REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.865-866 OF 2013

STATE OF MAHARASHTRA ...Appellant(s)

:Versus:

NISAR RAMZAN SAYYED ...Respondent(s)

JUDGMENT

Pinaki Chandra Ghose, J.

1. These appeals have been directed against the judgment and order dated 19th March, 2012 passed by the High Court of Judicature at Bombay, Bench at Aurangabad, in Confirmation Case No.1 of 2011 with Criminal Appeal No.584 of 2011, whereby the conviction order dated 22nd September, 2011 passed by learned District Judge-3 and Additional Sessions Judge, Shrirampur, against the respondent herein was quashed and set-aside. The Confirmation Case No.1 of 2011 was filed by the State for confirmation of the death sentence awarded to the accused respondent. The High Court, however, rejected the death sentence and acquitted the accused respondent.

2. The brief facts leading to present criminal appeals may be summarized as follows:

Respondent Nisar Ramzan Sayyed got married with one Summayya (deceased herein) on 30.03.2007. After the marriage they were jointly living with the respondent's family and were blessed with a male child, namely Sayej who was three years old on the fateful day of incident. The deceased was seven months pregnant at the time of the incident. The respondent and his family members treated Summayya well for a period of one year after the marriage. Thereafter, the respondent started ill-treating her on the pretext of demand of Rs.50,000/- for purchasing an auto rickshaw. As the financial condition of the father of Summayya was poor, the said demand could not be met. The respondent continued the act of ill-treatment with the deceased. On 29th October, 2010 at 5:00 a.m. the respondent herein allegedly set the deceased on fire by pouring kerosene oil and also threw the son (Sayej) on the burning body of the deceased. Summayya and her son sustained burn injuries. Thereafter the deceased was taken to the hospital by the respondent but her son died on the spot due to burn injuries. The deceased succumbed to her injuries on 3rd November, 2010 after

giving birth to a dead baby fetus.

3. Law was set into motion against the respondent and his family members when FIR No.I-227 of 2010 was lodged at Police Station Newasa at the instance of one Nisar Ashraf Pathan after registration of report AD No.91 of 2010 under Section 174 of Code of Criminal Procedure. Learned Additional Sessions Judge while taking cognizance on the basis of charge-sheet No.12 of 2011 received on 27.01.2011 initiated Sessions Case No.18 of 2011 and vide his judgment and order dated 22nd September, 2011 convicted the respondent herein for the offence punishable under Sections 302 and 498-A of the Indian Penal Code, 1860 and sentenced him to suffer death sentence and pay a fine of Rs.2000/-. Five other accused who were family members of the respondent were, however, acquitted from all the charges.

4. The respondent herein preferred Criminal Appeal No.584 of 2011 before the High Court against the above-noted conviction order and the State of Maharashtra filed Confirmation Case No.1 of 2011 for confirmation of the death sentence awarded to the respondent by the Trial Court. The High Court vide impugned

judgment quashed and set-aside the conviction order passed against the respondent herein and consequently, the death sentence confirmation case was dismissed. Hence, the present appeals before us by the State of Maharashtra.

5. We have heard the learned counsel on both sides. On a perusal of the judgments passed by the High Court and the Trial Court, we find that in the present case there is no eye-witness of the incident and the prosecution has been totally depending upon the dying declarations of the deceased, namely, Summayya. There are three written and three oral dying declarations. Since there is no direct evidence but only dying declarations of the deceased and proof proffered by the prosecution, tested by the conventional process of cross-examination and the standard yardsticks of credibility, we confine ourselves to the contentious issue of acquittal order and its legality.

6. From a perusal of the records of the Courts below, we have noticed that there are three written dying declarations viz, Exhibit No.61, Exhibit No.67 and Exhibit No.73, recorded before PW8–Dr.Prabhakar, PW7-ASI Argade and Circle Inspector,

respectively. Three oral dying declarations were given before PW-1, PW-2 and PW-3, respectively. The role attributed to accused No.1 (respondent herein) is consistent in all the dying declarations whereby it has been proved beyond all reasonable doubt that the respondent herein had poured kerosene on his wife and set her on fire in their house itself during early hours of 29th October, 2010. The demand of an amount of Rs.50,000/- by accused No.1 was also reiterated by the deceased in her dying declarations. The Medical Officer gave his opinion in the letter issued by PW7-ASI Argade, inquiring about the conscious mental state of the deceased while stating the cause of the burn injuries on the victim wife. The Trial Court has rightly relied on the judgment passed by this Court in ***Satish Ambanna Bansode Vs. State of Maharashtra***, (2009) 11 SCC 217, wherein this court reiterated the principles governing dying declaration which had been elaborately discussed in an earlier decision of ***Paniben Vs. State of Gujarat,*** *(1992) 2 SCC 474 in para 18*. Relevant part of the relied judgment is reproduced herein below:

> *"14.... (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See: Munnu Raja v. State of M.P. (1976) 3 SCC 104]*

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See: State of U.P. v. Ram Sagar Yadav (1985) 1 SCC 552, and Ramawati Devi v. State of Bihar (1983) 1 SCC 211].

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See: K. Ramachandra Reddy v. Public Prosecutor (1976) 3 SCC 618].

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See: Rasheed Beg v. State of M.P., (1974) 4 SCC 264.]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See: Kake Singh v. State of M.P., (1981) Supp. SCC 25.]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See: Ram Manorath v. State of U.P., (1981) 2 SCC 654.]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurti Laxmipati Naidu, (1980) Supp. SCC 455.]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See: Surajdeo Ojha v. State of Bihar, (1980) Supp. SCC 769]

(ix) Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical

opinion cannot prevail. [See: Nanhau Ram v. State of M.P., (1988) Supp. SCC 152.]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See: State of U.P. v. Madan Mohan (1989) 3 SCC 390.]

(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See: Mohanlal Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700.]"

In our considered opinion the High Court erred in acquitting the respondent herein as the spot Panchnama, being Exhibit-86, was duly proved by PW11-Investigating Officer of the case whereby recovery of kerosene mixed soil, burnt pieces of Saree and Blouse etc. etc. was proved.

7. We have also noticed that factum of pregnancy before death of deceased was also proved by PW9-Dr. Nitin Sudhakar Samudra. The typical conduct of the accused respondent also describes his guilty intention of neglecting his wife when she was on death bed as there is no evidence on record to prove that the respondent got the deceased admitted in Wadala Mission Hospital. From the testimony of the Investigating Officer during the cross-examination,

it has been proved that the height between floor and the roof of spot of incident is 13 to 14 feet and the roof is covered by dried sugarcane leaves which were put on the plastic gunny bags. The Trial Court has rightly appreciated that it is not possible to cause any damage to the said roof due to the incident.

8. Mr. Kunal A. Cheema, learned counsel appearing for the State of Maharashtra contended that under these circumstances the respondent and other accused had caused triple murder in one shot and taken lives of innocent and helpless persons, including a human being who had not even seen the light of the day. It was further submitted by the learned counsel that the officers of Executive Magistrate's office are independent persons and as a matter of safety, the statements are kept in sealed condition to prevent tampering or manipulating the same. Therefore, there is no reason to doubt Ext.-61. Furthermore, once the dying declarations are duly proved and it is admitted that the deceased and the minor child were in the custody of the accused persons, it is for the accused to show that facts were otherwise. Learned counsel further argued that the delay in registering the FIR was due to the fact that the incident happened in the jurisdiction of different police stations

and the hospital in which treatment was given was in different jurisdiction, as could be seen from the FIR, Ext.67 and Ext.61.

9. *Per Contra*, Mr. Atul Babasaheb Dakh, learned counsel appearing for the respondent argued that albeit admittedly, the roof of the house was made of sugarcane leaves, there were domestic articles and utensils kept in the room of the accused. As per the arguments advanced by the learned counsel for the respondent, the prosecution failed to prove that the alleged incident took place in the house as there was no sign of burning on the roof (chhappar) of the house. The same was stated by PW10 – Police Head Constable who was the first person to visit the place of occurrence and this was corroborated by the I.O. who had conducted spot Panchnama. It was further argued that the dying declaration Ext.-67 cannot be made admissible with regard to the place of occurrence because PW-10 in his statement has averred that the dead body of 3-year old son was found at a distance of 200-250 ft. away from the house of the accused. The learned counsel for the respondent concluded his arguments by submitting that the dying declarations, which suffered from infirmity, cannot form the basis of conviction and in support of this

he relied upon judgment of this Court in ***Surinder Kumar Vs. State of Haryana***, (2011) 10 SCC 173, wherein this Court observed:

> *"28. Though there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration but the court must be satisfied that the dying declaration is true and voluntary and in that event, there is no impediment in basing conviction on it, without corroboration. It is the duty of the court to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. Likewise, where the deceased was unconscious and could never make any declaration the evidence with regard to it is rejected. The dying declaration which suffers from infirmity cannot form the basis of conviction. All these principles have been fully adhered to by the trial court and rightly acquitted the accused and on wrong assumption the High Court interfered with the order of acquittal."*

10. Respondent herein in his statement under Section 313 of the Code of Criminal Procedure, 1973 has stated about the threat by his wife of committing suicide. He has further stated that he had made a complaint to Newasa Police Station. However, the Trial Court has rightly appreciated the evidence on record whereby it was proved from the N.C. Register of Newasa Police Station that no such complaint was lodged by the respondent herein during the relevant days. On the date of the incident the respondent and his

deceased wife were in their house and that the deceased met an unnatural death has been proved by medical evidence. Under these circumstances where there is no other eye-witness to the incident, the failure on the part of the accused respondent to explain how his pregnant wife and their minor child met with unnatural death due to burn injuries sustained at their house leads to an inference which goes against the accused respondent. This relevant proposition of law was discussed by this Court in the case of ***Swamy Shraddananda Vs. State of Karnataka***, (2007) 12 SCC 288. The relevant part of the judgment is reproduced hereunder:

> *"If it is proved that the deceased died in an unnatural circumstance in her bed room, which was occupied only by her and her husband, law requires the husband to offer an explanation in this behalf. We, however, do not intend to lay down a general law in this behalf as much would depend upon the facts and circumstances of each case. Absence of any explanation by the husband would lead to an inference which would lead to a circumstance against the accused."*

11. It is also discussed by this Court in the case of ***Munna Kumar Upadhyay Vs. State of Andhra Pradesh***, (2012) 6 SCC 174 at para 73 as follows:

> *"It is a settled law that the statement under Section 313 CrPC is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and*

secondly to use denials of established facts as incriminating evidence against him..."

12. Astonishingly we have found the dying declarations of the deceased with consistent allegations about demand of dowry and modus operandi of the offence which resulted into the death of the declarant and her minor child. Before coming to the conclusion in the present case, we would like to emphasize on the principle enumerated in the famous legal maxim of the Law of Evidence i.e., *Nemo Moriturus Praesumitur mentire* which means a man will not meet his maker with a lie in his mouth. Our Indian Law also recognizes this fact that "a dying man seldom lies" or in other words "truth sits upon the lips of a dying man". The relevance of this very fact, though exception to rule of hearsay evidence, has been discussed in numerous judgments of this Court including ***Uka Ram Vs. State of Rajasthan***, (2001) 5 SCC 254; ***Babulal & Ors. Vs. State of M.P.***, (2003) 12 SCC 490; ***Muthu Kutty & Anr. Vs. State***, (2005) 9 SCC 113; ***Dharam Pal & Ors. Vs. State of Uttar Pradesh***, (2008) 17 SCC 337; ***Lakhan Vs. State of Madhya Pradesh***, (2010) 8 SCC 514.

13. The various circumstances pointing out to the guilt of the

respondent and respondent alone have been enumerated by us hereinbefore. From our discussions, it is evident that each of the circumstances had been established, the cumulative effect whereof would show that all the links in the chain are complete and the conclusion of the guilt is fully established. Therefore, in our considered opinion the respondent herein is guilty of the offence causing death of his pregnant wife and minor child.

14. The next question, however, is as to whether in a case of this nature death sentence should be awarded. A life is at stake subject to human error and discrepancies and therefore the doctrine of 'rarest of rare cases', which is not *res-integra* in awarding the death penalty, shall be applied while considering quantum of sentence in the present case. Not so far but too recently, the Law Commission of India has submitted its Report No.262 titled "The Death Penalty" after the reference was made from this Court to study the issue of Death Penalty in India to "allow for an up-to-date and informed discussion and debate on this subject". We have noticed that the Law Commission of India has recommended the abolition of death penalty for all the crimes other than terrorism related offences and waging war (offences affecting National Security). Today when

capital punishment has become a distinctive feature of death penalty apparatus in India which somehow breaches the reformative theory of punishment under criminal law, we are not inclined to award the same in the peculiar facts and circumstances of the present case. Therefore, confinement till natural life of the accused respondent shall fulfill the requisite criteria of punishment in peculiar facts and circumstances of the present case.

15. Hence, the judgment and order passed by High Court is hereby set aside and that of the Trial Court is restored with regard to conviction of the accused respondent. However, in the light of the above noted discussions, the death sentence awarded by the Trial Court is hereby modified to 'life imprisonment' which will mean imprisonment for the natural life of the respondent herein. The criminal appeals are allowed accordingly in the afore-stated terms.

. . . . . .J
(Pinaki Chandra Ghose)

. . . . . .J
(Rohinton Fali Nariman)

New Delhi;
April 07, 2017.