

(2020) 10 BOM CK 0036
In the Bombay High Court
Case No : Criminal Appeal No. 803 Of 2016

Sheikh Wajid Sheikh Sarvar

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 19-10-2020

Acts Referred:

Indian Penal Code, 1860 — Section 302, 304, 307
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2020) 10 BOM CK 0036

Hon'ble Judges : Vinay Joshi, J

Bench : Single Bench

Advocate : H.G. Katekar, N. Rizwy, N.H. Joshi

Final Decision : Allowed

Judgement

1. Heard learned Counsel for the parties.
2. Challenge in this appeal is to the judgment and order of conviction of appellant/accused for the offence punishable under Section 304 Part-II of the Indian Penal Code, for which the Trial Court has imposed sentence to suffer rigorous imprisonment for 5 years and to pay fine of Rs.10,000/- with stipulation of default. The appellant/accused was initially charged for the offence punishable under Section 302 of the Indian Penal Code, however, the trial Court held the accused guilty for the offence punishable under Section 304 Part-II, and imposed the sentence as mentioned above.
3. The prosecution case as it emerges from the record is that, the informant - Meghraj (P.W.2) was running a grocery shop at village Mungoli. On 15.12.2017, the informant filled petrol in his motorcycle at village Ghughus and also brought petrol in a plastic bottle. The informant kept the plastic bottle containing petrol on the counter of his grocery shop and went to his nearby house for taking meals. At that time, the informant's father - Yogiraj [deceased] was warming himself at coal fire in front of his shop. It is the informants' case that the accused

arrived at his grocery shop and demanded bottle containing petrol to his father. Since the deceased Yogiraj refused, the accused threatened him and threw plastic bottle containing petrol in the coal fire where the deceased was seated. In the result there was ablaze in which Yogiraj caught fire. The nearby person gathered and extinguished the fire. Yogiraj sustained severe burn injuries, hence he was shifted to hospital.

4. On the basis of the said report, police registered crime vide C.R.No.250/2017, for the offence punishable under Section 307 of the Indian Penal Code. During the course of investigation panchnama of the scene of offence was drawn, clothes of Yogiraj and other articles were seized. While Yogiraj was in the hospital of Dr. Paliwal, his statement [dying declaration] came to be recorded. Unfortunately Yogiraj succumbed to his burn injuries on 27.12.2017, hence, the police added offence of homicidal death punishable under Section 302 of the Indian Penal Code. Police carried inquest panchnama and post mortem was conducted on the dead body. After completion of investigation charge sheet came to be filed.

5. On committal, the trial Court has framed charge against the appellant/accused for the offence punishable under Section 302 of the Indian Penal Code. Since the accused denied the guilt, prosecution has examined in all 10 witnesses to prove his guilt. Statement of accused under Section 313 of the Code of Criminal Procedure was recorded. The defence of accused is of total denial and false implication. Having regard to the oral and documentary evidence, the trial Court held that the prosecution has proved the incident as alleged, however, held that the act of accused constitutes an offence punishable under Section 304 Part-II of the Indian Penal Code, and accordingly passed the judgment and order of conviction.

6. The learned counsel for the appellant has submitted that the trial Court has erred in believing the evidence of informant and dying declaration, which resulted into miscarriage of justice. No independent witness, though available was examined. Investigating officer has not endeavored to record dying declaration through Executive Magistrate. There was impossibility of obtaining thumb impression of the deceased on the dying declaration since his upper limbs were fully burnt. It is his submission that P.W.2- informant though admits that he had not witnessed the incident, however, the trial Court discarded said vital admission for no valid reason. In short, despite convincing evidence/material, the trial Court erred in convicting the accused.

