

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.705 OF 2021

Kiran Janardhan Kolhe
Age: 28 years, Occu.: Agri.,
R/o. Kolhewadi, Tq. Jamkhed,
Dist. Ahmednagar

.. Appellant

Versus

1. The State of Maharashtra
Through Incharge of,
Jamkhed Police Station,
Tq. and Dist. Ahmednagar.
2. Chaitali Kishor Kolhe
Age: 27 years, Occu.: Household,
3. Vijaya @ Vijubai Manohar Kolhe
Age: 68 years, Occu.: Household,

Both R/o. Kolhewadi, Tq. Jamkhed,
Dist. Ahmednagar

.. Respondents

...

Mr. Z. H. Farooqui h/f Mr. N. V. Gaware, Advocate for the appellant.
Mr. A. M. Phule, APP for respondent No.1 – State.

...

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

DATE : 8th June, 2023

1

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

Present appeal has been filed under Section 372 of the Code of Criminal Procedure by the original informant, who is the brother of

deceased Sangita Gaikwad, to challenge the acquittal of respondent Nos.2 and 3 - original accused in Sessions Case No.136 of 2016 on 09.08.2017 by learned Additional Sessions Judge, Ahmednagar from the charges under Section 302 read with Section 34 of Indian Penal Code.

2. Heard learned Advocate Mr. Z. H. Farooqui holding for learned Advocate Mr. N. V. Gaware for the appellant and learned APP Mr. A. M. Phule for respondent No.1 - State. With the help of both the Advocates, we have gone through the material, which was before the learned Trial Judge. Since we are considering the material only for the sake that whether matter needs to be admitted, we do not intend to go much deep into the scrutiny. Unless perversity or legal lacuna has been shown, there is no necessity to admit the appeal and call upon the accused persons, who have got acquittal after facing the trial before the competent Court.

3. The prosecution story is that Sangita Gaikwad came to be admitted to Civil Hospital, Ahmednagar on 13.12.2015 and P.I. Hanpude-Patil was deputed to record her statement. After getting the endorsement from the concerned doctor on duty about the mental and physical condition of the injured, the statement has been recorded. Sangita was admitted due to 70% burn injuries. She has stated that the incident has taken place on 12.12.2015 around 11.30 a.m. This dying declaration by A.S.I. Ingale from Jamkhed Police Station, which has been treated as FIR, has been recorded

between 12.20 p.m. to 1.10 p.m. Prior to that Naib Tehsildar, Ahmednagar recorded her dying declaration between 11.35 a.m. to 12.10 p.m. on the request of Kotwali Police Station, Ahmednagar on the same day i.e. 13.12.2015. In both the dying declarations, she had disclosed that she was married to Shahaji Gaikwad, but was not cohabiting with him and therefore, since last 3 and ½ years, she is residing at Kolhewadi where her parental home is situated. Accused No.1 Chaitali is her cousin co-sister (wife of cousin brother of husband), who is also residing at Kolhewadi. As there is dispute pending in Court between Sangita and her husband; Sangita states that there was quarrel between herself and accused No.1 and that quarrel was taken place on 11.12.2015 around 11.30 a.m. Her brother Kiran had gone to Chaitali's house around 11.30 a.m. on 12.12.2015 and asked about the incident. Chaitali got annoyed with the same and when Sangita was standing near the dump in front of her house, at that time, Chaitali arrived holding kerosene in a mug in hand and by abusing her, she poured the kerosene on her person and at that time Chaitali's mother-in-law came there and instructed accused No.1, thereupon accused No.1 Chaitali ignited the matchstick and thrown it towards the person of Sangita, thereby Sangita got fire. When she started shouting, her brother Kiran came and extinguished the fire. Thereafter, she became unconscious and was taken to Civil Hospital, Ahmednagar.

4. After the investigation was over, charge-sheet was filed and after its committal before the learned Additional Sessions Judge, charge was framed. Prosecution has examined in all seven witnesses to bring home the guilt of the accused and after considering the evidence on record and hearing both sides, the learned Trial Judge has acquitted both the accused persons. Hence, present appeal.

