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**(2004) 04 SC CK 0033**

**In the Supreme Court Of India**

**Case No : Criminal Appeal No. 1173 of 2003**

Gaffar Badshaha Pathan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

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**Date of Decision : 01-04-2004**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Penal Code, 1860 (IPC) — Section 302

**Citation :** (2005) 3 ACR 2713 : (2004) 10 SCC 589

**Hon'ble Judges :** Y. K. Sabharwal, J; B. N. Agrawal, J

**Bench :** Division Bench

**Final Decision :** Disposed Of

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**Judgement**

Y.K. Sabharwal and B.N. Agrawal, JJ.—Whether the death was homicidal or accidental is the question that falls for determination in this appeal. This Court of Session has held it to be homicidal, convicted the Appellant and imposed on him life imprisonment. The High Court confirmed the conviction and sentence of the Appellant by dismissal of the criminal appeal that was filed by the Appellant. The correctness of the judgment of the High Court has been challenged in this appeal. The case rests on circumstantial evidence.

2. The Appellant (accused) was 22 years old at the time of the occurrence. The deceased was 32 years of age. She was married and had 5 children. Her husband, P.W. 14, was working at Abu Dhabi. As a result of burn injuries received by the deceased on 18.11.1980 at about 4.30 p.m., she was admitted in a hospital and died on 19.11.1980. The accused and the deceased were near relatives, their mothers being real sisters. According to the case of the prosecution, the accused used to render help in construction of a bungalow on the plot owned by the husband of the deceased who used to send money for the purpose of construction from Abu Dhabi. The motive for the crime, as per the prosecution case, is illicit relations between the accused and the deceased and also extraction of money by the accused from the deceased. The burning incident

had taken place in the kitchen of the house of the deceased. In the hospital D.W. 1, a Head Constable on police duty, recorded the statement of the deceased at about 9.00 p.m., according to which accidentally, the deceased received burn injuries while she was preparing tea on a stove in her kitchen and when she was removing the vessel with the edge of her sari, which suddenly caught fire. She was wearing a nylon sari. But, according to the prosecution, the dying declaration was recorded by the Head Constable to help the accused. It was not a genuine document. The husband of the deceased made a complaint dated 15.5.1981 complaining that the investigation had not been properly conducted. On the basis of the said complaint, the matter was inquired into and ultimately on 8.1.1984, a case for offence u/s 302 was registered against the Appellant. The Appellant was arrested on 9.1.1984. The Appellant has been found guilty of offence u/s 302 and that finding has been confirmed in appeal as earlier noticed.

3. The prosecution relied upon the following circumstances:

(a) Motive-ill-treatment to the deceased to extract money from her and illicit intimacy. Statement of Paulad (P.W. 5) that 4-5 months prior to the incident while passing on the road, he had seen the accused catching the deceased Akhtarbanu and taking her inside the house.

(b) Door of the house of the deceased was found closed from inside and when it was broken open, the accused was seen in the company of the deceased and the deceased was found engulfed in flames.

(c) Kerosene tin and matchbox were lying on the floor of the kitchen and the floor was smelling of kerosene.

(d) Residue of kerosene was found on chemical analysis of the clothes of the deceased.

(e) Burn injuries on the hand of the accused speak for his presence at the scene of offence.

(f) The accused had not opened the door though it was knocked by the persons who came to extinguish the fire. He had not raised hue and cry, nor he took any steps to give medical aid to the deceased.

4. Before we examine the aforesaid circumstances which have been held to be proved by the prosecution and the conviction of the Appellant based thereupon, it would be appropriate to first deal with the aspect of the dying declaration above-referred. The dying declaration recorded by D.W. 1 reads as under:

Date: 18.11.1980

I, Akhtarbanu, w/o Babubhai Pathan, age 32, r/o Shrirampur, near Government godown state that I am residing at the abovementioned place. I have total five issues, out of them three are daughters and two sons. My husband is serving at Dubai since 4 months. My elder brother Ekbal Babakhan is residing with me since about 6 months.

Today on 18.11.1980 at about 14.00 hours in the noon all my children went to the school. I was alone in the house. For preparing tea, I ignited the brass stove and put the tea vessel on the stove. After the tea was ready, I was removing the vessel with the edge of my sari when the part fell on the stove and the synthetic sari suddenly caught fire. I shouted, then the persons residing in neighbourhood Palad Sheth, his wife and other people rushed and extinguished my burning sari. And those persons brought me in St. Luke's Hospital for medical treatment. I was burnt from chest to legs and up to both hands. There is no reason except this. I can sign, but now I cannot sign due to burning. I am giving thumb impression. I have no complaint of any type.

My statement is read over to me and it is correct.

Before me Dated: 18.11.1980

Abbas Shaikh, Head Constable TI of Akhtarbanu, w/o Babubhai Pathan, of her right hand.

9.25 p.m.

18.11.1980

This statement has been made while in a conscious state.

