

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.555 OF 1996

Kashibai Satyawar Darade & Anr.	]	..	Appellants
vs.			
State of Maharashtra	]	..	Respondent

Mr.Harshad Bhadbhade, for the Appellants.

Mr.S.R. Agarkar, APP for the State.

CORAM : BHARATI DANGRE, J

DATE : 19th October, 2023.

ORAL JUDGMENT :-

1] The two Appellants are prosecuted by the Sessions Judge at Solapur in Sessions Case No.107 of 1995 for the offences punishable under Section 452 and 302 read with 34 of the Indian Penal Code and on their conviction, they are sentenced to suffer Simple Imprisonment for 6 months and to pay fine of Rs.200/- in default to suffer Simple Imprisonment for 1 month, on both counts. Both the sentences are directed to run concurrently.

Being aggrieved by the impugned Judgment, the present Appeal is filed by them, which came to be admitted on 04.10.1996 and they are released on bail.

2] The prosecution case has been narrated in the impugned Judgment and I deem it prudent to reproduce the same, which is to the following effect :-

“Rama Darade PW 4 had his residential hut in the land bearing consolidation Block No.201 of village Bhalgaon, Taluka Barshi, District Solapur. Deceased Sunita was the wife of Rama Darade PW 4 and Rama PW 4 and Sunita his wife were residing in the hut situated in the land Block No.201.

Rama PW 4 had gone to village Goudgaon on 03.02.1995. His wife Sunita was cooking food at about 8.00 a.m. on 03.02.1995. She was cooking food on the fire place. It is alleged by the prosecution that accused Nos.1 and 2 committed house trespass by entering into the residential hut belonging to Rama PW 4. Both the accused picked up a quarrel with Sunita in connection with the theft of sugercane. The accused Nos.1 and 2 abused Sunita. Sunita in turn also abused accused Nos.1 and 2 and asked them as to why they were abusing her. It is the prosecution case that in the heat of anger and in the process of quarrel the accused Nos.1 and 2 pushed Sunita. Sunita fell on the fire place. Due to the fall of Sunita on the fire place, saree which was on the person of Sunita caught fire. The entire hut also caught fire. Sunita came out of the hut shouting.

Because of fire, the persons from the neighbourhood rushed on the spot and tried to extinguish the fire. The persons assembled on the spot extinguished Sunita. On enquiry Sunita told them that Accused Nos.1 and 2 entered in her house while she was cooking food on the fire place and after abusing her pushed her on the fire place. She also disclosed to the persons present in the Tempo that the accused

Nos.1 and 2 pushed her on the fire place, when she was being taken to the hospital.”

3] Pursuant to the incident, when Sunita was taken to the Hospital, her statement was recorded by ASI Maindargi (PW 1), in the hospital itself, on assessing her medical condition, from PW 5 Dr. Bhise.

Sunita expired on 03.02.1995 at 5.00 p.m. and hence the crime was registered under Section 302 of the IPC.

On completion of investigation, charge sheet was filed, based on which, charge was framed on 04.10.1995, where both the accused were charged of committing house trespass by entering into the house of the deceased Sunita, and they were also charged of committing her murder, in furtherance of their common intention, by intentionally and knowingly pushing her on the burning oven and thereby committing offence punishable under Section 452 and 302 r/w 34 of the IPC.

Both the accused pleaded not guilty and were tried.

4] The prosecution examined 9 witnesses and to establish its case is also relied upon two Dying Declarations of Sunita.

The Death Certificate has opined the final cause of death as “Death due to superficial to deep burns (93%)”.

The charge faced by the accused that she was thrown at the hearth, as a consequence her saree caught fire and she succumbed to the burn injuries, is brought on record through the two Dying Declarations.

5] PW 1, who was on duty at Civil Hospital as a Police Support Officer has recorded statement of Sunita, after he was handed over a written letter that she was in a position to give the statement.

On visiting the burn ward, PW 1 enquired from her about the incident and was told that at about 8.00 a.m., while she was cooking the food, the two accused persons picked up a quarrel with her in connection with theft of sugercane and when she questioned them about its impropriety, she was thrown on the burning fire place.

The Dying Declaration recorded by PW 1 is exhibited as Exhibit 40 and time of recording of the Dying Declaration is reflected as 3.30 p.m. It also bear the signature of Dr. Bhise and and thumb impression of the deceased.

6] Another Dying Declaration came to be recorded by Naib Tahsildar, PW 8, who received requisition from PW 1 for recording the Dying Declaration and he visited the Civil Hospital , Osmanabad, where Sunita was admitted, at around 1.30 a.m. and after enquiring from Dr. Bhise, whether she was in a position to give her statement, it was recorded at around 13.50 p.m., which is marked as Exhibit 54.