5. Perusal of the record would show that prosecution has heavily relied on two dying declarations recorded by P.W.1 Smt. Manisha Mane – Naib Tahsildar and P.W.6 Rajendra Ingale. Interestingly, he is also the investigating officer. The record would also show that by order below Exhibit-66, the Court had called court witness Madhukar Sakharam Kolhe, who claimed to be the eye witness and it also appears that since his statement was not recorded by police, he had come to this Court by way of petition. Of course when his statement was recorded, it appears that this Court dropped the action of contempt of Court for which show cause was already issued against the investigating officer. The statement of the said witness has then been tendered before the Court by way of record in the additional charge-sheet, however, said witness Madhukar Kolhe was not examined by the prosecution. Time and again Hon'ble Supreme Court as well as this Court has held that the prosecution has to be neutral and the prosecutor conducting a case is neither the mouthpiece of police nor the

informant. Under such circumstance, it appears that in this case the learned Additional Sessions Judge has exercised her powers and passed order below Exhibit-66 and called same Madhukar Kolhe as court witness.

6. A detailed scrutiny has been made by the learned Trial Judge as regards both the dying declarations i.e. Exhibit-25 and Exhibit-59 and it has been observed that both the dying declarations are not free from doubt. Here, it is important to note that the incident is stated to have occurred around 11.30 a.m. on 12.12.2015 at Kolhewadi, Tq. Jamkhed, Dist. Ahmednagar and thereafter, she appears to have been taken directly to Civil Hospital, Ahmednagar. The prosecution has not taken pains to examine the medical officer, who was present when Sangita was admitted in the hospital. P.W.7 Dr. Vijay Sable, who was on duty on 13.12.2015 and has given endorsement on Exhibit-25, appears to be not the doctor, who was on duty when Sangita was admitted in the said hospital. Interestingly, P.W.3 Kiran – brother of deceased Sangita has also not given the timing when he took Sangita to Civil Hospital, Ahmednagar. He rather says that after the incident his friend Ravindra Kolhe arrived at the spot and they both took his sister on motorcycle to Jamkhed Rural Hospital. The doctor at that hospital asked her to take her to Civil Hospital, Ahmednagar and then they had made arrangement to shift her in ambulance. There is no evidence collected to show what treatment was given at Jamkhed Hospital

by the doctor there. The concerned medical officer of the said hospital has not been examined. Conduct of P.W.3 has been considered by the learned Trial Judge, as he had not taken pains to inform the fact to police immediately. Not even after the admission of Sangita to Civil Hospital, he had contacted to police desk. The MLC issued by Civil Hospital on 13.12.2015 has not been proved, but the investigating officer P.W.6 Ingale has stated that written order was given to him by Police Station Officer, Jamkhed Police Station on 12.12.2015 to record the statement of Sangita. There is also letter given to P.W.1 Manisha – Executive Magistrate by the police officer on 12.12.2015 that she should visit the police station and record the statement of Sangita. In this letter, we can get that Sangita was admitted to Civil Hospital, Ahmednagar around 15.40 p.m. on 12.12.2015 and the said letter was received by P.W.1 Manisha at 5.02 p.m. Still she had not gone to the police station immediately. She reached the hospital around 11.35 a.m. on next date i.e. 13.12.2015. We can see the insensitivity on the part of the said Executive Magistrate. Though she had received the letter within a reasonable time from the time of admission, yet she has not made any efforts to record the statement of the person, who was stated to be on death bed immediately. She has not given any explanation for the delay caused by her to record the statement. Since Sangita was already with the relative, possibility of tutoring cannot be ruled out and on this count also, both the dying declarations are doubtful.