7. Learned A.P.P. appearing for the respondent State has strongly supported the judgment and order of conviction. According to him, the trial Court has rightly appreciated the evidence of informant, as well as dying declaration. He would submit that P.W.8 - Dr. Paliwal has specifically deposed about mental fitness of the deceased Yogiraj at the time of recording dying declaration. According to him, there is no requirement of law to record dying declaration through Executive Magistrate. He would submit that the deceased in his dying declaration has

specifically stated about the act of the accused, and therefore, the judgment of conviction calls for no interference. Learned A.P.P. would submit that there is no legal deficiency in recording dying declaration by the police person. In support of this contention he has relied on the decision of Hon'ble Supreme Court in case of Shama .vrs. State of Haryana - 2017 All MR (Cri) 448. There is no dispute that dying declaration recorded by the police can be relied, but, always it depends upon the facts and circumstances of the case.

8. The prosecution case is very short that at the time of occurrence the deceased was seated, warming near coal fire in front of his shop. The accused arrived and demanded petrol, which was kept in a plastic bottle on the counter of the shop. Since the deceased refused, the accused had thrown the petrol bottle in the coal fire causing ablaze in which Yogiraj sustained burn injuries and consequently succumbed to the same.

9. The guilt can be established on the basis of direct or circumstantial evidence. The prosecution case is about direct evidence of eye witness i.e. informant P.W.2 Meghraj, and about dying declaration (Exh.96), recorded by the investigating officer. The trial Court believed the prosecution case on both the counts while returning the finding of guilt. Though the prosecution has examined in all 10 witnesses, P.W.2 Meghraj [informant], is the only eye witness. Pertinent to note that the FIR [Exh.57], as well as Dying declaration [Exh.96] bears reference of some other persons, who were present on the spot, however, none of them has been examined. Therefore, the prosecution case falls back only on the limited evidence of eye witness i.e. the evidence of the informant. In the circumstances, the evidence of P.W.2 informant needs careful consideration.

10. In his evidence P.W.2 - Meghraj [informant] has stated that on 15.12.2017, he brought one litre petrol in plastic bottle and kept it on the counter of his grocery shop and went to take his meals. At that time, his father was warming himself near coal fire in front of the shop. He deposed that the accused came and demanded petrol to his father. When the later refused, the accused picked up the petrol bottle and put the petrol in the fire, due to which there was ablaze, in which his father got extensive burn injuries. The learned defence counsel has put question mark on the point whether in reality P.W.2 informant has witnessed the incident. As per his evidence, after keeping the petrol bottle on the counter, he went to his house for taking meals. However, his evidence is silent as to when he came back near his shop. He never stated that he has seen the occurrence. Particularly, his admission that he has not witnessed the incident in question, creates serious doubt about his presence on the spot. On safer side Marathi deposition was also seen to ensure that the admission is not mistaken.

11. Learned A.P.P. has submitted that since P.W.2 informant has stated about the conversation in between the accused and his father, which means that he has witnessed the incident. Infact the entire evidence of particular witness has to be read as a whole. Though he has specifically stated that after keeping bottle on the counter, he went to take meals, he never deposed that as to when he came

out or after hearing shouts he arrived on the spot. In the light of such admission, his specific admission that he has not witnessed the incident creates entertainable doubt. Rather on the background of such clear admission, it is not safe to rely on his sole testimony at all.

12. Pertinent to note that the FIR [Exh.57], bears reference that at the time of occurrence three named persons i.e. Wasudeo, Ramchandra and Haridas arrived and extinguished the fire. Moreover, the dying declaration [Exh.96] bears a reference that at the relevant time, one Arun came running and extinguished Yogiraj. Moreover, the dying declaration also bears a reference that the deceased was seated with one Mahadeo near the fire place, but, he was not examined. In the circumstances, it was incumbent on the part of the prosecution to examine those eye witnesses. Perhaps they are independent persons, but, the prosecution has not endeavored to lead their evidence for the reasons unexplained. In short, the evidence of sole eye witness P.W.2 informant is unbelievable as well as there is no other direct evidence on the point of occurrence.

