A SHEIKH MEHEBOOB @ HETAK AND ORS.

v.

STATE OF MAHARASHTRA

MARCH 10, 2005

B [K.G. BALAKRISHNAN AND B.N. SRIKRISHNA, JJ.]

Penal Code, 1860—Section 302 r/w Section 34—Prosecution for murder—Incident seen by two eye-witnesses—Evidence of one eye-witness contradictory to his own police statement, evidence of other eye-witness and C *that of Investigating Officer, Dying Declaration and Medical Record—Credibility of Dying Declaration doubtful—Deliberate suppression of first Written Report made by the eyewitness—Conviction by Courts below—On appeal, held: In view of the contradictions and doubts in the prosecution case, the guilt of the accused not proved beyond reasonable doubt—Accused acquitted* D *giving benefit of doubt.*

Appellants-accused were charged u/s 302 IPC for having caused death of a person by setting him on fire. According to PW-2, father of the deceased, his son (PW-9) and he had witnessed the incident. According to him, he extinguished the fire, took the deceased to hospital on a rickshaw, on getting E **threat at the hospital from the appellants called a police van, thereafter went to Police Station and gave a Written Report. Dying Declaration of the deceased was recorded by Executive Magistrate (PW-4). During Trial, the Written Report by PW-2 was suppressed by the prosecution. Despite its production was sought, it was not produced. The evidence of PW-2 was in contradiction** F **with his police statement and with the statements of PWs 9 and 10 (the Investigating Officer) and the Dying Declaration. According to PW-9 no such incident took place in his presence and hence he was declared hostile. In the Dying Delcaration, the words "I kerosene on the body" were deleted. PW-4 explained that those words were spoken by the deceased, but the version was changed after shouting heard from outside. Hence, the words were deleted.** G **In the medical case papers, the burns, at one place, were shown as 'self inflicted' and at another as 'accidental'. The contention of the accused was that failure to produce the Written Report by PW-2 had given rise to an adverse inference that, had it been produced, it would have disproved the case of the prosecution. Trial Court rejected the contention and relying on the**

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Dying Declaration and the evidence of PW-2, convicted the appellants for the offences charged. High Court upheld the conviction. Hence, the appeal. A

Allowing the appeal, the Court

HELD: 1. The reasoning of the High Court for rejecting the contention that failure to produce Written Report by PW-2 gives rise to adverse inference, is erroneous. The prosecution has suppressed the document. The fact that no suggestion was put to the Investigating Officer is totally irrelevant. As to whether the said report was made prior to the Dying Declaration, on a fair reading of the evidence of PW 2 the sequence of events given by him before the Court suggests that he had no idea as to the recording of the Dying Declaration at all, for he nowhere mentions it. Nor does it appear from his evidence that the Dying Declaration was recorded prior to his going to the Police Station to lodge his Written Report. [633-D-F] B C

2. Evidence of PW-2 as an eye-witness does not appear to be credible. A number of inconsistencies between his statement to the police under Section 161 Cr.P.C. and his evidence were thrown up in the cross examination. The contradictions between his evidence and the evidence of the Investigating Officer PW 10 make interesting reading. For every inconsistency between his police statement and his evidence in the court, while PW-2 insisted that he had made some statement or had not made such statement, the Investigating Officer directly contradicts him on the issue. Apart from the contradictions, there is contradiction with evidence of the other cited witness PW 9, who flatly contradicts PW 2. [633-G-H; 634-A-B] D E

3. Who took the deceased to the hospital and extinguished the fire, is also a matter of controversy. The evidence of PW-9 and the Dying Declaration of the deceased in this regard are in contradiction with the evidence of PW-2. Investigating Officer admitted that he had made no effort to trace the rikshaw driver, who took the deceased to the hospital. The rikshaw driver would have been a material witness on the issue as to who accompanied the deceased to the hospital. It is not possible to believe that, in a small town, the police were not able to trace the rikshaw driver, who had carried the deceased to the hospital. [634-C-D] F G

4. Doubts arising from the eye witness account left too many question marks and too many unexplained circumstances, which contra-indicated their acceptance without corroboration. Corroboration was available in the form H

A of a document, which was not deliberately placed on record by the prosecution. This by itself should have sufficed for the court to induce a reasonable doubt as to the discharge of the onerous burden by the prosecution. [634-E-F]

5. The medical record raises a number of questions, which have not been B satisfactorily answered, and which preclude implicit acceptance of the Dying Declaration. The Dying Declaration suggests that the neighbours had admitted the deceased in the hospital, while PW 2 maintained that it was he, who had admitted him to the hospital. As regards the history of the patient given to the doctor on duty at the time of admission, PW-2 says nothing about it. The C medical record suggests that the uncle of the deceased was the one who accompanied the patient, and probably had given the history of the burns to the doctor on duty at the time of admission. The medical record also has two curious endorsements. At one place, it says that there was history of "accidental burns"; at another place there was history of "self- inflicted burns". The Dying Declaration itself indicates that the deceased had started D to make a statement which was suggestive of his having poured kerosene on himself and set himself on fire because the appellants were demanding interest and beating him. The evidence of the Executive Magistrate (PW 4) clinches that this was precisely what the deceased had stated in the first instance, which he changed on hearing some shouting from outside. These are some of the E circumstances which raise serious doubts as to the implicit credibility of the dying declaration. [636-E-H]

Laxman v. *State of Maharashtra,* [2002] 6 SCC 710, referred to.

6. Both the Courts have ignored a number of reasonable doubts which F legitimately arose on the evidence led by the prosecution, and its conduct in suppressing the vital document and witnesses. The evidence led on record by the prosecution does not prove the guilt of the accused-appellants beyond reasonable doubt. The appellants are entitled to benefit of doubt. [637-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 772 G of 2004.

From the Judgment and Order dated 12.2.2004 of the High Court of Juidicature at Bombay, at Nagpur Bench in in Crl.A. No. 369 of 1999.

Uday U. Lalit, Satyajit Desai, Nitin Sangra, Prasenjit Keswani and H Venkateswara Rao Anumolu for the Appellants.

Mukesh K. Giri for the Respondent. A

The Judgment of the Court was delivered by

SRIKRISHNA, J. The appellants, who were convicted for offences under Section 302/34 IPC by the IInd Additional Sessions Judge, Akola, and whose convictions were affirmed on appeal to the High Court of Judicature B at Bombay, are before this Court by special leave.

According to the prosecution case, a young lad of 20 years, Lalit Kumar, was murdered by the three appellants by setting him on fire on 14.3.1992 at about 10.00 p.m.. The alleged motive for this heinous act is that the appellants used to advance monies to young boys, including Lalit Kumar, to enable C them to gamble, and demand interest on the monies advanced. According to the prosecution, although Lalit Kumar had returned the capital amount, since he failed to return the interest as demanded by the appellants, the appellants killed him in the gruesome manner as alleged. The conviction is based on the dying declaration of Lalit Kumar (Ex. 49) and the evidence of the father of D Lalit Kumar, Hanumandas (PW 2).

Where two courts have concurrently analysed the evidence and recorded a conviction or acquittal, this Court is reluctant to reappraise the evidence and differ therefrom save in exceptional circumstances indicative of gross miscarriage of justice for reasons. This is one such case where we need to E interfere. Since the two legs on which the case of the prosecution rests consist of the testimony of Hanumandas (PW 2), and the dying declaration of Lalit Kumar, we were taken through the evidence with particular focus on the aforesaid and shown a number of circumstances which raise serious doubts as to the credibility of the prosecution case.