Another fact to be noted is that when the letter was already given on the earlier day, why there was necessity to record the statement by P.W.6 Ingale on the next date and it was not explained. The order which he had also received from his superior as per his own testimony was on 13.12.2015. The said order appears to have not been got exhibited by the prosecution, though it was part of charge-sheet intentionally. It is not the case of P.W.6 Ingale that though the letter was given to Executive Magistrate to record the dying declaration on the earlier day, still she had not recorded and therefore, he was directed by Police Inspector, Jamkhed Police Station to record the dying declaration. One more aspect to be noted is that Sangita was admitted at Ahmednagar Civil Hospital which was within the jurisdiction of Tophkhana Police Station. Why there was no effort on the part of the police officer in the police desk in the Civil Hospital to get the dying declaration recorded immediately. How the information reached Jamkhed Police Station and under which circumstance Police Inspector had given directions to P.W.6 Ingale to record the statement of Sangitabai by going to Ahmednagar, is a mystery, which has not been solved by the prosecution. Both the dying declarations appear to have been then taken in quick succession and it has come on record through the cross-examination of P.W.7 medical officer that sedative was given at 11.00 a.m. on 13.12.2015 to Sangita i.e. even prior to recording the first dying declaration. Under such circumstance, she could not have been in proper

mental state to give the statement. Both the dying declarations have been rightly discarded by the learned Trial Judge.

7. The learned Trial Judge has also taken note of the testimony of the court witness Madhukar Kolhe. He has deposed that he was proceeding towards market and saw that there was quarrel between Sangita and Kiran on one side and one Sundarbai on the another side. He found that it was a domestic issue, but then stopped there, tried to console them, but then Sangita and Janardhan started running towards the house of the accused and in the midway Janardhan uttered પેટવૂન ઘે, પેટવૂન ઘે (ablaze herself). Since beginning Sangita's clothes were smelling of kerosene and then Sangita ablaze herself. He has stated that when he noticed the fire, he tried to extinguish the same and in that process, he himself had sustained burn injuries to both of his hands. Then Kiran had taken Sangita to Government Hospital. He says that he himself was got treated at Rameshwar Hospital. The cross-examination of this witness is nothing but denial and as aforesaid he was intentionally not examined by the prosecution. Definitely, his version will have to be upheld.

8. The incident is stated to have taken place in broad daylight that too in a thickly populated locality in a village, still there is no eye witness who has been examined in this case. P.W.3 Kiran is not an eye witness because

he reached to the place after Sangita started crying for help when she was put to fire.

9. The prosecution has also relied on the discovery panchanama. What has been discovered by both the accused is their saree's, which were allegedly on their person on the day of incident and it is stated that as per the CA report Exhibit-55, residue of kerosene was detected on the same. It is hard to believe that if such offence is committed, then those saree's would still be kept, one was beneath the cot and another was in the cupboard having kerosene smell.

10. As regards the motive is concerned, it is to be noted that Sangita was not cohabiting with husband Shahaji since 3 and ½ years prior to the incident. Still, according to her dying declaration, when accused No.1 met her, she made inquiry with her about husband Shahaji. She was already not keeping any relations. Merely because she has filed proceedings in the Court of law, it is hard to believe that she would have made such kind of inquiry with accused No.1 and merely because the said quarrel was raised on the earlier day, it is hard to believe that PW.3 Kiran would have gone to the house of Chaitali to make inquiry at her place on 12.12.2015. If we consider dying declaration Exhibit-25, she says that she had gone to the house of accused Chaitali on 11.12.2015 at about 11.45 p.m. to bring cow dung. When she is residing in the said village since about 3 and ½ years

there could not have been motive for her to kill Sangita after about 3 and ½ years. It appears that the real incident was different and all these things have been done with an intention to falsely implicate the accused person.

11. Learned Advocate for the applicant relied on the decision in ***Rakesh and another Vs. State of Haryana, (2013) 4 SCC 69***, on the point of credibility of dying declaration. The fact to be noted is that in this reported case on receipt of intimation from the police, the judicial officer had reached to the hospital within reasonable time and then recorded the statement. The other differentiating facts stated above will have to be considered and, therefore, the above-said authority is not applicable.

12. Therefore, taking into consideration the detailed reasons those have been given by the learned Trial Judge, we do not find any perversity. The appeal deserves to be dismissed. Accordingly, the appeal stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm