

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO. 411/2018

1. Vijay S/o. Pralhad Ramteke,
aged 41 years, R/o. Indira Nagar,
Jattarodi No.1, Nagpur.
2. Sau. Kirti w/o. Vijay Ramteke,
aged 28 years, R/o. Indira Nagar,
Jattarodi No.1, Nagpur.
(At present in Central Jail, Nagpur)

APPELLANTS

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station, Imamwada, Nagpur.

RESPONDENT

Mr. A. K. Bhangde, Advocate for appellants.
Mrs. Mayuri Deshmukh, Additional Public Prosecutor for
respondent/State.

CORAM

: VINAY JOSHI AND
MRS.VRUSHALI V. JOSHI JJ.

RESERVING THE JUDGMENT ON
PRONOUNCING THE JUDGMENT ON

: 10.11.2022
: 31.01.2023

JUDGMENT (PER VINAY JOSHI, J.)

The judgment and order of conviction dated 19.07.2017 in
Sessions Case No. 452/2014 led both convicts to file this appeal in

terms of Section 374 of the Code of Criminal Procedure ('Code'). Both appellants (accused) have been convicted by the Trial Court for the offence of murder punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life, and to pay fine of Rs.15,000/- each with default clause. The judgment and order of conviction is subject matter of challenge in this appeal.

2. In order to appreciate the rival contention of the parties and issues involved, it would be necessary to set out brief facts of the case, which gave rise to the present criminal appeal. Accused are husband and wife *inter se* whilst deceased was neighbouring resident. It emerges from the prosecution case that on 14.08.2014 around 04.00 p.m., there was quarrel in between accused No. 1 Vijay and deceased Vasanta. At relevant time, accused No. 2 Kirti brought a bottle containing kerosene from her house, accused No. 1 Vijay took the bottle and poured kerosene at the person of deceased Vasanta. While deceased Vasanta was proceeding his nearby house, accused No. 1 Vijay followed and threw matchstick at his person, on which Vasanta caught fire. The incident occurred in the courtyard of the house of deceased Vasanta. Since Vasanta was under flames, accused No. 1 Vijay immediately poured water at his person as well as covered him by bed-sheet. Nearby residents have shifted injured Vasanta to the Medical College Hospital, Nagpur. Vasanta was under treatment in the hospital, however he

succumbed to 61% burn injuries on 21.08.2014.

3. On the date of incident, wife of deceased namely PW-6 Anita Sardare was away from her house. After knowing the incident, she rushed to the Hospital. In the late evening, she went to the concerned Police Station and lodged report. The Police have registered Crime No. 90/2014 initially for the offence punishable under Section 307 of the Indian Penal Code. On the same day, Police visited the place of occurrence and drew Panchanama of the scene of offence (Exh. 38). During the course of investigation, a bottle containing kerosene and clothes of deceased Vasanta were seized. On the very day, Police Officer sent a requisition letter to the Naib Tehsildar for recording statement of injured Vasanta who was under treatment. In pursuance of that, PW-8 Naib Tahesildar Mr. Nandkishor went to the hospital. He requested Medical Officer to examine the patient about his fitness to give statement. Medical Officer has examined Vasanta and endorsed about his fit condition to give statement. PW-8 Naib Tehsildar has recorded dying declaration of injured Vasanta (Exh. 59) on the same day.

4. On 21.08.2014, Vasanta succumbed to 61% burn injuries. Inquest Panchanama was drawn and autopsy was conducted. Cause of death was as “septicemia due to burn injuries”. The Police recorded statement of necessary witnesses and after completion of investigation, filed final report in the Court of jurisdictional Magistrate.

5. The learned Additional Sessions Judge has framed charge against both accused. Since both of them denied the guilt, the prosecution has examined as many as 16 witnesses, to establish the guilt of accused. The prosecution also banks upon certain documents. The defence of the accused was of total denial and false implication. Relying on the evidence of eye-witnesses and dying declaration, the Trial Court held that the prosecution has proved the offence of murder against both accused and punished them as aforementioned.

