

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.517 OF 2017
WITH
CRIMINAL APPLICATION NO.1375 OF 2018
IN APEAL/517/2017

Raju s/o Bhagirath Irche
Age: 30 years, Occu.: Labour,
R/o. Misarwadi, Taluka and
District Aurangabad.

.. Appellant

Versus

The State of Maharashtra
Through Police Station Officer,
Police Station Jawaharnagar,
District Aurangabad.

.. Respondent

...

Ms. Poonam V. Bodke Patil, Advocate for the appellant.
Mr. A. M. Phule, APP for the respondent – State.

...

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

RESERVED ON : 16th October, 2023

PRONOUNCED ON : 6th November, 2023

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :-

. Original accused – present appellant takes an exception to challenge his conviction in Sessions Case No.397 of 2010 by learned Additional Sessions Judge, Aurangabad on 17.02.2017, by holding the appellant guilty of committing offence punishable under Section 302 of Indian Penal Code.

2. The prosecution story is that deceased Shital Bansilal Manpure @ Shital Arjun Patthe @ Shital Raju Irche (as these names are appearing in the record) came to be admitted with Ghati Hospital, Aurangabad on 26.05.2010. The Medico Legal Certificate is stated to be given on 13.06.2010 to the police chowki situated within the hospital premises. She was admitted with 59% superficial to deep burns. After the Medico Legal Certificate was given, PW.5 PHC Kautik Gore was asked by PSO Jawahar Nagar Police Station to carry out the further activities. Thereafter, he went to hospital and recorded the dying declaration around 11.40 p.m. after getting the endorsement by the medical officer that Shital was in a fit state of mind to give the statement. On the basis of said statement, offence came to be registered on 14.06.2010 under Section 307 of Indian Penal Code vide Crime No.96 of 2010. Thereafter, he gave letter to PW.3 Dulaji Mendke – Naib Tahsildar cum Executive Magistrate on 14.06.2010 to record the statement of Shital. Accordingly, PW.3 Mendke went to hospital and recorded dying declaration Exhibit-37 between 9.42 a.m. to 10.05 a.m.

3. It was revealed that deceased Shital was residing with the appellant and PW.2 Akash Deepak Patthe. It was also revealed from the dying declaration and the statement of witnesses that Shital was earlier married to one Deepak Patthe. PW.2 Akash is their son, however, at the time of incident and about four years prior to the incident, Shital was not residing

with Deepak, but accused was residing with her. It is said that they were staying as husband and wife, but they were not married. After the offence was registered, investigation was undertaken. Panchanama of the spot came to be executed. Statement of P.W.2 Akash came to be recorded, so also that of the other witnesses. Shital was expired on 24.06.2010 and thereafter intimation was given to the police and then after executing inquest panchanama, the dead body was sent for postmortem and offence under Section 302 of Indian Penal Code came to be added. Accused came to be arrested and after the completion of investigation, charge-sheet was filed.

4. After the committal of the case, charge was framed against the appellant. He pleaded not guilty. The prosecution, therefore, examined in all eight witnesses to bring home the guilt of the accused. After the evidence on record and hearing both sides, the learned Trial Judge held that the offence has been proved by the prosecution and, therefore, the accused came to be convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer simple imprisonment for six months for the offence punishable under Section 302 of Indian Penal Code. Set off was granted under Section 428 of the Code of Criminal Procedure. This is the judgment and order which is under challenge in this appeal.

5. Heard learned Advocate Ms. Poonam V. Bodke Patil for the appellant and learned APP Mr. A. M. Phule for the respondent – State.

6. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has absolutely not appreciated the evidence properly. The Trial Court failed to consider that the first dying declaration i.e. Exhibit-52, which was recorded by P.W.5 Kautik Gore was after many days of the incident and the delay in recording the dying declaration has not been explained by the prosecution. Dying declaration recorded by P.W.3 Mendke – the Naib Tahsildar is after the FIR. The learned Trial Judge failed to consider that P.W.2 Akash has turned hostile, though as per the prosecution story he was inside the house when the alleged incident took place in the house. P.W.6 Sunita Bhagure, who is the niece of Shital, was not present in the house or near the house when the incident took place. She admits that deceased was staying with the appellant, but that circumstance cannot be considered when P.W.2 Akash is not saying the presence of accused at the relevant time inside the house. The prosecution has also not examined the medical officer, who examined deceased immediately after her admission. The apparent corroboration in both the dying declarations cannot be simply accepted as gospel truth when overall evidence and situation is required to be considered. P.W.2 Akash in his examination-in-chief rather says that there was quarrel between his mother

and accused at night time and then he woke up, but thereafter his mother had poured kerosene on her person and set herself to fire. There was no scope for invoking Section 106 of Indian Evidence Act when the prosecution witness himself is saying that the act has been done by the deceased herself and not by the accused. Though bed head ticket i.e. treatment papers were produced on record, yet the notings do not show that at any point of time prior to the FIR deceased had conveyed it to police as to how she received burn injuries. Therefore, the learned Trial Judge ought to have acquitted the appellant by holding that the offence has not been proved beyond reasonable doubt.

7. Per contra, the learned APP strongly supported the reasons given by the learned Trial Judge while convicting the appellant. Both the dying declarations have been legally recorded. The cross-examination of P.W.3 Mendke, P.W.6 Sunita and P.W.7 Dr. Saiful Islam would show that all the relatives were asked to go out when the dying declaration was recorded. That means the procedure that was adopted was perfectly legal. The presence of the accused in the house of deceased appears to have not been denied. Therefore, naturally the burden would get shifted on the shoulders of the accused to prove or bring those circumstances on record, which caused injury to deceased Shital. There is no merit in the present appeal. It deserves to be dismissed.

8. It appears that the learned Trial Judge has come to the conclusion that the prosecution has proved the offence on the basis of both the dying declarations Exhibit-52 and Exhibit-37, which came to be recorded by P.W.5 Kautik Gore and P.W.3 Mendke respectively. Therefore, the law on manner of appreciation of evidence in the form of dying declaration as well as settled principles which are culled out by the Hon'ble Apex Court from the various landmark cases like *Khushal Rao vs. State of Bombay; AIR 1958 SC 22*, *Paniben vs. State of Gujarat; (1992) 2 SCC 774*, *Laxman vs. State of Maharashtra; (2002) 6 SCC 710*, *Ganpat Bakaramji Lad vs. State of Maharashtra; 2011 ALL MR Cri. 2249*, *Surendrakumar vs. State of Punjab; (2012) 12 SCC 120*, *Jagbir Singh vs. State (NCT of Delhi); (2019) 8 SCC 779*, *Madan vs. State of Maharashtra; (2019) 13 SCC 464*, *State of Uttar Pradesh vs. Veerapal and another; (2022) 4 SCC 741* and *Uttam vs. State of Maharashtra; (2022) 8 SCC 576*, is required to be taken into consideration.

9. Very recently certain principles of law with regard to case involving multiple dying declarations are spelt out in the case of *Abhishek Sharma vs. State (Govt. of NCT of Delhi)* [Criminal Appeal No.1473 of 2011, decided on 18-10-2023]. These principles read thus :

“9.1 The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind;

9.2 All dying declarations should be consistent. In other

words, inconsistencies between such statements should be 'material' for its credibility to be shaken;

9.3 When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purpose of corroboration of the contents of dying declarations.

9.4 The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances.

9.5 Each declaration must be scrutinized on its own merits. The court has to examine upon which of the statements reliance can be placed in order for the case to proceed further.

9.6 When there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicion.

9.7 In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc."

10. The ratio that is settled is that dying declaration must be firstly voluntary, truthful and secondly it should not be tutored and further the same should inspire the confidence of the Court. These are the basic principles which are to be borne in mind while appreciating dying declarations.

11. In this case, in fact, the case of the prosecution is not solely resting on the two dying declarations, but P.W.2 Akash was posed as eye witness also. When it comes to the comparison between the direct evidence of the

eye witness versus evidence in the nature of dying declaration, certainly the evidence of eye witness would be important, because he is available for cross-examination by the accused. In this case P.W.2 Akash – son of deceased Shital has turned hostile. He is definitely saying that he was inside the house when the incident took place, but then he says that he woke up after there was quarrel between his mother and accused. His mother then set herself to fire by matchbox and kerosene. She poured kerosene on her person. Accused then took her to Ghati Hospital. Prior to that whether he would be a competent witness or not being the child witness aged 8 years; the Trial Judge had put certain questions and it was found that he was giving rational answers and then his testimony is recorded by administering oath. When it was found by the prosecution that the witness is not supporting, permission was sought to put the questions in the nature of cross. After the said permission was granted, those questions have been put. P.W.4 Akash admitted that his mother was not married to accused. His mother was insisting accused to marry with her, but accused used to say that he would marry with another lady and on that count, there used to be quarrels between them. He then denied the suggestion that in the said quarrel accused had poured kerosene on the person of his mother. It was then tried to be posed that as P.W.2 Akash had come with his maternal aunt Sangita, whose husband is related to accused, it was tried to be painted that the witness is under the custody and guidance of those