5. Dr. A. U. Masurkar was the Chief Medical Officer of the hospital at the relevant time. The High Court has held that the recording of the dying declaration and story stated therein apparently appears to be false and concocted for the various reasons noticed in the impugned judgment. It has to be borne in mind that the fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted. The fact that the statement of the deceased was recorded at about 9.00 p.m. by the Head Constable cannot be doubted though an attempt to the contrary seems to have been made by the prosecution. The statements of the prosecution witnesses (P.W. 5 and P.W. 11) also show that the statement was recorded by the Head Constable. According to P.W. 5, it was only a show made by the Head Constable of recording statement, since according to the said witness, the deceased was not in a position to speak at that time. Even P.W. 11, a doctor in the hospital, has deposed about the recording of the statement by the Head Constable though he has not formally proved the dying declaration but has certified the correctness of the endorsement of Dr. A. U. Masurkar on the dying declaration. P.W. 11 was shown the dying declaration. He has deposed that the certificate recorded on the dying declaration is in the handwriting of Dr. Masurkar, Chief Medical Officer of the hospital. He has further deposed that Dr. Masurkar is in the hospital since the last 12 to 15 years and that he had degree in MS and was estimated to be an honest and expert surgeon of the area. One of the reasons, which had strongly weighed with the High Court in rejecting the dying declaration is that the endorsement of the doctor is only about the deceased lady being conscious and

not that she was in a fit condition to make the statement. The High Court went into distinction between consciousness and fitness to make statement. On the facts of the present case, we are unable to sustain the approach adopted by the High Court. It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. Under these circumstances, the dying declaration could not have been rejected on the ground that it does not contain the endorsement of the doctor of the fitness of the lady to make the statement as the certificate of the doctor only shows that she was in a conscious state. The endorsement of the doctor aforequoted is not only about the conscious state of the lady but is that she made the statement in a conscious state.

6. Yet another reason for rejecting the dying declaration is that as per the testimony of the Head Constable (D.W. 1), Dr. Masurkar did not examine the deceased in his presence before or after recording of her statement by the witness but the doctor told D.W. 1 that he had recently examined the lady and that she was in a conscious state of mind. It is in evidence that the endorsement on dying declaration, Ext. P-59 had been made in the handwriting of the doctor. D.W. 1, the impugned judgment notes, admitted that he had no personal knowledge regarding the actual examination of the patient by Dr. Masurkar. The High Court then goes on to hold that the defence failed to produce Dr. Masurkar as a witness and, relying upon the factum of pethidine injection having been administered, comes to the conclusion that there was every possibility that the patient was not in a position to speak. The High Court further gets support from the evidence of P.W. 12 and P.W. 15, since according to these witnesses, the patient was not in a position to speak. Here, again we are unable to sustain the approach adopted by the High Court. The dying declaration shows that it is a case of accident. It is possible in a given case that a case of homicide may be shown as a case of accident. But, then if such a dying declaration, as the one produced in the present case, is recorded, it would be for the prosecution to explain the circumstances under which the same was recorded and established by leading satisfactory evidence as to why it should be discarded and not acted upon. Nothing of the kind was done. The prosecution had to explain the circumstances under which the endorsement was made by the doctor on the dying declaration.

7. There is one more aspect about the dying declaration which shows that despite the fact that the case was registered more than three years after the date of the incident, the prosecution was still not clear about its case on the aspect of dying declaration. The complaint, Ext. 51 authored by a senior Police Sub-Inspector states that the deceased might have given the dying declaration falsely with an intention not to open the illicit connection between her and Gaffar Khan because the person burned remains in a condition of talking till the end. But she did not tell the truth to any of her relatives because she did not want to

open the abovementioned illicit connection. The complaint, Ext. 51 is dated 8.1.1984. That is the basis of registration of case against the accused and his arrest on the following day on 9.1.1984. According to the complaint, the deceased was talking till the end and deliberately made a false dying declaration to hide her illicit relations with the accused. If that is so, the question of the dying declaration being false and concocted would not arise as it would be a question of the state of mind of the deceased. Further, if a false dying declaration is given for the reasons aforesaid, the entire case would have to be examined from a different perspective and the circumstances would have to be explained by the prosecution. In an eventuality like this one, there would be no question of the author of the dying declaration trying to help the accused. At best, the only criticism which may be levelled against the author of the dying declaration in that eventuality would be that he could not extract the truth from the maker of the statement. But, then the only obligation of the author would be to show that the statement was recorded with bona fide intention and without any pressure having been exerted by him on the maker of the statement. This is not always an easy job for an author to enter into the mind of the maker. If an incorrect statement is given for the reasons attributed herein i.e. to hide the illicit relations between the deceased and the accused, there has to be positive evidence to override the theory of accident mentioned in the dying declaration. The other reasons given in the impugned judgment for rejecting the dying declaration also does not bear a closed scrutiny. Those reasons are also part of the aforequoted six circumstances on which the prosecution had relied. We will now consider those circumstances.

