

State of Maharashtra Vs. Sharanappa Malappa Sakhare

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Court : Mumbai

Decided On : Mar-18-1975

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Judge : Joshi and ;Aggarwal, JJ.

Appeal No. : Confirmation Case No. 13 of 1974 with Criminal Appeal No. 938 of 1974

Appellant : State of Maharashtra

Respondent : Sharanappa Malappa Sakhare

Judgement :

Joshi, J.

1. His Lordship after setting out the facts of the case, proceeded. At the outset, we are constrained to make one observation regarding the mode of recording evidence of such, a child witness. No doubt, following the head-note given by the Supreme Court in the case of Rameshwar Kalyan Singh v. State of Rajasthan : 1952 CriLJ547 , nowadays we find the Judges take the precaution of putting preliminary questions to ascertain whether the witness is in a position to distinguish between truth and falsehood. But they conveniently ignore the other caution repeatedly given that while recording the evidence of such a child witness it should invariably be in the form of questions and answers. This mode of

recording the evidence is not only a fair play but gives an idea to the Court which takes down the deposition as well as to the appellate Court what exactly the question put was and what answer was given by the witness. From the frame of questions and the answers given one can make out how far the witness is tutored, if at all, and in what manner. The evidence taken is in the usual stereo-typed manner in the form of a long narration. It is difficult to make out in what way the question was put by the public prosecutor himself, whether she was led in any manner and whether it was proper under the circumstances. Another feature worthy of note is that when the evidence is taken in question and answer form, the Judge himself is able to form his opinion from the demeanor as well as the details given, whether she is a truthful witness. Ample opportunity is also provided to the appellate Court to make out in what manner these particulars have come on record. Therefore, it is not only advisable but quite essential to record the evidence of the child witness in the question and answer form after making a note as stated in Rameshwar Kalyan Singh's case. That caution is given by the Supreme Court with a view to ascertain whether the witness is really capable of distinguishing between truth and falsehood, whether she is in a position to understand the implications thereof. From that point of view it would be better if the questions actually put are also recorded in the note because they are a test of her credibility and the degree of her understanding.

2. Another rule of caution which has been time and again given by the various High Courts is that although the child¹ witness is competent to testify, it is notoriously dangerous unless her statement is recorded immediately and before she comes in contact with others and in particular her close relatives. Pausing for a while here, we may add that Nanda was the only eye-witness and this fact was made known or was quite clear to the investigating agency when the casualty medical officer or the constable attached to the Sassoon Hospital or the first officer in charge of Bund Garden Police Station visited the hospital. Sub-inspector Patil who visited the hospital after escorting the Magistrate, could have done well by examining the two sisters forthwith giving priority to Nanda. Nanda's statement before the police, although dated 11th does not give the time factor. But it seems it was recorded somewhere in the morning and in all probability after 9 a.m.. Even if it be so, there was ample opportunity for this child witness to get the details from

others or to have deliberations with her elder sisters and to prepare a presentable narration. The second but equally significant point worthy of note is that child witnesses are apt to be tutored promptly. On occasions they are drilled nicely before they are put into the box and it would not be going out, of the way if some such questions are put to the witness either during the course of cross-examination or even by the Court to satisfy its own conscience. A bare formal certificate as is given by the learned Sessions Judge relying upon Rameshwar Kalyan Singh's case, to our mind, is not a fair compliance with the legal provisions. The Judge has further to state why he. thinks so.

3. His Lordship after dealing with a point not material to this report, continued.

4. The third witness in this category would be Abu Bakar, a resident of Vishrantwadi which was about two miles away from this hut. By chance he had been to this zopadpatty to meet his relative Syed Ali. He made no secret of his conviction under Section 420 and his confinement in Yerawda jail where he was giving the deposition. He made one small statement to the effect that the victim was there between 6 and 7 p.m.. When he made this solitary statement with a little variance about the time factor immediately permission was sought to get him declared hostile and it was given freely. The reason put forth by the assistant public prosecutor was that the witness was introducing a new story contrary to his version before the police; but no foundations were laid. Generally when a prosecutor seeks to get a witness declared hostile, he should seek the permission of the Court to put one or two leading questions with a view to impress the Court that he is prevaricating or perverting his previous statement. It is only on laying some such foundation that permission should be granted and it should not be a supply to the bare demand of the prosecutor. Certain guidelines are laid down as to when the witness summoned by the party should be got declared hostile, and to them we would make a reference shortly on taking a resume of the remaining evidence. After the permission was granted the assistant prosecutor cross-examined him and it appears that there were 10/15 persons collected and before the police he had told that one person was kicking the door from outside. This is an omission and it does not find place in the police record. Another statement which he made was that the girl embraced her mother while she was burning after

he put out the fire. When questioned for the accused, he said that he was present in the house of his relative Syed Ali and on hearing the screams he came out; but he corroborates the previous witness in saying that the deceased was shouting that she should be allowed to die, but even then out of humanitarian considerations he put out the fire by wrapping the quilt around her body. Next, he corroborates Sarang in saying that everybody collected questioned the victim as well as Nanda, but nobody opened the, lips. In the interval of 10/15 minutes during which he was there nobody came to know how the woman got burnt.

5. Section 145 of the Indian Evidence Act empowers the Court in its discretion to permit the person who calls a witness to put any questions to him which might be put in the cross-examination by the adverse party. In 'simpler words it means he could be got declared hostile. But when should the permission be granted? It is only on the exhibition of hostile animus. This exhibition is the sole test for declaring the witness adverse. Merely giving unfavorable testimony or committing a slip here and there is not a proper ground to get the witness declared hostile. The turning point or the basic requirement is that if a witness tries to injure the case of the party summoning him either by prevaricating or suppressing the truth, then only the opportunity should be granted. Whether a witness is suppressing the truth or not could be gathered by the presiding Judge by watching the demeanor, attitude and temper in the witness box while speaking from the box. To an experienced Judge it is not difficult to make out whether he is concealing the truth or is really making statements contrary to what he knew or was called upon to prove. No doubt, one of the modes to get a witness declared hostile is to peruse the previous statement made to the investigating officer and if it is at such a variance as to put him in the category that he has¹ exhibited a hostile animus, then only permission should be granted. A. witness who is unfavourable is not necessarily hostile because the very definition of a hostile witness indicates as one who from the manner in which he gives the evidence shows that he is not desirous of telling the truth. It is common experience that on occasions witnesses when they are speaking after a lapse of time or may be due to absent-mindedness or being unable to catch the implication of the questions give certain unfavourable answers but the moment unfavourable answer slips, it is not a, ground to get the witness declared hostile. There must be good ground to believe that the statement he is

making in favour of the adversary is due to enmity towards the prosecution or for some other extraneous consideration. It is only when these tests are satisfied, permission should be granted to declare him hostile and the provision should not be looked upon as an empty formality; nor should the Judge be easily amenable to the prosecutor on his bare statement that the witness has turned hostile and the Court should grant permission.

6. The matters in the instant case do not rest at this stage. There is an alarming observation made by the learned Sessions Judge for granting this permission and it finds place in paragraph 21 of his judgment. He has said 'The other witness Abu Bakar, exh. 17, was treated hostile because he was charged with the offence under Section 420 and was convicted and is now languishing in jail.' The conviction or the antecedent of this witness had very little bearing on the point at issue. It is a trite to say that Satins have their future and Saints have their past. It is not known what was the charge against this witness and in connection with what dealing. But certainly there is nothing to point out that he is connected with the persons involved in the trial. He may be a convict and suffering sentence in the jail; but that imports no disqualification to bear testimony to the occurrence which he has witnessed by his own eyes in which he is not interested, one way or the other. Therefore, this reasoning given by the learned Additional Sessions Judge, with due respects, is highly erroneous.

7. After dealing with the evidence of witnesses, His Lordship said.

8. This brings us now to the medical evidence which again is not free from some jumble or which does introduce an element of some reasonable doubt. The three doctors who treated the victim were Sarvashri Pabalkar, Dabak and Malegaonkar. Dr. Malegaonkar, to be accurate enough, did not treat her but conducted the post-mortem examination. The first doctor in point of time who received the patient was Dr. Pabalkar, P.W. 14. He was a Casualty Medical Officer and he has prepared the case papers on making the necessary entries in the register. He has made one important statement that a police constable is always present in the Casualty Medical Office with the register known as Medico-Legal Case Register. According to this doctor, some women had brought the papers to his office (probably Munna)

and the constable who was then present on duty had questioned a relative of the injured about the cause of injuries. According to him the relative gave the information to the police constable in his presence and the necessary¹ entries were made in the information register at about 9-45 p.m.. Munna signed the information in the register in his presence. On January 14, 1974 the accused was brought to the hospital, but he was examined by Dr. Pathak who is no longer in service. From the case papers prepared by Dr. Pathak who seems to have examined the patient, he says that the accused had a small blister of 1/4' x 1/4' on the posterior aspect of the middle finger. At that time Dr. Dabak was the Houseman in charge of the Burns Ward. It was elicited from Dr. Pabalkar that a blister of this type could be caused if a drop of boiling water had fallen on that part of the body. This explanation was elicited just to get some corroborations to the defence put forth by the accused who has said that while preparing the tea in the early hours of the next morning he suffered this injury.

9. Now, the case papers exh. 27 prepared by Dr. Pabalkar at the casualty ward render very little assistance, but they make a reference to the presence of Munna who gave the information. According to the note kept therein the burns were 40 per cent. This entry was made by Dr. Pabalkar by about 9.30 p.m. and the information was registered in the record at 9.45 p.m..

10. This entry in the Medico-Legal Case Register numbered as 483 made at 9.45 p.m. reads that information was given by Munna to the effect that the accused had set her mother on fire. This would be the substance; but the actual words used are quite different. While describing her mother she gives the name as Amaravati Kailaskumar Pardeshi. As a matter of fact her real name is Amaravati Jaykumar Pardeshi. In the next sentence she says that her paramour named Sharanappa, whose full name she did not know, poured kerosene on her body and, therefore, she was brought to the hospital. Sharanappa, according to the three sisters, was well known to them. As a matter of fact, it was their standing grievance that Sharanappa had managed to get rid of these sisters by some contrivance or the other. Making some allowance for the incorrect names given, the further additional statement that the patient had 40 per cent. burns is something out of tune. Probably Dr. Pabalkar supplied this missing link and the entry seems to have been

made on the joint information given by Dr. Pabalkar and Munna.

11. The next doctor who treated the patient within a short time was Dr. Dabak, P.W. 16. He was then working as a House Surgeon and claims to have examined her at 10-15 p.m.. On speaking to the treatment given by him to her he adds that injection morphine of about 15 mgs, was administered at about 10-40 p.m., the idea being to sedate the patient, meaning thereby to relieve her of her pains. The effect of the injection starts after half an hour. In the same breath the doctor added that the percentage of burns was 60 per cent, and the patient, though restless, was conscious. He immediately suggested to the police that arrangements should be made to get the dying declaration and to that declaration we would refer shortly. Proceeding further, the doctor said that when the Magistrate arrived, he went to the patient and asked her everything. Thereafter the Magistrate questioned him whether the patient was in a condition to talk and whether she could give a statement. The procedure is obviously reverse. In the ordinary course, the learned Magistrate ought to have taken the permission of the doctor, ascertained from him whether the patient was in a fit condition to make a statement and then gone to the bed of the patient. But we are not attaching much importance to this trivial departure from practice. The doctor proceeds to state further that the statement was recorded and it was complete by 11-30 p.m. but the effect of morphine might have started between 11-15 to 11-30 p.m.. Another significant statement made by the witness is that at the time of his examination the patient Amaravati had given the history of burns which he has entered in English in the case papers according to the usual practice. The doctor was cross-examined mainly with a view to ascertain from him whether the patient would be really in a position to give a statement to the Magistrate between 11 and 11-20 p.m. when she was already under the influence of morphine. The second line of cross examination was whether the doctor was present throughout when the statement was being recorded and when he appended the certificate. The replies given speak for themselves. They read thus: 'I cannot positively state that I was sitting there throughout the recording. I was already present when the recording was over. I cannot state who was writing the statement. I do not remember whether the Magistrate was dictating the statement or whether the writer was taking down in his own way.' The last answers reproduced above cast some

doubts on the authenticity of the dying declaration itself which is reduced to writing and which has been largely relied upon by the learned Additional Sessions Judge. These answers given by the doctor are, in a way, evasive and they give an impression that in all probability he was not present throughout but he might be moving in the ward, and seems to have appended the certificate treating it as a routine.