relatives, hence, he is not supporting the prosecution, however, it is to be noted that P.W.6 Sunita has been examined. It appears that there was typographical mistake in the cross of P.W.2 Akash, when the name of his maternal aunt has been typed as Sangita, but then he says that name of her husband is Mohan Bhagure. P.W.6 Sunita has given her full name as Sunita Mohan Bagure and therefore, it has to be taken that Sangita and Sunita are the same persons. P.W.6 Sunita has rather supported the prosecution and has not turned hostile. Therefore, in fact, there was no reason for P.W.2 Akash to give false evidence. The prosecution has not properly completed the procedure as laid down under Section 145 of the Indian Evidence Act and the celebrated case of **Tahsildar Singh and another Vs. State of Uttar Pradesh, [1959 AIR (SC) 1012]**, in which procedure has been laid down. The statement of P.W.2 Akash under Section 161 of the Code of Criminal Procedure was not shown to him and the specific portion was not brought to his notice, though in the testimony of P.W.8 Varsha Manale – investigating officer that portion marked ‘A’ was got exhibited as Exhibit-79. Under the said circumstance, we cannot take note of the said portion marked ‘A’ Exhibit-79, as it was not brought to the notice of P.W.2 Akash. The prosecution has not brought any reasons on record as to why P.W.2 Akash should not support the prosecution. When the eye witness himself is saying that his mother poured kerosene upon herself and set her to fire, we cannot give importance to the dying declarations.

12. Even if for the sake of arguments it is accepted that independently the dying declarations will have to be considered, then it is to be noted that Exhibit-52 FIR is the first in time and it was recorded by P.W.5 PHC Kautik Gore. In his examination-in-chief itself he has stated that after the Medico Legal Certificate was received and he was asked to record the dying declaration, he went to the hospital, got endorsement from medical officer stating that the patient was in a fit state of mind to give statement and then recorded the statement. If we consider the letter that was given by him to medical officer for the request of giving fitness certificate, he had given the name of patient as Shital Raju Irche to the hospital authorities. Another aspect to be noted is that in Exhibit-52, she had stated that she was married to one Arjun in 2002. She begotten a son from him and then separated from him in 2006 and since then Arjun has not met her. Thus, all the while she appears to have stated that name of her husband is Arjun Patthe. Thereafter, she says that name of her son is Akash, name of her sister is Samiksha Mohan Bhagure (here also the name has changed from Sunita to Samiksha), but then she says that she was residing with accused. At the end when it came to identification of thumb mark it is said that the said thumb mark is that of Shital Raju Irche. P.W.5 Kautik Gore does not say that he made a query with Shital as to why she is giving the name of Shital Arjun Patthe or Shital Raju Irche at convenient places. This is the point that is required to be considered to know the mental state of Shital and,

therefore, it casts doubt about the same.

13. The testimony of P.W.5 Kautik Gore does not explain the delay in recording the dying declaration. As per the contents of Exhibit-52, the incident had taken place in the intervening night of 26.05.2010 to 27.05.2010 and the dying declaration came to be recorded on 13.06.2010. At this stage itself we would like to consider the testimony of the investigating officer i.e. P.W.8 Varsha Manale. Here also there is absolutely no investigation by her as to why there was delay in sending the Medico Legal Certificate. Belated dying declaration definitely raises question. Exhibit-37 came to be recorded after P.W.5 Kautik Gore requested P.W.3 Mendke to record the dying declaration. The question first of all that arises is when P.W.5 Kautik Gore had already recorded the dying declaration why he asked or requested P.W.3 Mendke to record the dying declaration once again. P.W.3 Mendke recorded the dying declaration on 14.06.2010 and at that time, upon the inquiry, it is said that Shital gave her name as Shital Bansilal Manpure. It is also then stated that her name is Shital Raju Irche, as she was considering Raju Irche i.e. present appellant as her husband. No doubt, apparent reading of Exhibit-37 may give an impression that it is corroborating to Exhibit-52. However, she says that the incident had taken place 15 to 16 days prior to 14.06.2010. She has not given the time when the incident took place. There is no explanation in the testimony of P.W.3

Mendke as to why he had not tried to seek clarification regarding the name that was told by the patient to him, which was different from the name which he got in request letter Exhibit-35.

14. Neither PW.5 Kaurik Gore, nor PW.3 Mendke have given explanation as to why they obtained right toe impression on the dying declarations. No doubt, the percentage of burns given in postmortem report Exhibit-43, which is proved by PW.4 Dr. Shailesh Wakle would show that upper limbs right as well as left were to the extent of 9%, yet PW.4 Dr. Shailesh has not explained that it would not even possible even to take the thumb mark of either left or right hand. Taking into consideration all these aspects, in the background of the testimony of PW.2 Akash, we find that the dying declarations Exhibit-52 and Exhibit-37 are unreliable.