6. The learned counsel appearing for the appellants/accused has straneously criticized the impugned judgment on two counts that the evidence on dying declaration was not truthful and worthy of credit. Secondly, the evidence of eye-witnesses is not reliable as their statements have been belatedly recorded and their conduct was unnatural. Besides that, it has been argued that there was no evidence against the accused No. 2 Kirti to implicate her in the crime. Moreover, it is argued that the act of accused No. 1 Vijay does not fall within the offence of 'murder' as defined under Section 300 of the Indian Penal Code. It is his contention that there was total absence of intention on the part of the accused No.1 Vijay to kill deceased and therefore, at the most, he is liable for the offence punishable under Section 304 Part II of the Indian Penal Code.

7. Per contra, the learned Additional Public Prosecutor ('APP') has supported the impugned judgment and order of conviction. It is argued that there are clear evidences of four consistent eye-witnesses who have unequivocally stated about the role of both accused. The dying declaration recorded by Naib Tehsildar inspires full confidence. It is submitted that first information report ('FIR') was lodged on the date of incident itself involving both the accused. Our attention has been invited to chemical analysers report to state that kerosene residues were found on the clothes of deceased which corroborates the prosecution case. In sum and substance, the learned APP would submit that no interference is called in the well reasoned judgment and order of conviction.

8. Though the prosecution has examined in all 16 witnesses, the evidence of four eye-witnesses and evidence on the point of dying declaration assumes significance. The prosecution has examined PW-1 Ashsish (Shubham) Wasnik (Exh.35), PW-4 Abhishek Dahikar (Exh.45), PW-11 Dhamashila Naik (Exh-66) and PW-13 Saurabh Naik (Exh.70) who are eye-witnesses to the occurrence. On the point of dying declaration, the prosecution has led evidence of PW-8 Nandakishor (Exh. 57) Naib Tahsildar, who has recorded dying declaration and PW-16 Dr. Gaurav Sawant (Exh.83) who has certified about the fitness of patient at the time of recording dying declaration. Besides that the

prosecution has examined informant, Panch witnesses and Police personnel.

9. The first batch of eye-witnesses is of PW-1 Ashsish Wasnik and PW-4 Abhishek Dahikar who are neighbourers. It has come in the evidence of PW-1 Ashsish Wasnik that on the day of occurrence in the afternoon, he was watching television at his house along with his friend PW-4 Abhishek Dahikar. After hearing noise, he came out and saw the quarrel between accused No. 1 Vijay and deceased Vasanta. Accused No. 1 Vijay was demanding money to Vasanta alleging that due to him Police caught his motorcycle. He deposed that accused No. 2 Kirti brought a kerosene bottle which accused No. 1 Vijay poured at the person of Vasanta. While Vasanta was going to his house, accused No. 1 Vijay followed and by igniting matchstick, threw on the person of Vasanta setting him ablaze.

10. Contextually, we have gone through the evidence of PW-4 Abhishek Dahikar who equally deposed that there was quarrel between accused No. 1 Vijay and deceased Vasanta at the instance of Police seizing their motorcycle. He has stated about the incident as per evidence of PW-1 Ashish. Both these witnesses have been cross-examined at length. It has come in their evidence that though they were readily available, the Police did not record their statement till next four days. It is brought on record that though they have witnessed the

incident, they did not rescue Vasanta. Moreover, it has come in their evidence that deceased Vasanta was liquor addict, frustrated and did not have any work.

11. The second set of eye-witnesses is of PW-11 Dharmashila Naik who is a neighbour lady. It is her evidence that at the relevant time, accused Vijay was demanding Rs. 1,000/- to deceased for seizure of motorcycle. She stated that accused No. 2 Kirti brought kerosene which accused Vijay poured on the person of Vasanta and set him ablaze. PW-13 Saurabh Naik who is grandson of deceased equally stated that the dispute arose at the instance of seizure of motorcycle, in which accused No. 2 Kirti brought kerosene, whilst accused No. 1 Vijay poured on the person of Vasanta and set him on fire. These witnesses were subjected to searching cross-examination, but nothing emerges to discard their testimony.

12. All four eye-witnesses have consistently stated that, on flimsy ground the quarrel erupted in between the neighbours. It has come in the evidence that there was no previous quarrel or enmity in between both of them. All witnesses have stated that at the relevant time, accused No. 2 Kirti brought kerosene bottle, which accused No. 1 Vijay took and set Vasanta on fire by igniting matchstick. These witnesses are consistent on the core issue that accused No. 1 Vijay poured kerosene on the person of Vasanta and by his matchbox ignited

and set him ablaze. So far as the role of accused No. 1 Vijay is concerned, evidence of eye-witnesses is consistent. However, though they have ascribed a limited role to accused No. 2 Kirti of fetching kerosene bottle, her name has cropped up after four days from the occurrence.

13. Informant PW-6 Anita Sardare was wife of deceased. It is her evidence that on the day of occurrence, in the afternoon she learnt from PW-1 Ashish Wasnik and PW-4 Abhishek Dahikar about occurrence. On the same day, she lodged report (Exh.48) with the concerned Police. As per FIR, she learnt from these two eye-witnesses that there was quarrel in between duo at the instance of monetary dispute. In the said quarrel, accused No. 1 Vijay came back with kerosene bottle, poured at the person of deceased and set him ablaze with the aid of matchstick. Though PW-6 Anita was not the eye-witness to the incident, however it requires to be noted that FIR was lodged on the very day within few hours from the occurrence. The first version was about the entire role of accused No. 1 Vijay only. As per FIR, at the time of quarrel, though both accused were present, they returned to their house and thereafter accused No. 1 Vijay came with kerosene and set deceased Vasanta on fire. Pertinent to note that the first version was on the basis of information given to PW-6 Anita by two eye-witness i.e. PW-1 Ashish Wasnik and PW-4 Abhishek Dahikar. It assumes significance because the

statement of these two witnesses have been belatedly recorded. Thus, the evidence of informant PW-6 Anita, coupled with FIR (Exh.48) assigns no role to accused No. 2 Kirti in actual occurrence. Besides her mere presence, everything was done by accused No. 1 Vijay. Therefore, the possibility of exaggerating the role of accused No. 2 Kirti cannot be ruled out. We cannot construe any motive for commission of offence especially on the part of Accused No. 2 Kirti as everything has happened in the spur of moment.

14. By and large, three inconsistent stories have come up as regards to role of accused No. 2 Kirti. As per FIR, the entire role is assigned to Accused No.1 Vijay without reference of accused No. 2 Kirti in actual commission of crime. Dying declaration speaks that already accused No. 2 Kirti was holding kerosene bottle which accused No. 1 Vijay took in the sudden quarrel. Third story came from the eye-witnesses is that during course, accused No. 2 Kirti went to her house and brought the kerosene bottle. We have already referred above that the statement of eye-witnesses have been belatedly recorded. These inconsistencies also persuade us to raise a reasonable doubt about participation of accused No. 2 Kirti.

15. Be that as it may, even if the evidence against accused No. 2 Kirti is accepted, it says that when her husband was quarreling with neighbour, she handed over kerosene bottle to her husband.