13. This takes me to the crucial aspect of the case which pertains to dying declaration. Admittedly, the incident occurred on 15.12.2017, whilst Yogiraj died in the hospital on 27.12.2017. As per prosecution case on 18.12.2017 P.W.10 API Sagar Ingole has recorded dying declaration of the deceased in presence of P.W.8 - Dr. Paliwal. It has come in the evidence of P.W.10 API Ingole that on 18.12.2017, initially he met Dr. Paliwal and issued a requisition letter [Exh.84] asking him about the condition of Yogiraj for giving statement. It is his evidence that Dr. Paliwal, on examination gave endorsement on the requisition letter that the patient is able to give verbal statement. Thereafter, they went to the patient and he has recorded statement of Yogiraj.

14. P.W.10 deposed in detail as to what has been stated by Yogiraj in his statement. Some what different story then the contents of FIR emerges in his statement. As per the statement of Yogiraj [dying declaration], when the accused demanded petrol, he asked to pay Rs.100/-, on which the accused threw the petrol on his person and then threw some fire substance, because of which he caught fire. Pertinent to note that the evidence of informant is very distinct. He never stated that petrol was thrown on the person of his father which was again followed by throwing some fire substance to set ablaze. Thus, the contents of dying declaration are inconsistent from the contents of FIR.

15. The evidence of P.W.10 Ingole, further discloses that after completion of the statement he obtained thumb impression of left hand of Yogiraj on the statement and put his signature, and then Doctor also put his signature on the statement. Contextually, I have gone through the evidence of P.W.8 Dr. Paliwal, who was allegedly present at the time of recording dying declaration. It is his evidence that on 18.12.2017, API Ingole gave him a request letter [Exh.84] for recording dying declaration. He has examined the patient and found that the patient was conscious and fit to make verbal statement and accordingly he gave endorsement. Thereafter API Ingole recorded statement of the patient. On

completion, he has again examined the patient. Having found conscious and fitness of the patient, he put his endorsement to that effect.

16. The law is fairly well settled in the field that a conviction can be based solely on the basis of evidence of dying declaration, provided that it should inspire full confidence of the Court. Likewise, there is no rule, nor a particular form in which the dying declaration has to be recorded or who should record the dying declaration. Always it depends upon the facts and circumstances of the case, however, the recorder of the dying declaration must be satisfied about consciousness and mental fitness of the declarant to give such statement.

17. Before proceeding to deal with the dying declaration, I may profitably extract the guidelines set out by the Hon'ble Supreme Court in case of *Khushal Rao .vrs. State of Bombay* - AIR 1958 SC 22, to test the reliability of the dying declaration, the same are as under :

"16. (1) that it cannot be laid down 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 pieces 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, stands 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.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the, death and the assailants of the victim, there is no question of further corroboration."

18. It is apparent that the entire approach of both the witnesses on dying declaration was very casual. Before commencement of dying declaration, the doctor has made a casual endorsement as "patient conscious for statement". Consciousness and mental fitness to give statement are two different aspects. Likewise at the end of the statement doctor gave endorsement as "statement completed". How can it be gathered that at the end of recording of statement the doctor has again examined the patient and found to be conscious and fit throughout the statement. In the light of such casual endorsement put by the Doctor, it is necessary to see whether the recorder has himself independently satisfied about the consciousness of the patient. In this regard evidence of P.W.10 API Ingole is totally silent. He never deposed that he himself has got assured about the consciousness and fitness of the patient before commencement of recording of dying declaration or on completion thereof.

19. Dying declaration is recorded on a plain paper. The first paragraph gives detailed description regarding age, place of residence and occupation of the deceased. In second paragraph, the incident with various particulars has been narrated. The deceased has allegedly stated that he was sitting near coal fire with one Mahadeo, then about arrival of accused, their conversation and occurrence. He also stated that ambulance from WCL was called which shifted him to the hospital and so on. In the third paragraph, there is repetition about the cause for accused to do the act. The statement is quite lengthy, giving so many particulars which also creates suspicion on the background of other material on dying declaration.

