

Subhash and Another Vs. The State of Maharashtra

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Court : Mumbai Aurangabad

Decided On : Dec-22-2015

Judge : S.V. Gangapurwala & V.K. Jadhav

Appeal No. : Criminal Appeal No. 519 of 2012

Appellant : Subhash and Another

Respondent : The State of Maharashtra

Judgement :

Oral Judgment: (S.V. Gangapurwala, J.)

1. The present appellants/accused Nos. 1 and 2 are prosecuted for the offences punishable U/Sec. 302 and 504 read with Sec. 34 of the Indian Penal Code (for short I. P. Code?). The accused No. 1/Subhash Chavan is convicted for the offence punishable U/Sec. 302 of the I. P. Code and is sentenced to suffer rigorous imprisonment for life. The accused No. 1 is also convicted for the offence punishable U/Sec. 504 of the I. P. Code and is sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 5,000/-. The accused No. 2/Pappu Chavan is acquitted for an offence punishable U/Sec. 302 of the I. P. Code, but is convicted for an offence punishable U/Sec. 504 of the I. P. Code and sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 5,000/- and in default of payment of fine to suffer three months rigorous imprisonment.

2. As per the prosecution case, on or about 28th December, 2009 at 06.00 a.m. the deceased Sau. Sunita Sanjay Chavan had been to fetch water by means of Pohara (bucket) from well. The accused persons were nearby the well. They tried to snatch the bucket and rope from the deceased. The same was resisted by the deceased. Both the accused persons abused her. The deceased returned home. Both of them followed her. They abused her when she reached her house. The neighbouring persons convinced the accused persons. The accused persons brought kerosene in a plastic can from their house with a match box, poured kerosene on her person and ignited her. The complainant's saree caught fire. She received burn injuries. One Vinod Kaluram Rathod threw water on her person and also gunny bags so as to extinguish fire. The deceased Sunita sustained 98% burns. She was shifted to Civil Hospital Hingoli. Two dying declarations Exhibit 19 and Exhibit 29 were recorded. Exhibit 19 was recorded by the Police Officer, whereas Exhibit 29 was recorded by the Awwal Karkun of the Tahsil Office. It was also story of prosecution that the oral dying declaration was made to the father and mother i. e. P.W. Nos. 6 and 7. The prosecution had also examined one Vinod Rathod who had extinguished the fire. Upon appreciation of the evidence, the Sessions Court convicted accused No. 1/Subhash Chavan for the offences punishable U/Sec. 302 and 504 of the I. P. Code and the accused No. 2/Pappu Chavan for an offence punishable U/Sec. 504 of the I. P. Code.

3. Mr. Chatterji, the learned counsel for the appellant strenuously contends that the case of the prosecution rests solely on the dying declarations Exhibit 19 and Exhibit 29, so also oral dying declarations made to the P.W. No. 6 and 7. According to the learned counsel, if all the four dying declarations are read together, it would be clear that, the said dying declarations are inconsistent with each others. Each dying declaration is laying down a different story, which cannot be believed. The said dying declarations do not inspire confidence. It is the case of multiple dying declarations and when it is a case of multiple dying declarations, the inconsistencies would be vital to the prosecution case. According to the learned counsel, the material divergence will have to be considered. The learned counsel relies on the judgment of the Apex Court in the case of **Dandu Lakshmi Reddy Vs. State of A. P.** reported in **AIR 1999 SC 3255**. The learned counsel also relies on the judgment of the Apex Court in a case of **P. V. Radhakirishana Vs. State of**

Karnataka reported in **AIR 2003 SC 2589** to submit that, dying declaration is only piece of untested evidence and must satisfy the Court that what is stated therein is unalloyed truth to act upon. The learned counsel submits that, Exhibit 19 cannot be considered, as the same is made in presence of the father of the deceased. The father of the deceased has also signed the said dying declaration. Such a dying declaration cannot be relied. The possibility of tutoring cannot be ruled out. For the said purpose, the learned counsel relies on the judgment of this Court in the case of **Sunil Kashinath Raimale Vs. State of Maharashtra** reported in **2006 Cr. L. J. 589**.

4. The learned counsel further submits that, while appreciating the evidence of dying declaration, the Court has to be extremely cautious and examine with meticulous care the evidence regarding recording of dying declaration. The dying declaration recorded should be of a sterling quality and if there are suspicious circumstances, the dying declaration has to be rejected. The learned counsel relies on the judgment of this Court in a case of **Tukaram Dashrath Padhen and others Vs. State of Maharashtra** reported **2012 All M. R. 2754**. According to the learned counsel, where there are multiple dying declarations and acceptance of one dying declaration falsifies the other dying declarations have to be necessarily rejected. The learned counsel relies on the judgment of this Court in a case of **Suresh Arjun Dodorkar (Sonar) Vs. State of Maharashtra** reported in **2005 All M. R. (Cri.) 1599**.