Pertinent to note that it is not a case that accused No.2 Kirti has also brought matchbox and handed over to her husband. As per the evidence of prosecution witnesses, Accused No.1 Vijay from his matchbox ignited. Thus, it is difficult to assume that the accused No. 2 Kirti has shared common intention or there was prior meeting of mind in between them, to fasten joint liability. The incident as occurred was at the spur of moment. Both Vijay and Vasanta while riding motorcycle, caught by police and their motorcycle was seized. On that instance, Vijay was demanding money to Vasanta and as such, they were quarreling. It has come in the evidence that at the relevant time, deceased Vasanta had consumed liquor. Thus, it was unpremeditated sudden quarrel in between them, therefore one cannot assume that accused No. 2 Kirti had shared common intention with her husband to eliminate Vasanta.

16. There is no material to hold or circumstances never suggest that both accused have shared common intention. Even if, it is assumed that Kirti brought kerosene bottle, however that by itself cannot be construed that she had knowledge that her husband was having matchbox and would actually set the rival on fire. Sometime, in such quarrel in between the neighbours, one use to just give threats to other by showing something which is a mean of causing hurt. Before any one can be held liable for acts done by another, under the provisions of

Section 34 of the Indian Penal Code, it must be established that (i) there was common intention in the sense of a pre-arranged plan between the two , and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply. The prosecution evidence fails short to connect accused No. 2 Kirti with the aid of Section 34 of the Indian Penal Code.

17. The prosecution is also banking upon the evidence of dying declaration. It has come in the evidence of PW-14 PSI Prashant Sakhare that, during investigation he wrote letter to Naib Tehsildar (Executive Magistrate) for recording statement of injured Vasanta. The prosecution has examined PW-8 Naib Tehsildar who is recorder of dying declaration. It has come in his evidence that on 14.08.2014, around 07.40 p.m, he received requisition letter for recording statement (dying declaration). Immediately, he rushed to the hospital and contacted Medical Officer. In his presence, the Medical Officer has examined patient and gave certificate regarding fitness of the patient for giving statement. It is his evidence that he has asked some formal questions to the patient who gave rational answers. He himself felt that patient was fit to make a statement, thereafter, he proceeded in recording dying declaration as per narration of patient. He deposed that after recording statement, it was read over to the patient to which later admitted. He took patient's right

hand thumb impression on the statement and also signed on the statement which is at Exh. 59.

18. We have gone through the requisition letter (Exh. 58) given by the Naib Tehsildar to the Medical Officer alongwith dying declaration Exh.59. It bears endorsement of Medical Officer about patient's fitness to give statement with signature, date, and time. In the said statement, the deceased has stated the incident as narrated by the witness. Precisely deceased stated that accused Vijay demanded kerosene to his wife and set him on fire by matchstick. The statement bears thumb impression of patient as well as signature, stamp and seal of Naib Tehsildar.

19. The prosecution has also examined PW-16 Dr. Sawant who has examined the patient before recording dying declaration. It is his evidence that on receipt of requisition (Exh. 58), he has examined the patient. He has checked blood pressure, desperation, asked some questions to the patient and gave endorsement about fitness. He deposed that during recording of statement, the patient was in fit condition. This witness has been cross-examined on the line to suggest that due to severe burns, the patient was not in position to speak. However, this witness has denied the suggestions.

20. The learned counsel appearing for accused has seriously assailed the evidence of dying declaration. It is submitted that the

patient was not in fit condition to give statement, as he was under extensive burns. Moreover, the Medical Officer has not signed at the end of statement. It is submitted that the dying declaration was not true and voluntary. There are several infirmities therefore it is not safe to rely on dying declaration. In support of said contention, he relied on various decision in cases of *Ravi @ Rahul Dinesh Dangore & anr. Vs. State of Maharashtra, 2011 ALL MR (Cri) 151*, *Pandurang @ Ajab Deoman Gawai & ors. Vs. State of Maharashtra, 2011(1) Bom.C.R. (Cri.) 815*, *Shakuntalabai Khairuprasad Joshi & anr. vs. State of Maharashtra, 2011 Cri. L. J. 1819*, *Manohar Dadarao Landge Vs. State of Maharashtra, 2000(2) Mh.L.J.3* and *Jai Karan Vs. State of Delhi (NCT), (1999) 8 SCC 161*. We have gone through these decisions wherein on the basis of given facts, dying declarations were not relied. However, there cannot be a general proposition as everything depends and varies from case to case.