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The testimony of Hanumandas (PW 2), together with the manner in which the prosecution was conducted, raises the first serious doubt. According to Hanumandas, on the fateful day at about 8:30 to 9:00 p.m. he was coming towards his house after a long day at his shop, and while he was about 15 to 20 feet away from his house, he saw Appellant No. 3 (Mohd. Bhoja) had G caught hold of Lalit Kumar, Appellant No. 2 (Ismail) poured kerosene on the body of Lalit Kumar and Appellant No. 1 (Meheboob) set him on fire with a match stick. Hanumandas claimed that his other son, Shyam Kumar was also witnessing the scene from a distance of about 10 to 15 feet from the spot of incident. Lalit Kumar was engulfed in fire and ran towards the bathroom situated within the compound of Hanumandas house. Hanumandas ran after H

A him and attempted to extinguish the fire. When they reached the bath room, Hanumandas poured water from a bucket which was outside the bathroom and tried to extinguish the flame. Being unsuccessful in his attempt, he brought a blanket from the house and wrapped the blanket around Lalit Kumar and extinguished the fire. Thereafter, he called a cycle-rikshaw and took Lalit Kumar to the Main Civil Hospital, Akola for treatment. He admitted Lalit B Kumar in the hospital for treatment. He claimed that, at that time, all the three appellants had come to the hospital and given him threats that if he complained to the police, his entire family would be finished. Hanumandas stated that he had made a telephone call on the emergency telephone Number 100 from the hospital to the Police requesting for a Police van be sent C immediately. Immediately, a Police van did arrive at the hospital along with police personnel, on seeing whom the accused ran away. Thereafter, Hanumandas went to the City Kotwali Police Station on his Luna Moped and gave a written report disclosing the entire incident in connection with his son Lalit Kumar being set up on fire by pouring kerosene on his body and also the threat given to him and his son in the hospital. The Police had received D his written report. From the sequence of events narrated by Hanumandas it would appear that the written report made by Hanumandas to the Police would be the first contemporaneous document putting on record the true facts pertaining to the incident. That would have been the touchstone on which the credibility of Hanumandas could have been tested. Unfortunately, that E document appears to have been suppressed. It was obligatory on the prosecution to place the document on record for a fair trial. Not only did the prosecution fail to produce the document voluntarily, but the prosecution failed to produce the document despite an application for production of the said document by the accused and the order made thereupon by the Sessions Court for its production.

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Three contentions have been urged by the learned counsel for the appellants. First, that the failure of the prosecution to produce the document, whose existence is affirmed by the witness, PW 2, leaves a yawning gap in the story of the prosecution. Second, it gives rise to an adverse inference that, had it been produced, it would have disproved the case of the prosecution. G Third, the said report, being the first information given to the Police, ought to have been treated as the FIR.

Though, these issues were raised before the Sessions Court as well as the High Court, they have been side-tracked on reasoning which appears to H us to be unsustainable. While the Sessions Court referred to this contention

urged by the defence, it has given no reason for not accepting the contention. The High Court accepted the contention that Hanumandas (PW 2) had made the report to the Police about the incident and that, if the said report was made, then it ought to have been treated as the FIR. The High Court, however, dismissed the contention by taking the view that nothing had been placed on record, either in cross examination of Hanumandas, or otherwise, to show that the report to the City Kotwali Police Station had been lodged by him before the dying declaration was recorded. And that, unless the defence shows that the said report was prior to the dying declaration, it could not be treated as FIR, particularly when there is no suggestion put to the Investigating Officer, Jaswant Singh Hushare (PW 10), that the said report was deliberately suppressed and withheld by the police.

In our view, the reasoning of the High Court is erroneous. The defence made an application for production for a vital document (that it is a vital document, cannot be denied); the trial court accepting the application for production of such document passed an order directing the prosecution to produce the document and the prosecution failed to do so without any explanation, whatsoever. The conclusion is irresistible that the prosecution has suppressed the document. The fact that no suggestion was put to the Investigating Officer is totally irrelevant. As to whether the said report was made prior to the dying declaration (Ex. 49), on a fair reading of the evidence of Hanumandas (PW 2) the sequence of events given by Hanumandas before the Court suggests that when he admitted his son to the hospital, the accused-appellants had come to the hospital and threatened him. This was followed by his frantic call to the Police Control Room, the arrival of the police immediately thereafter and his going to the City Kotwali Police Station on his Luna Moped and lodging a report about the whole incidence including the threat given to him. In fact, reading the evidence of Hanumandas as a whole, it would suggest that he had no idea as to the recording of the dying declaration at all, for he no where mentions it. Nor does it appear from his evidence that the dying declaration was recorded prior to Hanumandas going to the Kotwali Police Station to lodge his written report.

