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Court : Mumbai Aurangabad

Decided On : Feb-28-2014

Judge : Abhay M. Thipsay

Appeal No. : Criminal Writ Petition No. 1212 of 2013

Appellant : Vijay

Respondent : The State of Maharashtra

Judgement :

1. Heard Mrs. M.N. Ghanekar, the learned Counsel for the petitioner. Heard Mr. P.N. Muley, the learned Additional Public Prosecutor for the State.
2. The petitioner is the accused no.1 in Sessions Case No. 172/2010, pending before the Additional Sessions Judge-2, Aurangabad. There are three other accused in the said case, which is in respect of offences punishable under Sections 302 of the IPC, and 498A of the IPC, read with Sections 107 of the IPC and 34 of the IPC. The trial is in progress. After one witness for the defence had been examined, the petitioner made an application (Exhibit 73) praying that two witnesses, whose evidence, according to him, was necessary for a just decision of the case, be summoned by the Court as per the powers vested in it, by Section 311 of the Code of Criminal Procedure [For short, "**the Code**"]. This application was opposed by the Additional Public Prosecutor in-charge of the matter. The learned Additional Sessions Judge, by an order dated 20-12-2013, rejected the

said application.

Being aggrieved thereby, the petitioner has approached this Court by filing the present petition invoking the constitutional jurisdiction and inherent powers of the court.

3. Considering the nature of challenge, it was thought fit to decide the petition finally at the admission stage itself. Hence, Rule was issued and was made returnable forthwith by consent. By consent, the petition has been heard finally.

4. The facts of the case and the circumstances in which the application (Exhibit 73) came to be made, may be stated thus:

The prosecution case is that, Smt. Geeta - wife of the petitioner - was set on fire by the petitioner at the instigation of the other accused which include parents of the petitioner. A statement of Geeta, recorded on 25-2-2010 at Krishna Hospital, implicating the petitioner and the other accused, formed a part of the charge sheet. That, this statement is admissible under the provisions of Section 32(1) of the Evidence Act, as her dying declaration, is not in dispute.

In the course of cross examination of the Investigating Officer, it was revealed that a statement of Geeta had been recorded by one L.R. Jadhav, a Police constable attached to Jinsi Police Station, on 23-2-2010, itself. It was revealed that, Constable Jadhav had given a letter to an Executive Magistrate requesting him to record the statement of Geeta and had also given a letter to the Medical Officer, Krishna Hospital, requesting him to ascertain the condition of Geeta and opine whether she was in a fit state of mind to make a statement.

The letters written by Constable Jadhav to the Medical Officer and to the Executive Magistrate, as also, the statement of Geeta recorded on 23-2-2010 were got produced before the court by the defence after the revelation of the said facts.

The defence thereafter claimed that since they were admitting the documents in question, the documents may be marked, exhibited and read in evidence. This was objected to by the prosecution and, therefore, such an application by the

defence was rejected by the learned Additional Sessions Judge. The challenge to that order given by the petitioner, by filing a Writ Petition in this Court (Criminal Writ Petition No. 1047 of 2013, decided on 29th November 2013) also failed. The view of the trial court that, the documents could not be read in evidence, unless admitted by the prosecution was held to be proper and legal by this Court.

It is thereafter that, the application (Exhibit 73) to summon Constable Jadhav and the Medical Officer (who had made endorsement on the statement of Geeta recorded on 23-2-2010, certifying her to be fit to make a statement) and to examine them as court witnesses was made, which, as aforesaid, was rejected by the learned Additional Sessions Judge.

5. It is not in dispute that, the version of Geeta, as reflected in her statement recorded on 23-2-2010 is favourable to the accused. In this statement, Geeta had stated that she had caught fire accidentally, and that, she had no trouble from her husband or any relatives and had no complaint of any nature regarding the incident. That, this statement of Geeta is also admissible under Section 32(1) of the Evidence Act as her dying declaration, is also not in dispute.

6. It is clear, that the fact that such a dying declaration of Geeta exists, was suppressed by the prosecution and it came to light only in the cross examination of the Investigating Officer.

7. The relevancy, admissibility, as also the importance of the evidence of the said witnesses viz. the Constable Jadhav and the Medical Officer cannot be doubted. However, before the trial court, the prosecution had vehemently objected for the examination of these witnesses on grounds which are not convincing at all.

8. I have gone through the impugned order. The only reason given by the learned Judge in rejecting the application is that, the accused persons were entitled to call these witnesses as defence witnesses. The learned Judge was of the view that, the defence was required to be proved by the accused and though the accused was given an opportunity to lead his evidence, still, he was trying to examine the witnesses in question as court witnesses. The learned Judge, in concluding part of her order, observed that, the said witnesses were not required to be examined as

court witnesses for just decision of the case, at the instance of the accused. The accused had opportunity to examine them as defence witnesses. It is, on this reasoning, that the application came to be rejected.