Sunita remained consistent on her version in the earlier declaration that when the quibble occurred between them, she was pushed by the accused women on the hearth and her saree caught fire and they ran away from the spot.

7] Apart from the two Dying Declarations, PW 2 Sinabai, sister in law of the deceased, who stepped into the witness box deposed that she saw the two accused persons, while pushing Sunita on the fire place, due to which she sustained burn injuries. PW 2 is also witness on the extra judicial confession given by Sunita in the Tempo, when she was being carried to the hospital, that Kashibai and Krishnabai pushed her in the fire place.

Another witness of the prosecution is a resident dwelling in the neighbourhood (PW 3) who saw Sunita running out of the

cattle-shed and when enquired she revealed that Kashibai and Krishnabai had pushed her on fire place.

Rama Darade, husband of deceased Sunita is also examined and he deposed that when he was informed that there is fire in the house, he rushed and was told by the deceased that Kashibai and Krishnabai had abused her and pushed her on the fire place. He specifically depose that all of them were asked to stay out of the ward when, Dying Declaration of Sunita was recorded.

8] The learned counsel Mr.Harshad Bhadbhade representing the Appellants has advanced his arguments by inviting my attention to the perversity in the impugned Judgment, as according to him the learned Judge has failed to consider two important aspects of the matter, first being the credibility of the Dying Declarations and second aspect being, the incriminating circumstances not being put to the accused persons while their statement under Section 313 of the Cr.P.C. was recorded and this according to him is fatal to the prosecution, and the consequences of it have gone unnoticed, by the Additional Sessions Judge who delivered his Judgment, convicting the Appellants.

According to the learned counsel, it is the case of the prosecution that the incident is alleged to have taken place at 8.00 a.m. in the morning on 03.02.1995 and at about 11.45 a.m. Sunita, in burned condition was admitted in the Civil Hospital at Osmanabad. PW 6, Police Head Constable who was posted in the hospital, received a letter from the hospital at 12.05 p.m. and as per this letter, he forwarded a request to ASI Maindargi (PW 1) to visit Civil Hospital and to record the statement of Sunita. As per the instructions, PW 1 recorded the statement, which is projected as Dying Declaration, at around 3.30 p.m. and this can be reflected from Exhibit 40, where Dr. Bhise has put his signature and endorsed the time as 3.30 p.m.

According to Mr. Bhadbhade, PW 6 has deposed that Mr. Maindargi (PW 1) has presented the statement of Sunita at 2.35 p.m. which is an impossibility as the time on which her Dying Declaration is recorded by PW 1 is 3.30 p.m. He would also invite my attention to the deposition of PW 8 Naib Tahasildar and in particular the statement recorded by him (Exhibit 54) where Dr. Bhise has put his signature and recorded the timing as 13.50 p.m.

PW 8 has deposed that he was asked by PW 1, ASI Maindargi to record the Dying Declaration of Sunita and he visited the

hospital at 1.30 a.m. in the night. Thereafter, he met Dr. Bhise, the Medial Officer on duty and he informed, that he wanted to record the Dying Declaration and ascertain whether the patient was in a position to give statement and when he indicated in the affirmative, the statement was recorded which is marked as Exhibit 54.

9] My attention is invited to the Postmortem Report (Exhibit 34) which record the time of death as 5.00 p.m. on 03.02.1995 and the PM Notes record that the postmortem began at 8.40 a.m. and ended at 8.55 a.m. on 04.02.1995.

The aforesaid sequence of timings, definitely make the prosecution case doubtful. It is the case of the prosecution that the patient Sunita was admitted in Civil Hospital at 11.45 a.m. and she expired at 5.00 p.m., since she sustained 93% burn injuries.

The first Dying Declaration recorded by PW 1 endorsed the time as 3.30 p.m., whereas, as per PW 6, the report is submitted by PW 1 at 2.35 p.m., which makes it doubtful. Not only this, PW 8 Nayab Tahasildar also depose that he reached the hospital at 1.30 a.m. in the night, but in the Dying Declaration recorded by

him the doctor has recorded the timing as 13.50 p.m. i.e. in the afternoon and in any case the patient is informed to have passed away at 5.00 p.m. and hence, the version of PW 8 that he visited the hospital at 1.30 a.m. in the night contradicts the prosecution case. The aforesaid inconsistency, definitely affect the case of the prosecution.

10] Another most important flaw according to Mr. Bhadbhade is, non-compliance of Section 311 of the Cr.P.C. and it is his specific contention that Dying Declarations recorded by PW 1 and PW 8 which, incriminate the accused persons is not at all put to them. He has invited my attention to the specific questions put to the accused under Section 313 of the Cr.P.C., which have failed to confront the accused persons with the version of Sunita, which is being used by the prosecution, as her "Dying Declaration".