12. Pausing for a while here, we may make a reference to the note made by this doctor which is a sort of a history given by the patient. The particulars run thus : 'Patient was cooking on stove. She had a quarrel with the neighbour. He came and threw kerosene on patient so patient saree got fired. Patient got injured at 9-00 p.m. today.' If the doctor's words are to be taken at their face value-and we see no reason to disbelieve this doctor when he says that according to the practice the history was given by the patient viz. Amaravati-then certainly these details not only run counter to the version of Nanda, Munna and Rekha, but they virtually damage the prosecution case to a large extent. If Nanda had witnessed the occurrence, if she had repeated the tale to Munna and if Munna had a confirmation of the same from her mother while she travelled in the rickshaw to the hospital and if there was a further confirmation to Rekha when she visited the hospital, such a contradictory narration would never have occurred in the case papers. These are the words which have fallen from the lips of the deceased at the earliest at 10-15 p.m.. No doubt the doctor had taken them in an indirect form, but the introduction of a stove, the quarrel with a neighbour are something strange and unknown to the theory of the accused entering the room, throwing the kerosene and setting her on fire after lighting a match. We have perused the panchanama of the scene of offence and we are conscious that there is no reference to stove but there is a reference to hearth or what is known as chula. It is not known what words the victim then used, and in all probability the doctor translated in his own diction using the word 'stove.' Even ignoring this aspect, the next statement that she had a quarrel with a neighbour is most surprising. She knew for certain that the mischief-monger was none else but Sharanappa, the paramour known to her for a couple of years and more, and she would never have failed to give his name. There was no reason for extricating him when she was in her last moments. It is said that truth always lingers on the lips of a dying person and we can hardly imagine such a vague

version while speaking to the doctor. There was no question of screening the shameless life led by her, because it was widely known to all and everybody had already spoken to it. The very entry made by the constable long before Dr. Dabak has a reference to the name Sharanappa which was given by Munna and. the entry was made in the presence of Dr. Pabalkar, by the constable with the aid of Munna. On this background this entry, to a considerable extent, has proved damaging to the prosecution case.

13. The information transmitted by this constable Nanajkar to the Bund Garden Police Station and recorded at the other end is not brought before the Court. May it be noted that a similar register is kept at the Police Station and when information is flashed by the constable on duty at the hospital, it is taken down ad verbatim at the Police Station. The corresponding register ought to have been brought by the prosecution before the Court and its suppression is another circumstance which speaks adversely to the prosecution. Instead, what is produced before the Court is another entry made in the Station Diary at Bund Garden Police Station on the 14th and it is mentioned therein that the deceased died on the 14th at 5-30 p.m.. It has however very little bearing on the points under consideration.

14. On taking a review of the medical evidence given by these two doctors and read in the context of the contemporaneous record prepared by the constable on duty as well as by the two doctors, we are afraid comments would be superfluous. We conclude this chapter by observing that it is difficult to reconcile the various statements made by the deceased from time to time. There is no consistency in her versions although she was in her senses and was in a position to make a statement, as would be apparent not only from the statement of the doctor, but from the version of the Honorary Magistrate.

15. There remains the evidence of the third doctor viz. Dr. Malegaonkar, P.W. 5, who has conducted the post-mortem. Very little turns upon his notes, but the evidence has its own implications which create some doubt about the account given by Nanda and others. On speaking to the burns, their dimensions, degree etc. the doctor has said that the burns were muscle deep and he could not give the exact origin of the burns. One surprising feature is that the uppermost part affected

is chin and front of neck, but the hair was not in the least damaged by the flames. If, as stated by the eye witness Nanda the accused had a wrangle with the deceased and while in a standing pose he had poured kerosene on her saree and set her on fire, the flames would certainly affect her hair. The very fact that the hair remained in tact not only connotes but corroborates the counter version that the deceased was sitting near the the chula and while in a sitting pose she caught the fire or in all probability got herself burnt by her own acts. The very panchanama of the scene of offence further fortifies this conclusion. The panchnama rends that there were kerosene spots or left-over in the space between the chula and the sink. The victim, in all probability, was sitting there near the hearth and as it was evening meal time, she might have taken a burning ember or a small stem and got herself burnt. Such a possibility cannot be ruled out from the circumstances which are brought before the Court. To strengthen all these inferences is the last act on the part of the deceased to get the door latched from inside. If on the other hand the prosecution version is to be accepted that there was an assault at the hands of the accused by a blow-pipe after the deceased was taken into the room while in a standing pose and the accused poured the kerosene or sprinkled the kerosene all over the saree of the deceased and lighted the match, the body would be in high flames and the hair would not have been left in tact.

16. This brings us on to the cross-examination of Dr. Malegaonkar who has said that at the time of the post-mortem examination he did not notice any marks of violence on the upper region of the back side, nor could he find any marks of injuries even on the lower region. The deep burns were mostly confined to the centre of the body and the burning might have started from the central region first. By central region he meant abdominal level. He could not detect any burns on the hair, and at the end of his cross-examination he said 'At the time when the victim caught fire, she must be either in a sitting¹ position or in a lying down position and I state this after studying the nature of the burns.' This admission corroborates the counter version presented by the accused rather than supporting the prosecution case.

17. On an analysis of the medical evidence given by the three doctors, another striking feature is that not a single leftover of the assault by a wooden rod or iron

blow-pipe is detected. The weal marks, if they are the effect of lighter blows, would be visible at least for some hours. If the deceased was really beaten by a wooden rod or chappals or blow-pipe, certainly there would be contusions, abrasions or to speak the least, some weal marks. Nothing of this type is detected on any part of the body of the deceased and the medical evidence on this score falsifies the account given by all the witnesses whose evidence is summarised in the foregoing paragraphs.

18. A strong grievance made by Mr. Agarwal for the appellant in this context needs a somewhat detailed reference. His principal contention was that the accused was never supplied with the copies of the case papers. The important entries made by Dr. Dabak in the case papers about the history of burns noted at 10-15 p.m. which speak of 'The patient was cooking on a stove. She had a quarrel with the neighbour...etc.' were never furnished. The doctors ushered these case papers in their evidence while speaking from the box and the accused was taken by surprise. The submissions of the public prosecutor that there was no cross-examination on these details and they deserve every credence merit on substance. Section 173(4) of the old Criminal Procedure Code (Cr PC) (Section 173 of the new Criminal Procedure Code (Cr PC)) casts a burden on the prosecution to furnish copies of the statements of the witnesses and such other record on which the prosecution intends to rely. Even if a witness is not examined and the prosecution feels that his evidence is material, no provision in the Code debars the prosecution to lead evidence at the eleventh hour, but before he is put up in the box a copy of the statement, which the witness is likely to make should be furnished to the accused. Mr. Hudlikar could not convince us from the record that the copies of the case papers were furnished to the accused. We find considerable force in the submissions of Mr. Agarwal. It has been repeatedly pointed out by the Supreme Court that the prosecution may examine witnesses even though not named in the charge-sheet, or produce other evidence at the eleventh hour. But it would be doing violence to the language of Section 173 of the Criminal Procedure Code (Cr PC) (old) if no copies of the documents intended to be relied upon or of the proposed statement likely to be made by the witness are supplied to the accused. Not only the language of Section 173, Criminal Procedure Code (Cr PC) but fairplay necessitates the prosecution to supply such copies

before additional or new evidence is adduced; lest prejudice is likely to be caused. In the instant case the accused was heavily handicapped in his defence and he could have exposed the doctors by eliciting better particulars provided copies were given to him well in advance.

19. This takes us on to the so-called dying declaration recorded by the Honorary Magistrate Mr. Vasantlal Shah. P.W. 11. To recapitulate the background, after the victim was admitted in the hospital on the doctor's advice, the investigating officer with post haste secured the presence of Mr. Vasantlal Shah. Mr. Shah, with due respects, seems to know very little of reading and writing Marathi. No doubt, being a resident of Poona and having settled for years together, he does possess the knowledge, of understanding or following what one may call 'colloquial Marathi.' With this handicap of language he entered the ward after 10-30 p.m.. After he entered the ward, the doctor arrived there within five minutes and on examining the deceased he told the Magistrate that the patient was in a fit condition to make a statement. Before recording the statement he asked the near relatives of the patient and others to go out of the room, a statement contradicted by Rekha. He then summoned one person who was in plain clothes and asked him to render his assistance as a scribe. But this Honorary Magistrate, with respects, pretends that he does not know whether the writer was a member of the Police Force. To a Magistrate to whose residence the police officer had gone with a request to visit the hospital and to take down the dying declaration, an initial query of this type was a must. We do not think that the learned Magistrate was BE gullible as to call for any person and ask him to take down the declaration. On speaking to the preliminaries he claims to have taken down the declaration, but it is not in the question and answer form. What he says that he put a few preliminary questions about the name, age etc. and suddenly the deceased started narrating her story which was taken down by the writer on his behalf. The patient was making a statement and the writer was reducing it to writing sentence by sentence. As all the fingers of both the hands were burnt, he could not take the thumb impression and obtain the endorsement of the doctor. The statement, according to him, was over by 11-20 p.m.. May it be recalled here that the deceased was accustomed to speak broken Marathi mixed with Hindi. The Honorary Magistrate does not claim to be conversant with Hindi. The writer is not examined. When the victim narrates

her version she would be doing so ordinarily in her own dialect which was an admixture of Hindi and Marathi. It ought to have been taken down in the words falling from her lips. But when we read the dying declaration, we realise at once that it is nothing short of a police statement taken down by a seasoned writer constable. Some of the statements embodied in the declaration are out of place and out of tune. The Honorary Magistrate has been cross-examined at considerable length. It was elicited from him that he did not verify from the relatives who were present as to whether they had tutored the patient. After putting a few questions about her name, address and age he asked what statement she would like to make. To that solitary last question the reply was a running narration into many lines to which a reference would be made just now. The reply was given without any break. It is something surprising, nay, shocking. The woman was in agony. She was under the influence of morphine and one has to imagine whether a running statement with these meticulous particulars would be given by the victim in that state of health. Proceeding further, the Magistrate ventured to tell the Court that he did not enquire whether that person who had scribed the statement was employed as a writer. He did not even ask his name. He did not endorse below the statement that it was scribed by a particular writer under his directives. That person, meaning thereby the scribe, was present outside in the verandah and the witness had told him that he had to record a statement and asked him whether he would be in a position to write. On such a casual query, the outsider in the verandah readily agreed to render his services. This is nothing short of a dramatic performance. On conceding that he is educated in Gujarati and is conversant with colloquial Marathi, he adds that paragraphs were not given by him, nor did he instruct the writer how to begin the paragraphs and from what particular point. While concluding the statement lie has given an account which has exposed the police officer as well as Dr. Dabak. To quote his words, he has said: 'After the recording of the statement was over, I took the recorded statement to my residence where I put my seal and the rubber stamp of my name, etc. on that statement. Thereafter I gave that statement to the police who had come along¹ with me. After the recording was over, I waited for the doctor, who was to make his endorsement on the statement about the condition of the patient. Thereafter, I wrote the words 'Before me,' in Marathi and put my signature and designation