21. Way back in celebrated case of *Khushal Rao Vs. State of Bombay, AIR 1958 SC*, the Supreme Court has laid down the following propositions of law relating to the test and reliability of dying declaration. We wish to reproduce the same as below:-

“(1) That it cannot be laid own as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(2) That each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) That it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence.

(4) That a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) That a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration on a much higher footing than a dying declaration which depends upon oral testimony, which may suffer from all the infirmities of human memory and human character; and

(6) That in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

22. It is well settled that a dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be credible and trustworthy. A dying declaration is an independent piece of evidence like any other evidence. In case at hand, the prosecution is not solely resting on the evidence of dying declaration, but there are four eye-witnesses to the occurrence. Therefore, the worth of dying declaration has to be tested on the anvil of background facts. We have already reproduced consistent evidence of eye-witnesses which corroborates the dying declaration (Exh. 58) stating that accused No. 1 Vijay has poured kerosene on the person of deceased

and set him ablaze. Mental and physical fitness of the declarant and his capacity to make a statement in his full consciousness and senses is essential feature. Mere percentage of burns is not a sole criteria to judge the truthfulness of the declaration. It depends upon the facts and circumstances of each case. The patient was under 61% burn and had survived for next seven days from the occurrence. Though at the end of statement, there is no specific endorsement of Doctor, however both, recorder and Doctor led evidence about their personal satisfaction. In the circumstances, the evidence of dying declaration inspires confidence.

23. It emerges from the evidence that accused No.1 Vijay while quarreling with deceased Vasanta on petty issue has poured kerosene and thrown a matchstick. In this regard, the learned counsel appearing for the accused would submit that the case does not fall within the meaning of the term “murder” as defined under Section 300 of the Indian Penal Code. It is argued that the incident was occurred as of sudden on petty quarrel. It was not premeditated attack nor accused was carrying dangerous weapon. Incident arose at the spur of moment, in which under heat of passion, the accused set deceased ablaze. Our attention has been invited to the evidence of PW-1 Ashsish Wasnik who stated that there was no prior dispute in between them, but both were good friends. Particularly, this witness has deposed in chief examination itself that while Vasanta was under burn, accused No. 1 Vijay poured

water on his person and covered his body by bed-sheet. There is no denial that accused Vijay has immediately extinguished the fire. Similarly, another eye-witness PW-4 Abhishek Dahikar also deposed that immediately accused No.1 Vijay poured water on the person of deceased and covered him by bed-sheet. Thus, it is evident that though initially, accused No.1 Vijay set deceased ablaze, however, immediately he has extinguished the fire by pouring water and covering his body by bed-sheet. Immediate subsequent conduct of accused No.1 Vijay is quite relevant as one has to see the entire incident as a whole.

24. The learned APP would submit that the act of accused squarely falls within the parameters of murder and it does not fall under exception 4 to Section 300 of the Indian Penal Code. In this regard reliance is placed on the decision of the Supreme Court in case of ***Kikar Singh Vs. State of Rajasthan, AIR 1993 SC 2426***. The said case is distinguishable on facts as the accused therein had used a sharp aged spade by which he gave initial blow on the head causing deceased to fall down. Assailant inflicted another two fatal blows and under such circumstances benefit of exception 4 was denied. The facts in case at hand are quite distinct and therefore, the said decision is of no assistance to the prosecution.

25. The learned counsel appearing for the accused has relied on the decision in cases of ***Dhan Singh Vs. State of Haryana, (2010) 12 SCC***

277, and *Tularam Vs. State of Madhya Pradesh, AIR 2018 SCC 2146* to contend that in absence of intention to kill without premeditation, Section 300 of the Indian Penal Code would not apply.

