

**(2016) 03 BOM CK 0015**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 557 of 2014**

Anil Laxman Hichami

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

**Date of Decision :** 02-03-2016

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 302, Section 307

**Citation :** (2016) 3 AIRBomRCri 317 : (2017) ALLMRCri 1073 : (2016) 2 BomCR(Cri) 13 : (2016) 5 MhLJCrI 63

**Hon'ble Judges :** B.P. Dharmadhikari and V.M. Deshpande, JJ.

**Bench :** Division Bench

**Advocate :** Mir Nagman Ali, Advocate, for the Appellant; V.A. Thakare, Additional Public Prosecutor, for the Respondent

**Final Decision :** Allowed

## Judgement

V.M. Deshpande, J.—1. By the present appeal, the appellant has challenged the judgment and order of conviction passed by the learned Sessions Judge, Gadchiroli, in S.C. No. 06 of 2012 dated 30.09.2013, by which he is convicted for the offence punishable under Section 302 of Indian Penal Code. Consequent to the conviction, the appellant is directed to suffer rigorous imprisonment for life and to pay a fine of Rs. 1000/-, in default to suffer further rigorous imprisonment for a period of one month.

2. We have heard Advocate Mir Nagman Ali for the appellant and Shri V.A. Thakare, learned APP for the State. With their able assistance we have gone through in detail the record and proceedings and also the notes of evidence with a view to re-appreciate the entire prosecution case.

3. According to learned counsel for the appellant, the prosecution has utterly failed to bring home the guilt of the appellant beyond reasonable doubt. He submits that though there are two written dying declarations and one oral dying declaration made to Banibai (P.W.3), none of these dying declarations are helpful

to the prosecution for securing conviction of the appellant. He submits that there are inherent flaws in these dying declarations and, therefore, those cannot be made a basis for appellant's conviction. He, therefore, prays for acquittal of the appellant.

4. Per contra, learned APP would submit that the case of the prosecution is fully proved by the two written dying declarations. He submits that the dying declaration (Ex.40) is recorded by the Executive Magistrate after getting satisfied with the mental fitness of the deceased and also it was noticed by him that he was in a condition to give statement. He further submits that the other written dying declaration fulfills the criteria as laid down by various Court to treat the statement as dying declaration. He submits that both these written dying declarations inspire confidence and, therefore, no fault can be found in the impugned judgment.

Learned APP submits that the oral dying declaration made to Banibai (P.W.3), wife of deceased, is most natural on the part of the deceased. He, therefore, submits that the appeal deserves to be dismissed.

5. For appreciation of rival contentions, it would be useful to narrate the prosecution case, which is as under :

(i) Somnath Diwakar (P.W.11) was working as Police Station Officer at Ghot P.H.C. On 14.9.2011, which comes under the jurisdiction of Police Station Chamorshi. Baburao, the brother of deceased Bajirao, arrived at the police station and informed him that Bajirao is burnt. He, therefore, sent Bajirao to General Hospital Gadchiroli. P.W.11 Somnath Diwakar then went to village Darpanguda, where the incident had occurred, in search of the accused, as his name was disclosed to him by Baburao. However, the appellant was not found in the village. Thereafter, this witness went to Gadchiroli and visited General Hospital. There, he met the medical officer Dr.Tushar Dahake (P.W.12). He gave a requisition (Ex.56) to the Medical Officer by which Somnath Diwakar expressed his desire to record the statement of Bajirao admitted in the hospital. Therefore, Dr. Dahake examined Bajirao and gave his opinion on the requisition itself to the effect that the patient is in a fit condition to give statement. Thereafter P.W.11 Somnath Diwakar recorded the statement of Bajirao. As per the statement of Bajirao, on 13.9.2011 the appellant/accused called him to his house. Accordingly he went there, where a dispute arose over some domestic reason. Therefore, in a fit of anger the appellant poured kerosene on the person of Bajirao by pushing him outside his house and thereafter set him ablaze.

After the statement was recorded by Somnath Diwakar (P.W.11), same was read over to the declarant and since it was noticed by P.S.I. Somnath Diwakar that both the palms of Bajirao are burnt, he obtained toe impression of Bajirao on the said statement. The said statement is at Ex.58.