below it.' Here again we may point out from the last answer that the doctor was not there when the statement was being recorded and the learned Magistrate had to wait for the arrival of the doctor. Secondly, the statement is handed over to the police officer after going home and affixing the seal. The police officer contradicts the Magistrate in saying that he got the copy then and there in the hospital compound soon after the statement was completed, Either the Magistrate is speaking through oversight or the police officer has scant regard for truth. There was no ostensible reason for the Magistrate to give such an important version, and he cannot be committing a mistake. It was not a small lapse. It related to a particular act. The act was of taking the statement home, affixing the seal and then handing it over to the police officer. It has come in evidence that the police officer who accompanied the Magistrate, went to his residence and got the seal. The police officer wants us to believe that on getting the statement at the hospital he immediately rushed to the Bund Garden Police Station and gave information for registration. These two statements, the one made by the Honorary Magistrate and the other by the investigating officer run counter to each other and are beyond reconciliation. The only inference we can draw is that one of them is telling a falsehood or all the three versions are far from true or they are an admixture of half truth and half falsehood. But the probability seems to be that in a hurry the learned Magistrate forgot to carry his seal. This observation we make, having regard to the manner in which the Magistrate was summoned and he discharged his duties by taking the help of the scribe who was kept ready in the verandah by the investigating agency.

20. Now, what is the dying declaration? It is reduced to writing in Marathi. A bare reading would make it clear that it was nothing short of a police statement rather than a dying declaration. A reference has already been made to the administration of morphine, the condition of the patient and the presence of the relatives. While in such a state of agony it passes our comprehension whether she would give such a detailed narration referring not only to the bald fact of her illicit connection with the accused, but the duration thereof, the acquaintance of the accused with Shobha, the quarrel with her about a fortnight back and her warnings. Pausing for a while here, we may mention that there is no corroboration to the imputed quarrel from Shobha who has been examined by the prosecution. Then the most important and

material part of the confessional statement reads thus: To-day at about 9-15 p.m.. I had gone to Shobha Kamble's house to make her understand. She was not at home. Her parents were in the house. They abused me and Shobha's father beat me with chappal and her mother, with a wood. Then I returned to house and sent my daughter Nanda to bring Sharanappa and he said that he would not come. Then he came. He poured kerosene oil from a battle on my body and took a match from match-box near the oven and set fire to my body, after lighting the match. Thereafter he left. I had burns. At that time, Nanda, my younger daughter was in the house. Other children were with my elder daughter Munna.

After I was set on fire, I cried, 'save, save'. Then the old man residing nearby came there. He put off the fire by keeping clothes on me. At that time, my daughter Munna came there and she brought me to the Sassoon Hospital, in a rickshaw.

All these details find no place in the statement of Nanda. Munna, Shobha and Rekha give the first slip to the prosecution story of the deceased having an urge to answer the nature's call and going with Nanda towards the public latrine or meeting Shobha or the accused near the petrol pump. On the other hand, she unveils her declaration with the version that she had been to Shobha Kamble's house, but she was not present there. It is only her parents who assaulted or manhandled her. Another singular circumstance is that she does not refer to the presence of the accused. It is only on reaching her house she deposes Nanda to call Sharanappa (the accused) or to secure his presence. Sharanappa in the first instance declined and returned after some hours. These important statements made by her are in direct conflict with the versions of the other principal prosecution witnesses. Then again we may note that she wants us to believe that the cries were to the effect 'save, save.' But independent witnesses like Abubakar and Babu alias Sarang have told the Court that they heard the words, 'Do not save me, do not save me, allow me to die.' The witnesses who were perfectly in their senses and not interested in the accused, cannot commit a mistake. This part of her declaration in which she has tried to implicate the accused and to take the credit of natural conduct has exposed her to a considerable extent. The matters do not rest here. Then comes an alarming concluding portion to this effect: 'The statement is read over to me and it is correct as per my narration. The fingers of

my both hands and the hands and the part below my stomach are burnt. As all the fingers of my hand are burnt, I cannot sign nor put my thumb impression.' This concluding portion is not the statement of the deceased. It could not be under the circumstances, if one has to pay due regard to the frame of her mind and the condition of her health when she was slowly sinking. This is the brain-work of the writer constable and it needs no argument to make such an observation. The dying declaration suffers not only from grave infirmities but it has a tinge of a concoction and a touch of a police record. The dying declaration which has been strongly relied upon by the learned Additional Sessions Judges has failed the prosecution miserably.