11] I have perused the 313 Statement of the Accused Nos.1 and 2 and the pertinent questions are reproduced hereunder :-

"Q.No.5 :- It has come in the evidence of ASI Maindargi, PW 1 that he recorded the dying declaration as per the narration of Sunita Rama Darade and obtained her thumb impression on the dying declaration recorded by him Exhibit 40. What have you to

say about it?

Q.No.18:- It has come in the evidence of Dr.Bhise, PW 5 that while admitting the patient, he asked the history from the patient and the patient told him that the two women pushed her on the fire place and accordingly he has made entry in the original MLC Register Exhibit 49. What have you to say about it ?

Q.No.20:- It has come in the evidence of Banssi Sagat PW 6 that on 03.02.1995 while he was on duty, he asked ASI Maindargi to record Dying Declaration of Sunita and as per his direction, Shri Maindargi recorded the Dying Declaration of Sunita and presented it to him. What have you to say about it ?

Q.No.21:- It has come in the evidence of Vithal Tidke, PW 8 that on 03.02.1995, he recorded dying declaration of Sunita Darade in the Hospital after having ascertained from Dr.Bhise whether Sunita was in a position to give statement and was actually found in a position to give statement. What have you to say about it ?”

The incriminating circumstance that the deceased had named the two Appellants as the one who had pushed her to the hearth and as a result she sustained burn injuries, is not at all put to the Accused/Appellants.

12] The legislative scheme contained under Section 313 Criminal Procedure Code is to put to the accused, all incriminating material and to provide an opportunity to state his case. It is an option of the accused whether to remain silent or to

provide answer to the questions so put, but once the accused opts to give answer and put forward his own defence or events as they occurred, then he is bound by such statement and the Court is likely to examine the same, in the light of evidence brought on record.

The said provision bestow upon the Court, the power to examine the accused with respect to the evidence which has been produced by the prosecution, against him. The principles underlying Section 313 takes its colour from the basic principle of natural justice i.e. "*audi alteram partem*" and is a facet of the same.

It embodies the basic principle of fair trial. Though a well accepted position that the said statement cannot be used as evidence, as it is recorded without administering any oath, the focus of the provision is on inviting the attention of the accused to each and every piece of evidence that has the potential of being used against him and offering him an opportunity to provide an explanation for the same.

The answers given by the accused, if he chooses to reply to the question though would not form the basis of his conviction, but it can be used to appreciate the evidence of the prosecution.

Recently, the position of law as regards Section 313 Cr.P.C. has been summarized by the Apex Court in the decision of *Premchand vs. State of Maharashtra, in Criminal Appeal No.211/2023*, and after referring to the plethora of Judgments on the said point, the principle flowing from Section 313 has been highlighted, in Para 15 of the Law Report, to the following effect:-

“15. What follows from these authorities may briefly be summarized thus:

- a. section 313, Cr. P.C. [clause (b) of sub-section 1] is a valuable safeguard in the trial process for the accused to establish his innocence;
- b. section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain any circumstances appearing in the evidence against him;
- c. when questioned, the accused may not admit his involvement at all and choose to flatly deny or outrightly repudiate whatever is put to him by the court;
- d. the accused may even admit or own incriminating circumstances adduced against him to adopt legally recognized defences;
- e. an accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him;
- f. the explanations that an accused may furnish cannot be considered in isolation but has to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no

conviction can be premised solely on the basis of the section 313 statement(s);

g. statements of the accused in course of examination under section 313, since not on oath, do not constitute evidence under section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case;

h. statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole, inter alia, to test the authenticity of the exculpatory nature of admission; and

i. if the accused takes a defence and proffers any alternate version of events or interpretation, the court has to carefully analyze and consider his statements;

j. any failure to consider the accused's explanation of incriminating circumstances, in a given case, may vitiate the trial and/or endanger the conviction.”

13] In cases where the incriminating material brought on record by the prosecution is not put to the accused, but when merely by way of formality some questions are put to the accused, it has been held to be in violation of Section 313 Cr.P.C. In *Shivaji Sahebrao Bobade vs. State of Maharashtra*, 1973 AIR 2622, a Three Judges Bench of the Apex Court deliberated upon the consequences of omitting certain incriminating evidence against the accused and the word of caution which followed is of some relevance, in Para 7, and I reproduce the same :-

“The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will breakdown and lose credibility with the community.”

The Bench, held that it was fundamental and in furtherance of a right to have a fair trial, that the attention of the accused is drawn to every incriminating or inculpatory material against him, so as to provide him an opportunity to offer explanation of the same.