8. Taking first the presence of the accused at the place of occurrence, it seems that it could be a natural act. The accused and the deceased were not strangers, they were near relatives. The accused had helped in the construction of bungalow of the deceased and her husband. It is also in evidence that the husband of the deceased had asked the accused to look after his wife and children while he was away on work to Abu Dhabi. Another important factor is that near the bungalow of the deceased where the incident took place, there was a plot owned by the mother of the accused. It is in evidence that construction of a boundary wall on the said plot was going on. It has further come out in the testimony of the star witness of the prosecution, P.W. 5 that 15 to 20 minutes before the time of incident, the accused was seen at the said plot of his mother. The accused in his statement, recorded u/s 313 of the Code of Criminal Procedure, has stated that on hearing the shouts of the deceased, he along with 7/8 others rushed to the bungalow in question. The accused pushing others aside was the first one to enter the house. The testimony of P.W. 5 is also that when he entered the house of the deceased, the accused was present. His further statement is that he was trying to extinguish the fire by his hands. P.W. 5 deposed that he told the accused that the fire cannot be extinguished by use of hands and he brought a cloth sheet and covered the deceased with it in an attempt to extinguish the fire. It has further been established that the hands of

the accused had been burnt. Under these circumstances, the presence of the accused and the burns on the hands of the accused are not necessarily compatible with the commission of offence. The probability of the accused trying to extinguish the fire cannot be ruled out. The possibility of the accused reaching the bungalow and the room in question first of all in the manner stated by him in Section 313 statement is also a reasonable possibility. Further, the circumstance about the breaking open of the door of the house, as also the door not being opened despite being knocked by the persons, has been taken against the accused. There is no evidence to establish that the door was knocked. Regarding breaking open of the door, again the evidence only shows that the door was closed from inside. There is no evidence that from inside, any latch had been put. The door may appear to be closed depending upon various factors. Further, it is also the evidence that there were four doors and entry and exit in the house was possible from any of the doors.

9. Regarding the smell of the kerosene oil, lying of the matchbox and the kerosene tin on the floor of the kitchen and residue of the kerosene having been found on chemical analysis, on the clothes of the deceased, it may be noted that mere presence of the matchbox and the kerosene tin in the kitchen is not a circumstance which by itself will connect the accused with the commission of crime. It is but natural that a kerosene tin with kerosene and matchbox would find place in the kitchen. Regarding the residue of the kerosene having been found on the clothes of the deceased, on chemical analysis, it deserves to be noticed that the evidence has established that the kitchen had been cleaned before it was examined by the police. It was further in evidence that the clothes of the deceased were not found by the police in the kitchen. What is in evidence is that the brother of the deceased, when the panchnama was prepared in the bungalow, had produced those clothes before the police.

10. Reverting now to the motive of illicit intimacy between the accused and the deceased, reliance of the prosecution is on the testimony of P.W. 2, being the minor daughter of the deceased who was about 11 years old at the time of the occurrence, and P.W. 5. Before we examine as to what these two witnesses say, it may be noticed that despite the fact that P.W. 14, the husband of the deceased made a complaint nearly six months later, i.e., on 15.5.1981 about proper investigation not having been conducted, he did not mention in the complaint, Ext. 35 about any such motive. Even while appearing in Court, he has not attributed any such motive to the accused. P.W. 2 has only made a general statement to the effect that the accused used to give them money, asked them to go outside the house and purchase confectionery and used to threaten them and ask them to sit outside. This statement was also made for the first time in Court. In fact, on vital aspects, the witness made improvements while appearing in Court. In the statement recorded by the police on 21.11.1980, i.e., three days after the incident, no such statement was made. Further, P.W. 2, for the first time, stated in Court that soon after the incident, her younger brother, then aged 2 years and 9 months, by gestures had conveyed to her that their mother had

been burnt by the accused. Clearly, it was an improvement on a very vital and important aspect. One fails to understand the reason why such a statement was not made before the police. Further, P.W. 2 has stated that her mother was treating the accused like her real brother. On the aspect of illicit relations, P.W. 5 only made a statement that about 4 to 5 months prior to the incident, when he was passing from the street, he saw the accused catching the deceased and taking her inside the house. Too much is being read into this statement, to return a finding of illicit intimacy between the deceased and the accused. No other evidence has been brought to our notice to establish illicit intimacy. Likewise, the evidence of extraction of money by the accused from the deceased is also absent.

11. In view of the aforesaid deficiencies, we are of the view that neither the circumstances on which the prosecution was relying have been proved nor those circumstances conclusively prove the guilt of the accused. The conviction of the accused is a result of approach which is not sustainable in law. The prosecution has failed to establish the case of homicide. The accused is clearly entitled to the benefit of doubt.

12. For the reasons aforesaid, the impugned judgment and order of the High Court, confirming that of the Court of Session, is set aside. The appeal is allowed. The Appellant is directed to be set free forthwith, if not required in any other case.