20. As per evidence of P.W.10 API Ingole, he has obtained left hand thumb impression of the patient. It requires to be noted that both the upper limbs of patient were fully burnt. P.W.6 Dr. Ramteke, has conducted autopsy on the dead body. It is his evidence that upper limb right 9% and left 9% were having burn wounds. Likewise, column no.17 of the post mortem notes [Exh.77], bears reference about right and left 9% burn wounds each. The trial Court has casually mentioned that injuries on upper limb of left and right side was of 9% each, and therefore, it cannot be said that the deceased was not in a position to put his thumb impression on dying declaration. Infact in medical parlance, mentioning of 9% burns to the limb amounts to 100% burns of limb. Therefore, in existence of total burn injuries on both upper limbs, it is difficult to accept that still thumb impression of injured was obtained on the statement.

21. One must advert to the important aspect of this case that the dying declaration was recorded by the investigating officer himself. True, any one can record dying declaration, but, it depends upon the facts and circumstances of each case. Logically the dying declaration has to be recorded through the Executive Magistrate and if there are compelling reasons, the dying declaration recorded by the police can also be relied. In case at hand, though the injured Yogiraj was hospitalized from 15.12.2017 to 27.12.2017, still no efforts were made to get his statement recorded through Executive Magistrate.

22. The investigating officer is totally silent on the point as to why he has not endeavored to record the statement through the Executive Magistrate. P.W. 10 Ingole admits that he has not issued any letter to the Executive Magistrate for recording dying declaration of the victim. As a matter of fact on 18.12.2017, the first dying declaration [Exh.96], was recorded by the investigating officer. Thereafter for next 9 days, the injured was alive, but, no efforts were made to call the Executive Magistrate for recording dying declaration. It would be another aspect, if during said period injured was not in a position to give statement, but, neither such is the prosecution case, nor any material to that effect has been placed on record. To my mind this glaring lacunae of the investigation would go to the root of the case. The trial Court has discarded this submission by expressing that there is no necessity in law to record the statement through the Executive Magistrate. The second reason is that when the first statement [dying declaration] inspires confidence, then non recording of statement of deceased through Executive Magistrate is not fatal to the prosecution case. Infact it is for the Court to decide whether the first dying declaration inspires confidence or not and certainly it is not the job of the investigating officer. At the cost of repetition, I may also say that though there is no bar to record the dying declaration by police, however, in present case despite ample opportunity no endeavor was made to record the statement through Executive Magistrate, which is not free from suspicious. Moreover, the story narrated in the dying declaration is quite distinct, than what has been stated in the FIR. For all these reasons, it is not safe to rely on the piece of dying declaration. Particularly when the author is not available for cross examination, heavy duty lies on the Court to see whether the dying declaration inspires confidence. On scrutiny of the dying declaration from every possible angle, it emerges that the dying declaration is full of suspicion and suffers from various infirmities, hence, at any rate it cannot be relied to base the conviction.

23. To summarize the position, evidence of sole eye witness P.W.2 informant is doubtful about his presence on the spot. Though there were eye witness to the incident, none of them has been examined. The dying declaration is shrouded by various suspicious circumstances. Despite sufficient opportunity, the Executive Magistrate was not summoned to record dying declaration, other circumstances were explained. Moreover, the CA report is totally contrary to the prosecution case. Pertinent to note that as per the prosecution case, petrol was thrown on the person of deceased Yogiraj, however, no petrol residues were found on his clothes, ash found on the place and pair of chappal. In the context of all these deficiencies, it would not be safe to base conviction.

24. It is a settled jurisprudential principle that when two view emerges from the situation, the view favourable to the accused would take precedence. The trial Court failed in appreciating the evidence of dying declaration in proper perspective which leads him to reach erroneous conclusion. In view of that, the conviction is not sustainable in the eyes of law. Criminal Appeal is therefore, allowed. The judgment and order of conviction dated 25.09.2019 in Sessions

Trial No. 10/2018, delivered by the Additional Sessions Judge, Kelapur, District Yavatmal is hereby quashed and set aside. The appellant/accused is acquitted from the leveled charges and he be set at liberty forthwith, if not required in any other offence. Fine amount if deposited by the appellant, be refunded. Muddemal property be dealt with in accordance with law.