5. The learned counsel submits that, Exhibit 19 and 29 are the two dying declarations which are also inconsistent in many aspects. The dying declaration Exhibit 19 is made in presence of the father before Police Officer. The father of the deceased has also signed the said dying declaration. Exhibit 29 is the dying declaration made before the Awwal Karkun of the Tahsil Office. In dying declaration Exhibit 19 it is stated that, the accused abused and threatened to kill her. In dying declaration Exhibit 29 the said fact is not stated. In dying declaration Exhibit 19 the deceased said that neighbours tried to pacify them, but in vain. The same is lacking in Exhibit 29. In Exhibit 19 it is stated that, deceased was annoyed and insulted so she went to their house and talked to them. This fact is not stated in Exhibit 29. The scribe of Exhibit 19 P.W. No. 2 is examined before the Court,

wherein he stated that doctor has written the time as 12.20 p.m. to 13.00 p.m. That endorsement is said to have been made before recording the dying declaration. He also specifically admits that, the relatives of the deceased Sunita were present there and he has obtained the signature of father of deceased P. V. Rathod. The said statement was not read over and explained to the deceased Sunita and she has not stated that the same is correct. The evidence of P.W. No. 2 scribe of Exhibit 19 very clearly and categorically refers to the presence of the relatives of the deceased at the time of recording the dying declaration. So also endorsement of the doctor is put before recording of dying declaration itself. The evidence of P.W. No. 4 scribe of second dying declaration Exhibit 29 also does not inspire confidence. According to the learned counsel as per Exhibit 20, P.W. No. 4, she received requisition and she reached hospital at 1.30 p.m. She received requisition letter at 12.30 p.m., but there is endorsement that, she had mentioned the time on Exhibit 20 of having received it at 1.35 p.m. and after receipt of requisition, she went to Civil Hospital, Hingoli. She further states that, since recording statement of deceased, the original dying declaration was in his custody. In the original dying declaration Exhibit 29 it bears the endorsement R and below that, there is name of K. B. Mitkar dated 31.12.2009, whereas xerox copy of dying declaration Exhibit 29 produced with the charge sheet, bears remark R, but there is no mention of name K. B. Mitkar. In the cross she has admitted that, as she was in frightened condition she has written the date in Marathi and month and year in English. She also admits that with regard to the time of the dying declaration there is over writing in figure 30 and in word two there is over writing and he cannot assign any reason for the said over writing in the time. She also admits that, the doctor has put signature at about 2.45 p.m. and at the beginning of the recording of the dying declaration the doctor has not put her signature. She also admits that, patient was serious and was unable to talk properly. She also admits that, when she went near the patient eight to ten persons were present there. The learned counsel submits that, the evidence of P.W. No. 2 and P.W. No. 4 would show that the dying declaration was recorded in presence of the relative i. e. father and there are anomalies to great extent as are pointed out.

6. According to the learned counsel apart from these two dying declarations, the oral dying declarations given to the father and mother are also relevant to be

considered. P.W. No. 6 father and P.W. No. 7 mother have stated in examination in chief that it is Pappu i. e. accused No. 2 who poured kerosene on the person of deceased and ignited her and ran away. In dying declaration Exhibit 19 and 29 no act is attributed to accused No. 2/Pappu, whereas in the oral dying declaration before the father and mother the act is attributed to accused No. 2/Pappu. So also in the evidence of P.W. No. 7 there is material omission that of Subhash caught hold and Pappu poured kerosene and ignited with match stick. The mother specifically says that, deceased Sunita had a dispute with her family members and deceased Sunita's mother-in-law insulted her on the ground of domestic work and the family members treated her cruelly. It is admitted by her that the deceased Sunita was behaving like a mad person. She also admitted that Sunita was fed up and committed suicide because family was treating her cruelly and had not sent her for cremation of Shiva. The P.W. No. 6 also admitted that, while recording Exhibit 19, he has put his signature over it. According to the learned counsel even witness P.W. No. 5 Vinod Rathod has not supported prosecution case. The said evidence read in totality does not prove the prosecution case. In fact, multiple dying declarations are not in consonance with each other in respect of proving the case of the prosecution. The said dying declarations read in totality disproves the case of the prosecution itself. The learned counsel submits that, the judgment and conviction deserves to be set aside.