14] While considering the purport of Section 313 of the Cr.P.C., it has been time and again reiterated that it is the duty of the Court to put all the material implicating him in a crime to him, so that he gets a fair chance to defend himself. The provision introduced in the Code is not in the form of the power enjoined upon the Court to examine the accused, but also cast a duty to indulge in an inquiry to enable the accused to elaborate and explain the

circumstances appearing in the evidence, against him. Each circumstance and material that is presented before the Court as evidence by the prosecution, shall be put to him specifically, distinctly and separately and failure to do so would amount to a serious irregularity vitiating the trial, if it results in the prejudice to the accused.

The nature of the statement of the accused recorded under Section 313 of the Cr.P.C. is, as if it is direct dialogue between the Court and the accused, when the court is expected to put him each and every circumstance, that was placed before it, by the prosecution in support of its case, with an intent to offer him an opportunity to deal with it. The exercise is not expected to be carried out in a perfunctory manner or as an empty formality, but has to be construed as a meaningful stage in the entire process of trial and if the incriminating circumstances are not put to the accused in his statement under Section 313, it would amount to complete exclusion of such circumstances from consideration, as the accused was not provided any chance to explain them.

15] In terms of Section 313 it is fundamental that an accused is

made aware of each detail that would result into his conviction and the Courts are expected to tread the path of trial, with care and caution and ensure that the accused is made aware and is able to understand and comprehend the circumstance/s which have been garnered against him, so as to record a finding of guilt. The absence of such information or knowledge regarding the information may itself gravely affect the validity of the trial itself and in such a situation, the duty falls upon the Court to afford an opportunity to the accused for refuting the evidence and circumstances put forth against him, by recording his statement under Section 313 Cr.P.C., the whole object being to ensure a fair trial, not only to the Prosecution, but also to the Accused.

16] Having explained the purport of Section 313, it is evident that the incriminating circumstance which has featured from the case of prosecution and in particular the two Dying Declarations recorded by PW 1 and PW 8, is not at all put to the accused. Merely stating that the Dying Declaration was recorded and it was signed/endorsed by the doctor, is not sufficient. Though it may not be necessary to repeat each and every word of the Dying Declaration, the incriminating circumstance relied upon by the

prosecution that the deceased was by the two accused i.e. Kashibai and Krishnabai and it is they who had thrown her at the hearth, and that is how she caught fire, is not at all put to the Appellants and as such in trial they did not get an opportunity to deal with or to offer an explanation, as regards the incriminating circumstance, which necessarily lead to their conviction.

17] The learned counsel Mr.Bhadbhade has also rightly placed reliance upon the latest decision of the Apex Court in case of *Uttam vs. State of Maharashtra (2022) 8 SCC 576*, which deals with multiple dying declarations and the contradictions and inconsistencies appearing therein, when it has been unequivocally held, that in such a case, the Court would look for some material in form of corroboration of the dying declaration and the principle of law which has been culled down in Para 14, reads thus :

“14. In *Paniben v. State of Gujarat*, on examining the entire conspectus of the law on the principles governing dying declaration, this Court had concluded thus: (SCC pp. 480-81, para 18)

"18. ... (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*Munnu Raja v. State of M.P.*)

(ii) If the Court is satisfied that the dying declaration is true

and voluntary it can base conviction on it, without corroboration.
(State of U.P. v. Ram Sagar Yadav: Ramawati Devi v. State of Bihar)

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor)

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P.)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P.)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Ojha v. State of Bihar)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanhau Ram v. State of M.P.)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan.)"

declaration, the Court is expected to carefully examine the entirety of the material on record and also the circumstances surrounding the making of the distinct dying declarations. True, it is, that if a dying declaration is to be found free and voluntary, it can be made basis for conviction of an accused, without any corroboration, but that will depend upon facts of each case.

In the facts before me, chronology of events and timelines which have surfaced in the case of prosecution make it improbable to believe that the second dying declaration is recorded after the death of the deceased which as per the prosecution has occurred at 5.00 p.m.

The burden lies on the prosecution to prove its case beyond reasonable doubt with no loopholes left by placing admissible evidence before the Court establishing that it is the accused, who are guilty of the offence. However, if the prosecution fail to produce reliable and doubtfree evidence to discharge the burden cast on it, and fail to prove the guilt of the accused, beyond reasonable doubt, the accused should have been held entitled for an acquittal.

In the present case, apart from the gross lacuna in the case of the prosecution, since the impugned Judgment apart from

being flawed is also imprecise, also on the ground of violating the principle under Section 313 of Cr.P.C., by not placing the incriminating material to the Appellants, the finding of conviction rendered in the impugned Judgment against both the Appellants cannot sustain and so is the sentence.

19] In the wake of the above, Appeal is allowed. The impugned Judgment is quashed and set aside. The Appellants are acquitted of the charge under Section 302, 452 r/w 34 of the IPC and their Bail Bonds stand cancelled.

[BHARATI DANGRE, J]