9. The impugned order is patently erroneous and contrary to the well settled principles relating to the exercise of the powers vested in court by virtue of Section 311 of the Code. Not only the approach of the prosecution and the stand taken by it before the trial court is surprising, but the approach of the learned Judge is also contrary to fair trial principles.

10. Section 311 of the Code is manifestly in two parts. The word used in the first part is may, whereas the word used in the second part is shall. Obviously, the first part is to be treated as discretionary, but the second part is to be treated as mandatory. In other words, should it appear to the court that the evidence of any person is essential to the just decision of the case, then the court would be obliged to take steps to have the evidence produced before it. Once the court is satisfied about the evidence sought to be summoned being essential to the just decision of the case, it may not be open for it to refuse to have such evidence before it. Whether such evidence is essential to the just decision of the case, would depend on facts of each case and would necessarily be required to be determined by the Judge.

11. It is not in dispute that, the case against the petitioner and the other accused is based mainly on the dying declaration of Geeta recorded on 25-2-2010, on which reliance has been placed by the prosecution. It is also not in dispute that, the defence has established that prior to her statement recorded on 25-2-2010, Geeta had made another statement which was recorded by Constable Jadhav. It is also not in dispute that, the existence of this statement was not disclosed by the prosecution and its existence came to be revealed only in the course of trial during the cross examination of the Investigating Officer. It is also not in dispute that, the version in the previous dying declaration i.e. the one recorded on 23-2-2010 is favourable to the accused, inasmuch as, in that statement, Geeta is supposed to have said that she had caught fire accidentally; that, she had no trouble from her husband or any other relatives; and that, she had no complaint of any nature

whatsoever against anyone.

12. A dying declaration is a substantive piece of evidence. It is an exception to the rule against hearsay. It is admissible for proving the facts revealed from it, though the declarant is not examined as a witness. The truth of the statement can be vouched only by the declarant and not by the witness to whom it was made. The witness can only say that such a statement was made by the dying person. Therefore, to hold a dying declaration as reliable, the court must be satisfied not only about reliability and trustworthiness of the witnesses who state that the deceased made a particular statement but also about the version of the deceased, as reflected in the said statement - i.e. the dying declaration - being reliable and trustworthy. What needs to be kept in mind that, in case of dying declarations, the court is required to form an opinion about the reliability of the declarant's version though he is not available for cross-examination. The task of judging the reliability of the version, without having the advantage of observing as to how the version stands to the test of cross-examination - which is recognized as the most powerful weapon for the discovery of truth - needs to be carefully performed. That the law makes a dying declaration admissible inspite of the non-availability of the declarant for cross-examination, does not mean the reliability of the declarant's version would not be open for examination and scrutiny. The declarant is not exempt from the attack that might be made on his version, had he appeared as a witness and advanced such version. Section 158 of the Evidence Act exposes the statements relevant under Section 32 or Section 33 of the Evidence Act to the same attack as might be made on the statements of a witness. Showing that a witness had formerly made statements inconsistent with the statements made by him in his evidence, is a permissible mode of discrediting such witness and thereby causing a doubt on the veracity of his evidence. The same principle, which is based on reason and logic, applies even to the statements under Section 32 of the Evidence Act and this is clearly recognized by Section 158 thereof. Therefore, where there are two or more dying declarations, the consistency, or inconsistency, or conflict, if any, between them would be certainly of some importance - to say the least - in judging the truth of the version reflected in one or more dying declarations on which reliance is placed by a party. Since the declarant cannot be cross-examined, this would be the most relevant aspect in judging the veracity of a

particular dying declaration.

13. It is because of this position, a view has been taken in several authoritative pronouncements, that, it would be the duty of the prosecution itself to bring on record all the dying declarations that have been revealed to the investigating agency in the course of investigation. It has been consistently held that even if a particular dying declaration is unfavourable to the prosecution, still, the prosecution must disclose the existence of such dying declaration though it shall be free to claim that, that particular dying declaration should not be relied upon; and in such a case, it would be open for the court to judge this aspect of the matter. That, a conflicting dying declaration exists, however, cannot be suppressed by the prosecution.

14. In **Chandars/o. Laxman Rakhunde and another Vs. The State of Maharashtra (2012 ALL MR (Cri) 859)**, a Division Bench of this Court (of which I was a Member), had an occasion to consider as to what should be the approach of the prosecution, and also of the court, in dealing with the evidence of dying declarations in cases involving a plurality of dying declarations which are not consistent with one another. It is clear from the observations made by the Division Bench that, suppression of a dying declaration, which is inconsistent with the dying declaration or declarations relied upon by the prosecution, would not be in the interest even of the prosecution, as this suppression, by itself, would be capable of forming a doubt about the truth of the version reflected in the dying declaration sought to be proved by the prosecution. Clearly, if the deceased is said to have made two statements, one implicating the accused, and the other exonerating the accused, the prosecution cannot suppress the existence of the statement exonerating the accused, particularly when such statement has also been collected by the investigating agency in the course of investigation, or at any rate, is within the knowledge of the investigating agency and the prosecution. At the cost of repetition, it may be observed that, it would be open for the prosecution to claim that the statement favourable to the accused was either not made at all, or that, even if made, the declarant's version reflected therein is not true; but the existence of such a statement should not be hidden or suppressed from the court. Thus, in my view, the prosecution ought not to have hidden or suppressed the

existence of the dying declaration recorded by Constable L.R. Jadhav, of which the investigating agency and the Public Prosecutor were well aware. That apart, when the defence managed to bring the existence of such a dying declaration on record, and even succeeded in having it produced before the court, it was not fair on the part of the prosecution to have objected to summoning Constable L.R. Jadhav, and the Medical Officer, as court witnesses, to prove the said statement.

