying declaration is concerned, the dying declaration can be the sole ground for conviction, if it inspires confidence and if all the procedure i.e. contemplated has been properly followed. Therefore, in the present case, when prosecution intends to rely on the dying declarations recorded by the Special Judicial Magistrate as well as Police Head Constable, then it requires to be seen firstly as to whether it has been properly recorded by respective persons. Secondly, it corroborates to the circumstances. Before turning towards those dying declarations, the postmortem report shows that Ashwini had sustained 84% burns, which were superficial to deep in nature and the cause of death is “death due to 84% burns”. Only on the basis of the postmortem report or

even the spot panchnama we cannot come to the conclusion that the death is homicidal only thereby ruling out the possibility of accidental death. In every burn case three possibilities would arise; 1) suicidal, 2) accidental and 3) homicidal. Nobody has come with a case of suicidal act of Ashwini and, therefore, only the two options remained; one is accidental and another is homicidal. Therefore, the prosecution should rule out the possibility of accidental burns.

7 In order to prove the two dying declarations prosecution has examined PW 7 PHC Mr. Dattatraya Narayan Shirsath and PW 8 Dr. Ajinkya Funde, the Medical Officer, who was on duty at the relevant time. Further, the second dying declaration was recorded by PW 6 Subhash Baburao Kadam, the Special Executive Magistrate and the endorsement to the same was given by PW 4 Dr. Pratap Haribhau Salve. The learned trial Judge has considered that even if we consider that both the dying declarations were procedurally correct; yet, those do not assure the truth in its contents. Even if we take the dying declarations as it is, those will show that there was no involvement of pouring of kerosene or any inflammable substance on her. Prior to throwing burning matchstick on her person, it has not been brought on record by the prosecution, as to what was the material of the nightie she was wearing. Unless it would have been of polyester or some such material

which catches the fire immediately, she could not have caught the fire. In other words, if the said nightie was of cotton, then there is less likelihood of it catching the fire without any inflammable substance. Interesting point to be noted is that there were residue of petrol found on the pieces of nightie. When there is absolutely no material on record that the accused persons had poured petrol on her person, then how the residue of petrol can be found on her clothes, is a mystery. Secondly, she says that she was facing towards the house while standing in the door of her house, but still she was able to identify both the accused, who had allegedly come from the back side. Without talking anything she says that they had put the burning matchstick on her person. Thus, it can be seen that the story itself is unbelievable. PW 2 Sudhir Sonawane is the neighbour. He has stated in examination-in-chief that around 3.00 p.m. on 24.03.2018 he heard shouts from outside and, therefore, he came out of the house. He went towards the house of Ashwini. He saw that Ashwini has sustained burn injuries and the fire was extinguished by her brother and neighbour Dada. Deceased Ashwini was saying that her brother had assaulted her and, therefore, she had ablazed herself. When it was found that the said witness was not supporting the prosecution, learned APP sought permission to put questions in the nature of cross to him. In the said cross, though he admitted that his statement was recorded by police; yet, he had disowned portion marked 'A' from the said

statement. Therefore, the person, who immediately went to the spot after the incident, is not supporting the prosecution. PW 3 Akshay Kisan Kamble, who is the brother of the deceased, has supported the prosecution, but he has also not stated that in the oral dying declaration Ashwini had told him that the accused persons had poured petrol on her person. Here, the interesting fact is that the incident is stated to have taken place on 24.03.2018. What history was given by Akshay, who admitted Ashwini in the hospital, has not been brought on record by the prosecution. When alleged oral dying declaration was given to PW 3 Akshay by deceased Ashwini, then what prevented him from lodging a report with the police, is a question. When it was asked to him that till death of Ashwini he has not filed any complaint with police, he answered that he did not find time for that. The dying declaration Exh.49 has been recorded around 9.00 p.m. on 24.03.2018 and the dying declaration by Special Executive Magistrate has been recorded around 7.00 p.m. on 26.03.2018 i.e. two days after the incident. Why the dying declarations were recorded belatedly is not explained by the prosecution. Further, there is absolutely no evidence collected by the Investigating Officer that both the accused used to harass deceased Ashwini by giving phone calls. The motive is also not coming on record. Even the brother of the deceased has not stated that when the fact of harassment by the accused was made known to him by the deceased, what action he had

taken against both the accused. Therefore, by taking into consideration all the points even if we consider that the dying declarations might have been recorded procedurally; yet, they are not free from doubts. They do not inspire confidence and, therefore, the acquittal of both the accused by the learned trial Judge is justifiable. There is no perversity requiring interference. The application, therefore, stands rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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