26. The learned counsel appearing for the accused also relied on the decision in case of *Maniben Vs. State of Gujarat (2009) 8 SCC 796* to contend that in similar circumstances, it was held that the case falls under Section 304 Part II of the Indian Penal Code. In the said case, a mother-in-law has thrown a burning wick on the deceased resulting into 60% burns. The victim developed septicemia and died after eight days from the occurrence. In domestic dispute, the incident arose and thus, it was held that it was not a case of murder. Similarly in case at hand also as of sudden incident occurred in between two friends. The accused was not carrying any lethal weapon, but used kerosene and has immediately extinguished the fire. The deceased was admitted in the hospital with about 61% burns. During the course of treatment, deceased developed septicemia resulting into death and therefore, on facts a definite intention to cause death cannot be derived.

27. Always, it is not possible to enunciate any general rule as what shall be deemed to be a sudden quarrel or an act without premeditation. It is a question of fact whether a quarrel is sudden or not which must necessarily depends upon the proved facts of each case. Accused and deceased were friends as well as neighbours. The Traffic

Police caught them while riding on motorcycle, on which there was a quarrel in between them. At the relevant time, accused No.1 Vijay was not carrying dangerous weapon. During the course of quarrel, he picked up kerosene bottle and set deceased ablaze. The said incident is not indicative of premeditated attack. Always, intention to cause death must not be readily inferred unless circumstances suggests so. It reveals that both were fighting with each other on petty issue. It is to be noted that the 'fight' occurred in Exception 4 to Section 300 of the Indian Penal Code is not defined in the Indian Penal Code which is to be inferred from the facts and circumstances. The fight was a sudden and not premeditated, particularly, the subsequent conduct of accused of immediately extinguishing the fire speak volumes. Rather it conveys loudly that accused never intended to kill or cause any injury which is likely caused death of Vasanta. The fact indicate that all the ingredients of Exception 4 to Section 300 of the Indian Penal Code are present.

28. In view of the evidence on record, we are satisfied that all the ingredients of murder as explained in Section 300 of the Indian Penal Code are missing in this case. The intention of accused No. 1 Vijay was to cause bodily injury from which however knowledge can be attributed that it may lead to death. Taking entire incident as a whole coupled with the background and subsequent conduct of the accused No. 1 Vijay, his case is covered under Section 304 Part II of the Indian

Penal Code.

29. We have carefully examined the entire prosecution evidence. For the reasons stated above, we are of the considered opinion that the case of accused No.1 Vijay is covered under Section 304 Part II of the Indian Penal Code whilst accused No. 2 Kirti is entitled for benefit of doubt. In the circumstances, we partially allowed the appeal by passing following order:-

(I) Impugned judgment and order of conviction as regards to accused No. 2 Sau. Kirti w/o. Vijay Ramteke is hereby quashed and set aside. Accused No. 2 Kirti is acquitted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, and she is set at liberty. Fine amount if paid by accused No. 2 Kirti, shall be refunded to her.

(II) Conviction and sentence of accused No. 1 Vijay S/o. Pralhad Ramteke is altered from Section 302 of the Indian Penal Code to Section 304 Part II of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 15,000/- in default to suffer rigorous imprisonment for 6 months.

(III) Accused No.1 Vijay is entitled for set off in terms of Section 428 of the Code of Criminal Procedure.

(IV) Fine amount of Rs. 15,000/- if recovered, be paid to the informant Anita Vasanta Sardare towards compensation in terms of Section 357(1) of the Code of Criminal Procedure.

(V) Muddemal Property be dealt with in accordance with rules.

(VI) Recommendation made by the Trial Court for additional compensation under Section 357-A(3) of the Code of Criminal Procedure is maintained.

30. Appeal stands disposed of in above terms.

(MRS.VRUSHALI V. JOSHI, J.)

(VINAY JOSHI, J.)

Gohane

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