15. PW.6 Sunita has supported the prosecution story and says that in fact, accused was the person who made phone call to her father on 26.05.2010 informing that Shital has sustained burns. She then says that they all went to Ghati Hospital to see her and when asked Shital she told that there was quarrel between herself and Raju. He used to say that he intends to perform another marriage and then leave her (sever the ties). When Shital objected/denied, then accused poured kerosene on her and set her to fire. Thus, according to PW.6 Sunita on 26.05.2010 itself, she could get the information that the accused had put Shital to fire. Then the

question arises as to why she had not approached police with a request to record her dying declaration. Her testimony is therefore untrustworthy. It is also contrary to what P.W.2 Akash is saying before the Court.

16. P.W.7 Dr. Saiful Islam is the medical officer, who was on duty on 13.06.2010 when P.W.5 PHC Kautik had gone to the hospital for recording dying declaration. He is also the medical officer, who had given endorsement on 14.06.2010 as per the request of P.W.3 Mendke. Even if for the sake of arguments it is accepted that he was giving the true account of what he has done, yet the fact is certain that though he was the treating doctor, he had not given the details as to why Medico Legal Certificate was not sent immediately to the police. As per Exhibit-74 which are the bed head tickets, Shital was admitted around 8.20 a.m. on 26.05.2010. Since it is exhibited documents, we can definitely consider it. The name of the person, who admitted her to hospital is given and it can be seen that the accused was the person, who admitted her in the hospital. Of course on his statement it appears that name of the patient was taken as Sital Raju Irche. Endorsement also shows that he has given intimation that the condition of his wife Shital is critical. History that has been given is accidental burns. The prosecution has not led evidence that the said history was given by the accused and it proved to be intentional. Even if for the sake of arguments we accept that the accused had given that intimation at the time of

admission of Shital in the hospital, yet he had told that it was accidental burns. It was still open for the hospital authorities and it was their duty to inform that even the accidental burn case i.e. Medico Legal Case to be referred to police immediately. Prosecution has not examined any witness, who would give explanation as to why the MLC was not given till 13.06.2010 and, therefore, this fact is fatal to the prosecution. Possibility of tutoring cannot be ruled out, as P.W.6 Sunita had visited the hospital. Sunita expired on 24.06.2010, that means even after recording dying declaration Exhibit-37 on 14.06.2010 still Shital could survive for 10 days and in those 10 days. There was no attempt on the part of P.W.8 Varsha Manale - the investigating officer to record her fresh statement seeking clarification in respect of the names those she had given.

17. Testimony of P.W.4 Dr. Shailesh would show that after taking note of the internal as well as external examination of the dead body he and the team of postmortem had come to the conclusion that the cause of death is due to septicemic shock due to burns. Thus, the postmortem report along with the testimony of P.W.4 Dr. Shailesh will not *ipso facto* prove that the death is homicidal in nature.

18. The learned Trial Judge has not considered the requirement of recording of dying declaration promptly so that the possibility of tutoring is ruled out. Such dying declarations taken after a considerable time, for

which there is no explanation for the delay, ought not to have been relied by the learned Trial Judge to convict the appellant. Even if we take the proof of spot panchanama, inquest panchanama, we cannot arrive at the conclusion that the death of Shital was homicidal in nature and the accused is the perpetrator of the crime. Thus, considering the reasons stated above, we hold that the learned Trial Judge erred in appreciating the evidence. The wrong appreciation of evidence has landed him in taking erroneous finding/conclusion and, therefore, those findings are required to be set aside by allowing the appeal. Hence, the following order :-

ORDER

- (i) The appeal stands allowed.
- (ii) The conviction awarded to the appellant – **Raju Bhagirath Irche** by learned Additional Sessions Judge, Aurangabad, in Sessions Case No.397 of 2010 on 17.02.2017 for the offence punishable under Sections 302 of Indian Penal Code stands quashed and set aside.
- (iii) The appellant stands acquitted of the offence punishable under Sections 302 of Indian Penal Code.
- (iv) He be set at liberty, if not required in any other case.
- (v) The fine amount deposited, if any, be refunded to the appellant after the statutory period is over.

(vi) We clarify that there is no change as regards the order in respect of disposal of muddemal.

vii) In view of disposal of criminal appeal, Criminal Application No.1375 of 2018 stands disposed of.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm