A SHAIKAH BAKSHU AND ORS.

v.

STATE OF MAHARASHTRA

JUNE 21, 2007

B [DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

Evidence Act,1872:

s.32—Dying declaration— In a case under s. 302/34 IPC two dying
C *declaration were recorded within a span of less than one and half an hour— The time of recording first one is even before intimation of the crime had reached the Police Station— Facts regarding place of occurrence and as to who took the victim to hospital stated in dying declaration being contrary to record—Copy of letter stated to have been written to Naib Tehsildar for*
D *recording second dying declaration not produced—No mention in dying declaration that it was read over to victim—Held: In view of the infirmities, accusations of prosecution have not been established—Conviction recorded by trial court and High Court set aside—Penal Code,1860—s.302/34.*

Penal Code, 1860:

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s. 302/34—Death of married woman by burn injuries—Husband, sister-in-law and mother-in-law of victim convicted by trial court and High Court on basis of two dying declaration—Held: In view of various infirmities in dying declarations, conviction set aside—Evidence Act, 1872—Dying declaration.

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Appellants, namely, the husband, the sister-in-law and the mother-in-law of the deceased were prosecuted for offences punishable u/ss. 302/34 and 498-A/34 IPC. The prosecution case against them was that they set the victim ablaze by pouring kerosene on her. The trial court, placing reliance on the
G **two dying declarations, convicted them of the offences charged. On appeal, It was contended for the accused-appellants that the dying declarations were totally unreliable and the place of occurrence was differently stated. High Court confirmed the view of the trial court that the two dying declarations were credible and cogent and maintained the conviction u/ss. 302/34 IPC, but recorded acquittal as regards charge u/s. 498-A IPC. Aggrieved, the accused**

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field the instant appeal. A

Allowing the appeal, the Court

HELD: 1.1. The dying declaration Exht.26 was claimed to have been recorded by the Naib Tehsildar between 7.15 and 7.30 p.m, while the other dying declaration, Exht. 31 was purported to have been recorded by PW 3, the B Police Officer, at 6.00 p.m. PW 3 stated that intimation regarding occurrence was received at 6.30 p.m as per Exht. 30. If the information of the incident was received at 6.30 p.m., the question of recording dying declaration before that time does not arise. Besides, from a perusal of Exht. 26 it appears that place of occurrence stated therein was different than that mentioned in the C 'Panchnama'. With reference to the 'Panchnama' it appears that no burn marks were found in the bed room; on the other hand, burn marks were found in the kitchen. It has not been established as to what was the necessity of a second dying declaration if there was already a dying declaration in existence recorded by PW 3. It is also to be seen that the letter requiring the Naib Tehsildar to record the dying declaration was not produced by him nor the D copy thereof was produced by the prosecution. The trial court and the High Court noted that the condition of the deceased was very poor, as was stated by the Medical Officer, and it was during deteriorating since 6.10 p.m. There is no mention in the dying declaration that it was read over and explained to the deceased. [Para 8] [1134-F-H; 1135-B-G]

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1.2. So far as the presence of the relatives and the tutoring aspect is concerned, the High Court held that there cannot be a possibility of tutoring the deceased for falsely implicating appellants in the offence because of the promptness in recording the declaration by PW 1 and PW 3. The conclusion is clearly based on surmises and conjectures. [Para 8] [1135-H; 1136-A-B] F

1.3. Another fallacy in the conclusions of the High Court and the trial Court was that mere change of the place of occurrence as borne out in the dying declaration, as projected by the prosecution with reference to the spot panchnama was not material. According to the deceased, the occurrence took place in the bed room. It is to be noted that no mark of burn injury was noticed G in the bed room and they were noticed in the kitchen. High Court noted even if spot of occurrence has not been correctly stated by the deceased same is of no consequence. That certainly has effect on the credibility of the dying declaration, contrary to what the High Court has observed.

[Para 8] [1136-B-C]

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1.4. Another aspect which assumes great importance is that in the dying declaration the deceased stated that she was brought to the hospital by a neighbour but the official records show that she was brought to the hospital by accused no.2 i.e. sister-in-law. It was categorically asked to the doctor whether in the admission register it was recorded that the injuries were due to the accidental burn. He stated that the witness has not gone thought the register of that date. [Para 8] [1136-C-D]

1.5 In view of the infirmities the inevitable conclusion is that the accusations of prosecution have not been established. The judgment of the High Court cannot be maintained and the same is set aside.

[Para 9 and 10] [1136-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 833 of 2007.

From the Judgment & Order dated 21.09.2005 of the High Court of Jadicature at Bombay, Bench at Aurangabad in Criminal Appeal No. 159 of 2005.

Sanjay R. Hegde, Ramesh Shivajirao Jadhav and Naresh Kumar for the Appellant.

Ravindra K. Adsure for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the judgment of a Divison Bench of the Bombay High Court, Aurangabad Bench. Conviction of the appellants under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') was confirmed while setting aside the conviction and sentence relatable to offence punishable under Section 498-A IPC read with Section 34 IPC. All the appellants were convicted by learned 1st Additional Sessions Judge, Parbhani in Sessions Trial No. 214/2001.

3. Prosecution version as unfolded during trial is as under:

Rubina (hereinafter referred to as 'deceased') was married to appellant No.1 Sk. Bakshu about 8 days prior to the alleged incident, which took place on 19.8.2001 at about 4 p.m. in the house of the appellants. While the deceased was staying in the house of her in-laws, the appellant No.2-Janubai Shakur, sister in law of the deceased and appellant No.3 Safirabi Sk. Wahed,

mother in law of the deceased caught hold of her and her husband, the appellant no.1 Sk. Bakshu by pouring kerosene on her person, set Rubina on fire. The deceased suffered burn injuries. While she was burning, her father in law extinguished the fire by pouring water on her. Thereafter, the neighbours had brought the deceased to the Civil Hospital, Parbhani. Court witness Dr. Bhagwan Dhutmal was on duty and after examining the patient, he started treatment. Radhakishan Katare (PW-3), who was working as ASI in Police Out Post in General Hospital. Parbhani, secured the MLC Certificate from the medical officer concerning the deceased Rubina, which is at Exhibit 13. After ascertaining from the medical officer regarding consciousness of the patient to make a declaration, Radhakishan (PW-3) recorded statement of the deceased on the same day i.e. 19.8.2001 at 6 p.m. The said dying declaration is at Exhibit 31. Thereafter, a letter was addressed to PW1- Naib Tahsildar for recording dying declaration of Rubina and on receipt of intimation, Narhari Pandit. Naib Tahsildar (PW-1), proceeded to the hospital. After ascertaining the physical and mental condition of the patient from the medical officer, the Naib Tahsildar recorded statement of Rubina at 7-15 p.m. which is at Exhibit 26. The medical officer Dr. Bhagwan endorsed on both the dying declarations to the effect that the patient was conscious oriented in time and space and was able to make a statement. The first dying declaration (Exh.31) was recorded between 6 p.m. to 6-10 p.m. and the second dying declaration (Exh.26), which was recorded by Naib Tahsildar was between 7-15 to 7-30 p.m. on the same day i.e. 19.8.2001. The deceased died at 8-30 p.m. on 19.8.2001. According to the post mortem report, the deceased had suffered 67% burn injuries. The post mortem of the deceased was conducted by Dr. Ashok Janapurkar (PW-2). The post mortem report is at Exhibit 28. The cause of death, according to the medical officer, was due to cardio respiratory failure due to superficial deep 66% burns. Anil Gaikwad (PW-6) conducted the investigation of the case. He had drawn spot panchnama and recorded statements of witnesses. All the appellants were arrested on 20.8.2001. The clothes of appellants were also seized. The seizure panchnamas are at Exhibits 42, 43 and 44. On 21.8.2001, viscera and articles seized on the spot were sent to Chemical Analyser, whose report is Exhibit 15. In viscera, no poison was detected. Kerosene was detected on the clothes of accused, which were seized. After completion of investigation, the charge-sheet was filed. The case was committed by JMFC, Parbhani, to the Court of Sessions for trial. The charges in Exhibit 10 were framed and the appellants were tried before the Court, to which they pleaded not guilty and came to be tried.

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A The prosecution examined 6 witnesses. In their statement u/s 313 of Cr.P.C. the appellants denied the incident in question and alleged that the witnesses were demanding money and for that reason, they are deposing falsely. The prosecution examined 6 witnesses and Dr. Bhagwan Pandit was examined as Court witness.

B 4. Placing reliance on the dying declarations purportedly to have been made by the deceased, the trial court found the appellant guilty and convicted them and imposed imprisonment for life and to pay a fine of Rs.100/- for the offences punishable under Section 302 read with Section 34 IPC. In respect of offence relatable to Section 498A read with Section 34 IPC custodial C sentence of 3 years and fine of Rs.100/- with default stipulation were imposed.

5. In appeal, it was urged that the dying declarations are totally unreliable. The alleged place of occurrence has been differently stated. No explanation has been offered as to why there was necessity of recording two dying declarations. Though there was clear evidence of tutoring, the trial court did D not attach any importance and there has been suppression of the station diary entry. All these go to show that prosecution has concocted a false case. The State's response was that after analyzing the evidence in detail conviction has been recorded.

6. The High Court confirmed the view of the trial court holding that the E dying declaration was credible and cogent. Therefore, conviction for offence relatable to Section 302 read with Section 34 was maintained. But acquittal was recorded under Section 498-A read with Section 34 IPC.

7. Stands taken before the High Court were reiterated in this appeal.

F 8. The dying declarations have been marked as Exh.26 and Exh.31. Exh. 26 was claimed to have been recorded by the Naib Tehsildar (PW-1) between 7.15 and 7.30 p.m. while Exh.31 was purported to have been recorded by the Police Officer (PW-3) at 6.00 p.m. In the Exh. 26, it was stated that the deceased did not know name of the mother in law and that the A-2 and A-G 3 were residents of Ramabai Nagar whereas the place where the alleged incident took place was Panchsheel road. It was stated that the neighbour had taken deceased to hospital. Police Officer (PW-3) stated that intimation regarding occurrence was received at 6.30 p.m. vide Exh.30. Strangely, the dying declaration was recorded even before the intimation had reached i.e. at 6.10 p.m. There was a point raised about the number of marriages of the

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deceased. Interestingly, the mother of the deceased supported the defence version. PW-3 in his evidence stated that he had accompanied Naib Tehsildar (PW-1). According to Trial Court and High Court the basic question was who recorded the dying declaration first. So far as the dying declaration purported to have been recorded by Naib Tehsildar (PW-1) is concerned, he has stated that one constable accompanied him in the hospital. He did not say that police inspector PW-3, accompanied him though PW-3 claimed it to be so. With reference to the Panchnama it appears that no burn marks were found in the bed room on the other hand burn marks were found in the kitchen. As noted above, Exh.30 shows that ASI had received intimation at 6.30 p.m. Dying declaration shows it was recorded between 6.00 to 6.10 p.m. If the intimation was received at 6.30 p.m. question of recording the dying declaration before that time does not arise. The trial court accepted this position to be correct from the record. But it made a new case that the time recorded to be 6.30 p.m. appears to be a mistake made by ASI. That was not the case of the prosecution and, in fact, PW-3 accepted that the intimation was received at 6.30 p.m. and the dying declaration was recorded later by the Naib Tehsildar. It has not been explained as to what was the necessity of a second dying declaration, if there was already a dying declaration in existence recorded by PW-3, who stated that he had accompanied PW-1. PW-1 in his statement stated that on 19.8.2001, on the basis of a letter requiring him to record dying declaration of the person who was admitted to the hospital. He went to the hospital at 7.00 p.m., met the medical officer in the hospital and thereafter he requested the medical officer to show the person to him. The letter in question was not produced by him. The trial court came to the conclusion that PW-3, the medical officer and the constable reached the Burns Ward at about 7.10 p.m. As noted above, it was the evidence of PW-3 that he had accompanied the Naib Tehsildar PW-1. Even if it is accepted as noted by the trial court that the Naib Tehsildar has not produced the letter because it may be misplaced but nothing prevented the prosecution to produce the copy of the letter which was purportedly written to the Naib Tehsildar. No effort in that regard has been made. The trial court and the High Court noted that the condition of the deceased was very poor as was stated by the medical officer and the condition was deteriorating since 6.10 p.m. The trial court, however, held the dying declaration to be credible because the medical officer was present when the dying declaration was recorded. There as no mention in the dying declaration that it was read over and explained to the deceased. The Trial court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained. The view is clearly unacceptable. So far as the presence of the relatives and the tutoring aspect

A is concerned, the High Court held that there cannot be a possibility of tutoring Rubina for falsely implicating appellants in the offence because of the promptness in recording the dying declaration by PW 1 and PW 3. The conclusion is clearly based on surmises and conjectures. Another fallacy in the conclusions of the High Court and the trial Court was that mere change the place of occurrence as borne out in the dying declaration, as projected B by the prosecution with reference to the spot panchnama was not material. According to the deceased, the occurrence took place in the bed room. It is to be noted that no mark of burn injury was noticed in the bed room and they were noticed in the kitchen. High Court noted even if spot of occurrence has not been correctly stated by the deceased same is of no consequence. C That certainly has effect on the credibility of the dying declaration, contrary to what the High Court has observed. Another aspect which assumes great importance is that in the dying declaration the deceased stated that she was brought to the hospital by a neighbour but the official records show that she was brought to the hospital by the accused no.2 i.e. sister-in-law. It was categorically asked to the doctor whether in the admission register it was D recorded that the injuries were due to the accidental burn. He stated that the witness has not gone through the register of that date.

9. In view of the aforesaid infirmities the inevitable conclusion is that the accusations of prosecution have not been established.

E 10. The judgment of the High Court cannot be maintained and the same is set aside. The appeal is allowed. The appellants are acquitted of the charges. They be set forth at liberty if not required in any other case.

R.P. Appeal allowed.