7. The learned Assistant Public Prosecutor submits that, minor inconsistencies in the dying declarations would not affect the credibility of the dying declarations. The dying declaration in substance will have to be considered. In both dying declarations Exhibit 19 and 29, the deceased has categorically stated that, it is accused No. 1 who had poured kerosene on her and set her ablaze. Both dying declarations are consistent in this regard. Only because father was present at the time of recording Exhibit 19, that would not be sufficient to disbelieve the said dying declaration. Even Exhibit 29 second dying declaration corroborates the said fact of accused Subhash pouring kerosene and setting her ablaze. The learned A. P. P. submits that, difference in timing has been sought to be harped by the learned counsel for the defence, that would not make much difference and that would not affect the credibility of the dying declarations. The explanation is given by P.W. No. 4 as to why the dates are written in that fashion. The substance of the

dying declaration is required to be considered. The scribe of dying declarations have proved the dying declarations and the same being consistent in material aspects are sufficient to convict the accused No. 1 for the offence punishable U/Sec. 302 of the I. P. Code. So also to convict accused Nos. 1 and 2 for the offence punishable U/Sec. 504 of the I. P. Code. According to the learned A. P. P., P.W. No. 6 and 7 can be said to have become hostile. Their evidence can be relied to the extent to which it supports the prosecution version. The defence would not be entitled for any benefit of it. When the written dying declarations are there, much importance need not be given to the evidence of P.W. Nos. 6 and 7. The learned A. P. P. relies on the judgment of the Apex Court in a case of **Bhajju alias Karan Singh Vs. State of M. P.** reported in **2012 AIR SCW 1963 (1)**.

8. With the assistance of learned counsel, we have gone through the judgment, record and proceedings.

9. The case of the prosecution is based on dying declarations Exhibit 19 and Exhibit 29, so also the oral dying declaration said to have been made to the P.W. No. 6 and P.W. No. 7 i. e. the father and mother of the deceased. There cannot be any dispute with the proposition put forth by the learned A. P. P. that, if a dying declaration is found reliable, the same can form the basis of conviction. The same can be acted upon, even if the dying declaration is uncorroborated. However, if the infirmities in the dying declarations are such as would render a dying declaration infirm, the same may be refused to be accepted as forming basis of conviction.

10. The case of the prosecution in the present matter rests on multiple dying declarations i. e. dying declarations Exhibit 19 and 29 and two oral dying declarations. If the case is based on multiple dying declarations, then all the dying declarations have to be consistent on material aspects of the incident. The Court cannot pick and choose one dying declaration de hors the other.

11. Scanning the dying declarations Exhibit 19 and 29 and also the oral dying declarations made to P.W. Nos. 6 and 7, it would be seen that, they are not consistent about the acts attributed to both the accused. In written dying declaration Exhibit 19 and Exhibit 29, the act of pouring kerosene and setting ablaze has been attributed to accused No. 1/Subhash, whereas in the oral dying

declaration made to the father and mother of the deceased i.e. P.W. No. 6 and P.W. No. 7 as narrated by them, the act of pouring kerosene and setting ablaze is attributed to accused No. 2/Pappu. This is a major inconsistency in the dying declarations. In the written dying declaration Exhibit 19, the deceased says that, both the accused snatched water pitcher from her at the public well. They abused her. She came home. The accused abused and threatened to kill her. Neighbourers tried to pacify them. The deceased felt annoyed and insulted, so she went to their house and talked to them. Thereafter, accused No. 1/Subhash said he would show her and Subhash went inside house and came with a plastic can, poured kerosene on her and set her ablaze. Whereas in dying declaration Exhibit 29 after narrating the incident on the public well, she does not say that accused followed her to her home. They abused and threatened to kill her. It also does not state that, the neighbourers tried to pacify them. It also does not state that, she was annoyed and felt insulted, so she went to their house and talked to them. These facts are absent in dying declaration Exhibit 29 which are stated in dying declaration Exhibit 19. The dying declaration Exhibit 19 is recorded in the presence of the father of the deceased P.W. No. 6. Not only that the father P.W. No. 6 has also signed the said dying declaration. The P.W. No. 6 has further stated in his evidence that, Jamadar Kamble had written the statement of Sunita i. e. deceased in his cabin. Thereafter police head constable Kamble obtained his signature on the statement in his cabin. He further stated that, after police recorded the statement of deceased, her statement was not recorded by anybody till her death. Exhibit 29 is said to be recorded subsequently.

