



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

CRIMINAL APPLICATION (APPA) NO. 40 OF 2024

IN

CRIMINAL APPEAL NO. 16 OF 2024

(Mangesh s/o Vasudeo Mundekar vs. The State of Maharashtra)

WITH

CRIMINAL APPLICATION (APPA) NO. 64 OF 2024

IN

CRIMINAL APPEAL NO. 26 OF 2024

(Chandrashekhar s/o Vasudeo Mundekar vs. The State of Maharashtra)

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr.Anil Mardikar, Senior Advocate assisted by
Mr.D.PSingh, Advocate for appellants/applicants.

Mr.Sagar Ashirgade, Additional Public Prosecutor for
respondent State.

Mrs.Manju M. Ghatole, Advocate for Assist to Prosecutor.

**CORAM : VINAY JOSHI, AND
SMT.VRUSHALI V. JOSHI, JJ.**

DATE : 07.05.2024

Heard.

2. These are applications seeking suspension
of execution of sentence passed in Sessions Case
No.372/2022 whereby both the applicants have been
convicted for the offence punishable under Section

302 of the Indian Penal Code and sentenced to undergo imprisonment for life along with fine.

3. Learned counsel for the applicants seeks suspension by stating that the trial Court committed serious error in recording a finding of guilt in absence of convincing evidence. It is argued that the entire prosecution case rests upon one written dying declaration and two oral dying declarations which are not credit worthy. It is argued that deceased was alive for four days from the date of occurrence but the police did not endeavour to get recorded his dying declaration through Executive Magistrate. Moreover, it is submitted that the evidence of oral dying declaration is not reliable since they did not immediately reported the matter to the police, but their statements have been recorded after gap.

4. On the other hand, learned Additional Public Prosecutor as well as learned counsel appearing for informant resisted these applications by contending that the evidence of recorder of dying declaration (PW-7), Medical Officer who examined the patient (PW-10) and two witnesses (PW – 4 & 12) in whose presence the deceased disclosed the cause of death is consistent.

5. Learned APP relied on the decision of the Hon'ble Supreme Court in the case of ***State of Jharkhand vs. Shailendra Kumar Rai Alias Pandav Rai [(2022)14 Supreme Court Cases 299]***, to contend that the dying declaration recorded by the police can be relied. Moreover, it is submitted that if applicants are released on bail they would threaten and pressurize the witnesses of the case.

6. The prosecution case in nutshell is that on 30.10.2021 around 12:30p.m. at public place the deceased Ambar Pandurang Tambulkar was assaulted by deadly weapons which has proved to be fatal. On the date of occurrence itself, deceased was initially taken to the Primary Health Center, Dhanla and then was shifted to General Hospital, Bhandara.

7. It is the prosecution case that while deceased was lying in injured condition, he disclosed the names of assailants to PW-4 Mohan (friend) and PW-12 Kamlabai, who is the mother of deceased. Particularly, the prosecution case is based on the written dying declaration (Exhibit 56) recorded by the Police Constable PW-7 namely, Manohar Maroti Jangwad. The defence heavily criticized the mode and manner of recording dying declaration by police

vis-a-vis the evidence of Medical Officer, who has allegedly examined the patient before recording dying declaration.

8. With the assistance of both sides, we have initially gone through the evidence of PW-7 Head Constable, Manohar Jangwad. It is his contention that after receipt of information, he went to Bhandara General Hospital, met Doctor and after obtaining fitness certificate has recorded the statement of injured as per his narration. He has also stated that the contents of disclosure, which are reflected in the dying declaration. After recording statement, he has obtained signature as well as thumb impression of the deceased.

9. There is no rule of law that dying declaration recorded by police cannot be believed. However, it depends upon the facts and circumstances of each case. Needless to say that if the dying declaration is recorded by Executive Magistrate, it will stand on higher pedestal.

10. Learned Senior Counsel for applicants pointed out that though patient was at Bhandara however, the recorder (PW-7) attached to Mauda

Police Station, where crime was registered went to Bhandara without any authorization.

11. Be that as it may, we have gone through the dying declaration (Exhibit 56) which does not bear the endorsement of Doctor either at commencement or at the end of certificate about the fitness of the patient to give statement. It only discloses that at the end, Doctor put his rubber stamp and signature without any endorsement.

12. In above situation, necessarily we have to go through the evidence of (PW-10) Doctor – Anirudha, who was allegedly present and vouched about the fitness of patient. It is surprising to note that in his evidence the Doctor never stated that he attended the patient, verified his physical condition, state of orientation and fitness of mind to give statement. In fact, the purpose of examination of this Doctor was to give assurance about mental fitness, but the said material aspect is lacking in the evidence of Doctor. Moreover, the deceased Ambar Tambulkar died after four days but there is no material to indicate that in the meantime, the Investigation Officer made efforts to get examine the patient about his fitness so as to call Executive Magistrate.

13. Though, two witnesses have been examined, on the point of oral dying declaration however, their statements have been recorded belatedly and they have not disclosed the incident immediately to the police.

14. In view of above facts, certainly an arguable case has been made out. Always the Court should be at guard while basing conviction solely on the dying declaration recorded by police. Obviously, the recorder's satisfaction is necessary. The Medical Officer's evidence is virtually of no assistance. In these circumstances, a case has been made out to exercise judicial discretion.

15. The applications are allowed.

16. Execution of substantive sentences against applicants Mangesh s/o Vasudeo Mundekar and Chandrashekhar s/o Vasudeo Mundekar stands suspended till conclusion of the present appeal.

17. In the meantime, both applicants shall be released on bail on executing PR bond of Rs. 50,000/- each with surety in the like amount.

18. The applicants shall attend concerned Police Station on first Monday of each month in between 10:00 a.m. to 12:00 noon till conclusion of these appeals.

19. The applicants shall desist from contacting the witnesses in any manner; failing which it will give rise to the prosecution to move for recalling of this order.

20. The trial Court shall release execution warrant after ensuring that the entire fine amount has been deposited.

(SMT. VRUSHALI V. JOSHI, J)

(VINAY JOSHI, J)