21. A word need be said to caution the Honorary Magistrates who are supposed to record dying declarations. It has been repeatedly brought to their notice that the dying declaration should be taken down as far as possible in the words of the deponent and secondly, it should be in the form of questions and answers. These irregularities do not prove fatal if there be other corroborative evidence. But if the corroborative evidence is too weak or does not fortify the version, much less such a lengthy narration, then certainly the entire dying declaration is rendered as a doubtful piece of evidence. It loses its probative value and it would be hazardous to rely upon, such a dying declaration when in particular a man is put on a trial on the charge of a serious offence like murder. We do not think it necessary to repeat the various tests, which a dying declaration is required to pass, and which have been laid down in the various rulings of the Supreme Court. To some of these rulings the learned Additional Sessions Judge has made a reference; but having made a reference, he has fallen into a grave error in accepting and exhibiting the dying declaration.

22. There remains the evidence of Shobha which was largely relied upon by Mr. Hudlikar for the State. Shobha, the new fiancée, who was unmarried at the time of the incident, happens to be the neighbour of the accused. She speaks to the principal events of the love affair between the two viz. herself and the accused. She stated that the deceased did not like her alliance with the accused and then proceeded to make an important statement that the deceased visited her hut, abused her and started abusing her parents using some slangs. Both the parents

got upset and there was exchange of words between them. The deceased threatened Shobha saying that she would see as to how she talked with the accused, meaning thereby that one day she would wreak the vengeance. So saying she went home. At this stage a question was put whether the deceased was dragged by the accused to her residence, and when the witness replied in the negative she was declared hostile. But very little has been elicited in the cross-examination. However, Mr. Hudlikar relying upon her statement in examination-in-chief said that Shobha herself admits the visit of the deceased to her house and this part of the prosecution story will have to be accepted. But the question is whether the deceased visited the house of Shobha's parents under the circumstances narrated by the principal prosecution witnesses or it was a visit of her own just to seek an explanation from Shobha or her parents. She does not refer in her examination-in-chief to her father and mother assaulting the deceased. This important link is missing. Taken at its best, it only establishes that the deceased had visited the house of Shobha sometime before the occurrence, but that does not take the prosecution case any further.

23. His Lordship after dealing with a point not material to this report, continued.

24. Before parting with this judgment we must clear a couple of misgivings of the learned Additional Sessions Judge, In the concluding paragraph he has referred to the law as to whether the death penalty is the primary penalty in the cases of murder or the matter is left to the discretion of the Court. He has referred to certain old rulings reported in *State v. Airarsing* A.I.R. [1956] Bom. 281 and *State v. Gourishankar* : AIR1966 Bom179 . He has further observed that death sentence is the normal sentence for the offence of murder. In making these observations he has totally gone wrong and has ignored the subsequent rulings of this High Court and the Supreme Court. This Court in the case of *State v. Vali Mohammad* (1968) 71 Bom. L.R. 1 has pointed out that after the amendment of Section 367(5) of the Criminal Procedure Code (Cr PC) in the year 1955 the question of sentence for an offence under Section 302, Indian Penal Code is left to the discretion of the Court. The moment the charge of murder is established, death penalty is not a must and it is only on proving or showing extenuating circumstances the lesser punishment of life imprisonment should be inflicted. This point is made all the more clear by the

Supreme Court in one of the latest pronouncements in Jagamohan Singh v. State of U.P. (1973) 1 S.C. W.R. 20. Their Lordships have pointed out that under 367(5) of the Criminal Procedure Code (Cr PC) as it stood before its amendment by Act 26 of 1955, the normal rule was to sentence the accused to death on a conviction for murder and to impose the lesser sentence of imprisonment for life for reasons to be recorded in writing. That provision is now deleted and it is left to the judicial discretion of the Court whether death sentence or lesser sentence should be imposed. It is hoped the learned Additional Sessions Judge would pay attention to these latest authoritative pronouncements and would stand himself corrected.

25. The rest of the judgment is not material to this report.

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