(ii) On 14.9.2011 the Investigating Officer gave a requisition (Ex.38) to the Executive Magistrate for recording the statement of Bajirao. Accordingly, Pradeep

Indurkar (P.W.8), who was working as Executive Magistrate at Gadchiroli visited General Hospital, Gadchiroli. There, he contacted the medical officer Dr.Bandu Nagrale (P.W.10) and requested him to examine the patient as to whether the patient is in a fit condition to give statement. Dr.Nagrale examined the patient and opined that he was in a fit condition to give statement. Thereafter the Executive Magistrate recorded the dying declaration of Bajirao. The said dying declaration is in printed Question -Answer form and it is at Ex.40.

(iii) Thereafter P.S.I. Somnath Diwakar (P.W.11) came to Police Help Centre, Ghot, and prepared occurrence report No. 91/11. It is at Ex.59. He also prepared spot panchanama by visiting the place of occurrence in presence of panch witnesses. It is at Ex.16. The articles from the scene of occurrence were seized vide seizure-memos (Exs. 13 to 15). Those articles were seized and sealed by the Investigating Officer. He thereafter deposited all the articles in the Malkhana of Ghot Police Help Centre. He also recorded statements of witnesses.

(iv) On 15.9.2011 P.S.I. Somnath sent the occurrence report along with the statement of Bajirao recorded by him to Chamorshi police station. Devendra Wargantiwar (P.W.11), who was working as P.S.I., on the basis of occurrence report, registered an offence in Chamorshi police station against the appellant for the offence punishable under Section 307 of Indian Penal Code. Printed FIR is at Ex.36.

On 20.9.2011 the appellant was arrested by the Investigating Officer Somnath (P.W.11).

On 23.9.2011 Bajirao died in the hospital and therefore the offence from Section 307 was converted to offence under Section 302 of Indian Penal Code. After completion of all other usual investigation, charge-sheet was presented in the Court.

(v) The trial Court framed charge against the appellant. The appellant denied the charge and claimed for trial.

(vi) Prosecution examined in all 12 witnesses and also relied upon documents, such as two written dying declarations. As observed above, the Court below was of the view that the prosecution has proved its case against the appellant beyond reasonable doubt and, therefore, the appellant was convicted and sentenced.

6. First of all, let us scrutinize whether the evidence of Banibai (P.W.3) and Baburao (P.W.4) in respect of oral dying declaration is reliable.

Banibai (P.W.3) is the wife of deceased Bajirao. Her evidence would disclose that Nana Gawde (P.W.2) came in a frightened condition. That time Baburao (P.W.4) was also present in the house. Therefore, they went towards the house of the appellant to notice that deceased Bajirao was lying in the court-yard of the appellant. He was brought to their house and that time Bajirao disclosed to her wife Banibai that the appellant poured kerosene on his person and set him ablaze.

7. Post mortem report is at Ex.22. From the post mortem report it is noticed that there were extensive burn injuries on the face, ears, neck, chest and part of abdomen. The autopsy surgeon found that the skin was peeled off at burnt area. He also drew a diagram in the post mortem report itself which shows that the entire face of the deceased was charred.

8. The evidence of Banibai (P.W.3) shows that the face of Bajirao was burnt and he was crying "Wachva Wachva". It would be useful to reproduce below the relevant portion from her cross-examination :

(I) "It is true that since the face of Bajirao was burnt, therefore he was only crying with utterances "Wachva Wachva". It is true that when we brought Bajirao to home, at that time also due to burning he was moaning only. It is true that since Bajirao was feeling severe pains in his body....

(II) It is true that since Bajirao was feeling severe pains in his body, he was merely crying and he did not tell me anything about the incident "

From the above, it is amply clear that Bajirao was not in a position to disclose anything and in fact he has not stated anything to Banibai about the incident. Even the evidence of P.W.4 Baburao, brother of deceased Bajirao, corroborates condition of deceased in respect of making statement, as can be seen from the following :

"It is true that since the face of Bajirao was burnt out, therefore he was unable to speak."

In view of the above, there is no hesitation in our mind to discard the evidence of these two prosecution witnesses in respect of the oral dying declaration made by deceased Bajirao, as claimed by the prosecution.