Apart from these glaring discrepancies, the evidence of Hanumandas as an eye witness does not appear to be credible. A number of inconsistencies between his statement to the police under Section 161 and his evidence were thrown up in the cross examination. The contradictions between his evidence and the evidence of the Investigating Officer (PW 10) make interesting reading. For every inconsistency between his police statement and his evidence in the

court, while Hanumandas insisted that he had made some statement or had not made such statement, the Investigating Officer directly contradicts him on the issue. Apart from the contradictions, there is contradiction with evidence of the other cited witness Shyam Kumar (PW 9). Shyam Kumar flatly contradicts Hanumandas (PW 2). If we were to go by his evidence, no such incident ever took place in his presence. Though, the prosecution cited Shyam Kumar (PW 9) as an eye witness, no wonder the prosecution was constrained to declare Shyam Kumar as a hostile witness and having been won over.

Who took Lalit Kumar to the hospital, is also shrouded in mystery. According to Shyam Kumar (PW 9), his uncle, Lakshmi Narayan, had taken Lalit Kumar to the hospital and got him admitted. Who extinguished the fire, is also a matter of controversy. While Hanumandas claims to have done it himself, the dying declaration and the evidence of Shyam Kumar (PW 9) suggest that some of the residents of the locality had done it. Strangely, the Investigating Officer (PW 10), who recorded the statement, candidly admitted that he had made no effort to trace the rikshaw driver, who took Lalit Kumar to the hospital. The rikshaw driver would have been a material witness on the issue as to who accompanied Lalit Kumar to the hospital. It is not possible to believe that, in a small town like Akola, the police were not able to trace the rikshaw driver, who had carried Lalit Kumar to the hospital.

So much for the gaping holes in the prosecution story based on the eye witness account. Doubts arising from the eye witness accounts left too many question marks and too many unexplained circumstances, which contra-indicated their acceptance without corroboration. Corroboration was available in the form of a document, which was not deliberately placed on record by the prosecution. This by itself should have sufficed for the court to induce a reasonable doubt as to the discharge of the onerous burden by the prosecution.

The other limb of the prosecution story (perhaps bearing greater weight) is the dying declaration (Ex. 49). We may ignore the usual contentions urged by the defence to discredit the dying declaration. The law as to the test for credibility of a dying declaration has been laid down by a Constitution Bench in *Laxman* v. *State of Maharashtra*[1]. We may, therefore, reject the contentions of the appellants that the certification as to mental fitness of the victim was not proper or that it was written in a particular language, in a particular fashion, and such like.

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1. [2002] 6 SCC 710.

The dying declaration (Ex. 49) was recorded at 00:05 hours by the Executive Magistrate, C.H. Upadhye (PW 4), on a requisition received on 14th March 1992 at 2345 hrs. through Police Constable Vijay, Batch No. 2067 attached to Police Station Ramdaspeth, Akola, requesting for recording of dying declaration at Main Hospital, Akola. According to PW 4, he received the requisition letter at his residence at about 2345 hrs. on that day. Immediately, thereafter, he went to the hospital and meet the Medical Officer on duty. He asked the Medical Officer to examine the patient and certify that the patient Lalit Kumar was in a fit condition to make his statement. The doctor issued a certificate (Ex. 49A). Then, he asked the relatives of the patient, who were present there, to go out from that place. After all of them had left the place, he recorded the dying declaration in question and answer form. The questions were put in Marathi and the patient replied in Marathi. What was written was read over to the patient and the patient admitted the same to have been correctly recorded. His signature could not be obtained as his both hands had burn injuries. The dying declaration, thereafter, was signed by PW4 and also once again endorsed with the certificate of the Medical Officer that the patient had been fit to make such a statement.