15. A reference may usefully be made to a decision of the Supreme Court of India, in the case of **SamadhanDhudaka Koli Vs. State of Maharashtra (2009 All MR (Cri.) 229 (S.C.))**, wherein Their Lordships of the Supreme Court of India had an occasion to consider the effect of suppression of a dying declaration. In that case, the declarant had initially made a statement that she had suffered burn injuries by reason of accident. This statement was recorded by a Judicial Magistrate. The said dying declaration was however, suppressed by the prosecution and the accused were being prosecuted on the basis of another dying declaration, in which the declarant had implicated them. The dying declaration, which gave a history of accidental burns, was suppressed by the prosecution. The appellant before the Supreme Court - the husband of the victim in that case - had been convicted on the basis of the dying declaration implicating him. Their Lordships of the Supreme Court did not approve this and observed as follows:

"The prosecution must also be fair to the accused. Fairness in investigation, as also trial, is a human right of an accused. The State cannot suppress any vital document from the court only because the same would support the case of the accused. "

(Para 12 of reported judgment)

If this position is kept in mind, the learned Judge's view, that, the defence was entitled to examine the said two witnesses, as a ground for not summoning them in exercising the powers under Section 311 of the Code, was clearly erroneous. In fact, once it would appear to the court, that, the examination of a particular person as a witness is essential for the just decision of the case, it would be obliged to call him by exercising powers under Section 311 of the Code; and it would be immaterial whether such a person could be or could have been called as a witness

by either party. It is because, the need to arrive at a proper and just decision by getting at the truth is that of the court itself. Undoubtedly, we have adopted an adversarial system, but it is not as if the court has merely to sit as an umpire at a contest between two parties and declare at the end of the combat, who has won and who has lost. A court has a duty to do justice for which it has to make efforts to find out the truth by all legal and permissible methods. A just decision can be expected to be reached if all the relevant facts are available to the court to come to a proper conclusion about the truth or falsity of the conflicting claims. If judgments are delivered on incomplete presentation of facts, there is a danger of them being incorrect.

16. In the instant case, how would the trial court feel assured about the reliability of the dying declaration of Geeta recorded on 25-2-2010, by avoiding to know whether or not, Geeta had earlier made a conflicting and different statement regarding the incident, is difficult to understand. If the court really wants to make an endeavour to discover the truth - as it is supposed to do - it would never feel comfortable in arriving at a conclusion about the truth of the statement allegedly made by Geeta on 25-2-2010, by refusing to be enlightened on whether or not Geeta had indeed earlier made a contrary statement. It may be recalled that the existence of such a statement was revealed only in the course of cross-examination.

17. It would be for the court to judge the conflicting versions, if any, and then form its opinion about the reliability or unreliability of any particular version. However, not feeling the necessity of having before it a conflicting piece of evidence - at least for the purpose of judging its reliability - is rather strange, if the duty of the court to decide objectively and impartially, by making an attempt to discover the truth, by all permissible methods is kept in mind. In this case, Mr. L.R. Jadhav is a Police Constable, who had supposedly recorded the statement of Geeta in discharge of his duties. The Medical Officer had also examined her in the course of his duties and is supposed to have certified the fitness of Geeta before recording the statement. These witnesses, or the record made by them, are not the creation of the accused. The record made by them is not invented by the accused. It was, therefore, essential for the court to have allowed the application

(Exhibit 73) and summoned the said two witnesses by exercising its powers under Section 311 of the Code. Since it was the need of the court itself to have the relevant evidence before it, in order to enable it to judge properly the reliability of the dying declaration relied upon by the prosecution and to evaluate the evidence in that regard, it could not have been avoided on the ground that the defence was entitled to examine the said persons as defence witnesses. There would be a difference when such persons would be examined as court witnesses and they would be examined as defence witnesses. The court ought to have realized that every attempt was made by the prosecution to suppress the existence of such a statement, which itself was unfair, and therefore, fairness required that they would be examined by the court under the provisions of Section 311 of the Code.

18. The impugned order is contrary to law. The same is, therefore, required to be interfered with.

19. The petition is allowed in terms of prayer "**B**". The learned Judge shall act in consonance with the above order and proceed further with the case, in accordance with law.

Rule is made absolute accordingly.

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