9. The other piece of evidence which is pressed into service against the appellant are two written dying declarations. The first in time is Ex.58 which is recorded by Somnath (P.W.11). Ex.56 is the requisition given by Investigating Officer to the Medical Officer to examine injured Bajirao for ascertaining his condition to record his statement. Ex.57 is the certificate given by the Medical Officer which shows that the patient is fit to give statement. Though it appears that fitness certificate is obtained by the Investigating Officer before recording the statement of Bajirao, in view of following portion appearing in the evidence of Dr.Tushar Dahake (P.W.12) there is no doubt in our mind that the dying declaration (Ex.58) is not free from tutoring. Relevant portion from the evidence of Dr. Tushar (P.W.12) is reproduced below :

"At the time of recording statement of Bajirao, relatives of Bajirao were also present there."

It is also brought on record through his cross-examination that Bajirao was having pains and was shouting.

10. From the aforesaid admission given by Dr.Tushar (P.W.12) it is clear that the

patient's relatives were present near him at the time of recording of his dying declaration. Further the Investigating Officer, the scribe of Ex.58, is blissfully silent in his evidence that before recording the statement of Bajirao he ensured that no relatives are present near the patient.

Further evidence of medical officer shows that the front portion of face of Bajirao was burnt and he was having pains and was shouting and, therefore, it becomes doubtful as to whether really such patient would be able to give detailed account of incidence in question, as scribed in the dying declaration Ex.58. In addition to that, as observed above, the statement is not free from tutoring. The influence of the relatives on the patient at the time of recording evidence cannot be completely ruled out. Therefore, we have no hesitation in our mind to discard the dying declaration Ex.58.

11. That leaves the prosecution case with another dying declaration which is at Ex.40. The said dying declaration is recorded by Pradip Indurkar (P.W.8). On 14.9.2011 this prosecution witness was working as Naib Tahsildar and Executive Magistrate. On that day he received a requisition (Ex.38) by which it was requested to him to record the statement of Bajirao, who was admitted in the General Hospital, Gadchiroli. Accordingly, Pradip Indurkar (P.W.8) went to General Hospital, Gadchiroli and contacted Dr. Bandu Nagrale. Ex.39 is the request made by the Executive Magistrate to Dr.Bandu Nagrale (P.W.10) to examine the patient. The said request is in printed form and it is on the top of Ex.40 which is also a printed form. Ex.40-the dying declaration is in question - answer form. Dr. Bandu Nagrale is candid in his cross-examination to state that he has not examined the patient before Ex.39. Further, the prosecution has not proved the printed certificate appearing at the bottom of Ex.40. It is to be noted that the scribe Pradip Indurkar (P.W.8) failed to depose from the witness-box that he himself was satisfied in respect of fitness of the patient.

The evidence of prosecution shows the presence of relatives near him as stated by Dr.Tushar Dahane (P.W.12)

The evidence of Pradip Indurkar (P.W.8) the scribe of Ex.40 is silent that when he was taking statement of Bajirao there was no relative near Bajirao.

Further, from his evidence it is clear that Dr.Bandu Nagrale (P.W.10) has not examined Bajirao prior to start of recording his statement (Ex.40). Evidence of Executive Magistrate shows that Medical officer has given certificate that while giving dying declaration Bajirao was conscious. That suggests that prior to start of recording statement, patient was not examined. In view of that, in absence of certification from the medical officer that the patient was in a fit condition, no importance can be attached to the dying declaration (Ex.40).

12. In view of the aforesaid discussion, we are of the view that the judgment and order of conviction needs to be set aside. Resultantly, we pass following order.

**ORDER**

(i) Criminal appeal is allowed.

(ii) Judgment dated 30.9.2013 delivered by the Sessions Judge, Gadchiroli, in Sessions Case No. 6 of 2012 is set aside. The appellant Anil Laxman Hichami is acquitted of the offence punishable under Section 302 of Indian Penal Code. He be set at liberty, if not required in any other case by the State.

(iii) Fine amount, if deposited, be refunded to the appellant.

(iv) Muddemal property, being worthless, be destroyed after appeal period is over.