The dying declaration has a curious aspect, which needs to be highlighted. The dying declaration reads as under:

> "I had taken money from Ismail. Mahmmad and Mehboob and I repaid the same to them. They asked me for more interest, they beat me, therefore Ismail, Mahmmad, Hetak poured kerosene on my person and set me on fire with the match stick. While I was running in the house, people from the locality rushed there and extinguished the fire caught to my person and then brought me in the hospital."

The original Exhibit 49, which is written in Marathi, shows that the words "mi ghaslet angavar" have been struck off. When asked for an explanation, the Executive Magistrate, C.H. Upadhye (PW 4), explained that the aforesaid words, which mean "I kerosene on the body" had been stated by the patient before him at that time. According to him, he was sitting facing the patient with his back towards the door of the room, and there was some shouting heard from outside after which the patient had changed his version. He maintains that, the words which are struck off had been uttered by the deceased in the first instance, and changed by him as a result of some shouting from outside. So those words were struck off.

Exhibit 52, the medical case papers placed on record and proved through,

A Dr. Ganesh Gir Gosavi (PW5), also raise some further doubts. In the medical case record, the very first entry, which logically should have been the entry made at the time of admission, bears the date 17/3. The history notes: "burns. Self inflicted", after which comes the line of treatment. On page 2 of the medical record, there is an endorsement in Marathi, which says, "the doctor B told me that my brother's son's condition is very serious" and bears someone's signature. On page 4 of the medical record, there is an endorsement "H/o Accidental burn."

According to Dr. Ganesh Gir Gosavi (PW 5), he was present as doctor on duty from 9:00 p.m. on 14th March to 9:00 a.m. the next morning. He also C stated that he was on duty at 9:45 p.m., and one Dr. Tayade was the CMO on out-door duty. He identified the hand writing and signatures of Dr. Tayade and proved the medical records. When his attention was drawn to the fact that the medical record noted that there was "self-inflicted" burns, in the history of the patient, he claimed that he was unable to say as to who had given the history of the patient. He, of course, claimed that, as sufficient time D had elapsed and a number of patients were examined and treated by him, it was not possible to remember facts of each and every case.

The medical record raises a number of questions, which have not been satisfactorily answered, and which preclude implicit acceptance of the dying declaration (Ex. 49). First, who admitted Lalit Kumar to the hospital? The E dying declaration suggests that the neighbours had done so, while Hanumandas (PW 2) maintained that it was he, who had admitted him to the hospital. Second, who gave the history of the patient to the doctor on duty at the time of admission? Hanumandas (PW 2) says nothing about it. The medical record suggests that the uncle of Lalit Kumar (Laxmi Narayan) was the one who F accompanied the patient, and probably had given the history of the burns to the doctor on duty at the time of admission. The medical record also has two curious endorsements. At one place, it says that there was history of "accidental burns"; at another place there was history of "self- inflicted burns". The dying declaration itself indicates that the deceased had started to make a statement which was suggestive of his having poured kerosene on G himself and set himself on fire because the appellants were demanding interest and beating him. The evidence of the Executive Magistrate (PW 4) clinches that this was precisely what the deceased had stated in the first instance, which he changed on hearing some shouting from outside. These are some of the circumstances which raise serious doubts as to the implicit credibility H of the dying declaration.

We have carefully examined the reasons adduced by the Sessions Court and the High Court for accepting the dying declaration as credible, and for accepting the evidence of Hanumandas (PW 2), and the dying declaration (Ex. 49), as bringing home the charge of murder against the appellants beyond the shadow of reasonable doubt. Shadows, there are; dark enough to eclipse the truth. Both the courts have ignored a number of reasonable doubts which legitimately arose on the evidence led by the prosecution, and its conduct in suppressing the vital document and witnesses. We are not satisfied that the evidence led on record by the prosecution proves the guilt of the accused-appellants beyond reasonable doubt.

In our view, the appellants are entitled to the benefit of doubt. In the result, we allow the appeal and set aside the judgments of the High Court and the Sessions Court. The appellants are acquitted of the charges against them. The appellants shall be set at liberty forthwith, unless required to be detained in connection with any other case.

K.K.T. Appeal allowed.