12. The scribes of Exhibit 19 and Exhibit 29 have deposed before the Court. They are P.W. No. 2 and P.W. No. 4. The said scribe P.W. No. 2 admits that doctor has put his endorsement i.e. time 12.20 p.m. to 1.30 p.m. before starting the recording of dying declaration. He also admits that, relatives of the deceased were present there and he has obtained the signature of the father of deceased. He also admits that, the relatives of the deceased were present near her while recording the statement. The Awwal Karkun from Tahsil office who has recorded dying declaration Exhibit 29 is P.W. No. 4. She admits that, she received the requisition letter of police by 12.30 p.m. However, she has written that she has received it at 1.35 p.m. She also admits that, after receipt of requisition within 30 minutes she

reached the Civil Hospital. The original dying declaration since the date of recording till her deposition was in her custody. She also admits that, in the xerox copy of the dying declaration produced with the charge sheet it bears remark R, but does not mention the name of K. B. Mitkar, whereas the original dying declaration produced before the Court bears the endorsement R, and further the name of K. B. Mitkar and date 31.12.2009 is mentioned. No explanation is coming forth for the same. She also accepts that on the date of recording the statement of Sunita, she has not sealed it in envelop. She also admits that on the timing of dying declaration in the figure 19, there is overwriting, so also in word two there is overwriting and for that she cannot assign any reason. She accepts that the doctor put his signature at about 2.45 p.m. and at the start of recording dying declaration the doctor had not put his signature. She also states that, the patient was serious and was unable to talk properly. She also states that, when she went near the patient eight to ten persons were present there. Placing these two dying declarations and the oral dying declarations in juxtaposition, it would be difficult to rely on the same. The oral dying declaration made to P.W. No. 6 and P.W. No. 7 are contrary to the dying declarations Exhibit 19 and Exhibit 29. Exhibit 19 and Exhibit 29 are made in presence of parents and the relatives as is clear from the statements of scribes of both the dying declarations. Not only that, even on the dying declaration Exhibit 19 father of the deceased/P.W. No. 6 has signed the said dying declaration. Reading these dying declarations along with the evidence of P.W. No. 7, the mother of the deceased wherein she states that, there was dispute between Sunita and her family members. Sunita's mother-in-law insulted her on the ground of domestic work. Sunita being only daughter could not bear anything happening against her will. Her family treated her cruelly five/six months after her marriage. She also states that, Sunita was behaving like a mad person and that she was fed up and committed suicide because her family was treating her cruelly and had not sent her for cremation of Shiva.

13. P.W. No. 5, who is the person who has doused the fire has not supported the prosecution case. So far as acts of accused are concerned, the accused are not family members of the deceased. The mother of the deceased even blamed the family members and goes to the extent of saying in cross that, deceased committed suicide, as her mental condition was not good. She was behaving like a

mad person because of the ill-treatment given by the family members.

14. In order to pass the test of reliability, a dying declaration has to be subject to a very close scrutiny. While appreciating credibility of the evidence produced before the Court, the Court has to view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The Court has to satisfy that the dying declaration is truthful. If there are multiple dying declarations giving two different versions a serious doubt is created about truthfulness of the dying declaration. If after examining the dying declarations in all its aspects and testing its veracity, if the Court comes to the conclusion that, it is not reliable by itself and that it suffers from infirmities, then without corroboration it cannot form the basis of conviction. The dying declarations i.e. Exhibit 19, 29 and oral dying declarations made to P.W. Nos. 6 and 7 in the instant case stand by themselves and, there is no other reliable evidence on record by reference to which their truthfulness can be tested. In view of the large scale inconsistencies appearing in Exhibit 19 and 29 and oral dying declarations made to P.W. No. 6 and 7 and absence of corroborative piece of evidence to test the truthfulness of the dying declarations, the dying declarations in the instant case cannot be relied to form the sole basis of conviction.

15. As discussed above, because of the large scale infirmities and the different versions appearing in dying declarations Exhibit 19 and 29 and oral dying declarations made to P.W. Nos. 6 and 7 and the same being not corroborated by any evidence, the said dying declarations in itself would not be sufficient to form the basis of conviction.

16. In the result, we pass the following order.

ORDER

A. The judgment and order dated 18.07.2012 passed by the Additional Sessions Judge, Hingoli in Sessions Trial No. 111 of 2010 convicting the accused No. 1 for the offences punishable U/Sec. 302 and 504 r/w Sec. 34 of the I. P. Code and convicting the accused No. 2 for the offence punishable U/Sec. 504 r/w Sec. 34 of the I. P. Code is quashed and set aside.

B. Accused No. 1/Subhash Ratan Chavan and accused No. 2/Pappu Vilas Chavan are hereby acquitted of the offences punishable U/Sec. 302 and 504 r/w Sec. 34 of the I. P. Code in Sessions Trial No. 111 of 2010.

C. They shall be set at liberty forthwith, if not required under any other offence.

D. Fine if deposited be refunded to the accused.

E. The appeal is accordingly allowed. No costs.

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