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VITHAL

v.

STATE OF MAHARASHTRA

NOVEMBER 1, 2006

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[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Evidence Act, 1872—Section 32—Multiple dying declarations—Conviction, on basis thereof—Correctness of—Held: All dying declarations named the accused—There is no inconsistency therein—Dying delcarations were corroborated by prosecution witnesses—Also it cannot be discarded for being in question answer form—Thus, dying declarations are reliable—Further, non-examination of persons not witness to the occurrence not prejudicial to accused—Testimony of deceased's mother cannot be discarded because she was interested witness—Accused had motive to commit offence—Thus, order of courts below convicting the accused under Section 302 upheld—Penal Code, 1860—Section 302.

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A quarrel took place between the appellant and the deceased. Appellant poured kerosenes on the deceased and lit the fire leading to 98% burn injuries on the body of the deceased. Ten days prior to the incident also, after an altercation between the parties, appellant had caused injuries to the deceased. Four dying delcarations of the deceased were recorded. The prosecution examined witnesses. Sessions judge discarded three dying declarations, however relying upon one, held appellant guilty under section 302 IPC. High Court held the four dying declarations to be reliable and upheld the conviction order. Hence, the present appeal.

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Dismissing the appeal, the Court

***HELD:* 1.1. Dying declarations which were four in number were made before different authorities including a Magistrate who was examined as prosecution witnesses. Both the Trial Judge as also the High Court found the dying declaration to be reliable. Thus, there is no reason to differ with the opinion of the courts below. [238-B-C]**

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1.2. A dying declaration if found to be acceptable, the same need not be described to be in question and answer form. In all the dying declarations the

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appellant had been named. There does not exist any inconsistency therein. Dying declaration although are more than one, but being not contradictory to and in consistent with each other, there is no reason as to why reliance should not be placed thereupon. The Court while considering the credibility of such dying declaration may seek corroboration. Mother of the deceased in her evidence categorically stated that the deceased had stated that it was the appellant who had poured kerosene. She saw the deceased in flames and also saw accused running away from the place of incident. [238-C; 239-F-H]

1.3. Brothers of the deceased who came immediately after the occurrence hearing the shouts, were not witnesses to the occurrence. Their non-examination did not prejudice the appellant as they neither saw the incident nor saw him running away from the scene of occurrence. They merely extinguished the fire and took the deceased to the hospital. [240-A-B]

1.4. The submission of appellant that the appellant was inimically disposed towards deceased is not matter which by itself would lead to a conclusion that the prosecution case should not be believed. He had a motive to commit the offence. He had caused injuries to the deceased ten days prior to the incident. He picked up quarrel with him even on the date on which offence took place. The offence took place near the house of the deceased. The deceased in his dying declaration not only named the appellant but also gave other details which were vital in nature. The testimony of the mother of the deceased should not be discarded only because she is an interested witness. Further, the submission that the appellant in his examination under section 313 Cr.P.C. had made out a case of self-immolation by the deceased and that he had been falsely implicated, cannot be given any credence as no such case was made out. Even to the mother of the deceased, no such suggestion had been given. [240-C-F]

***Lella Srinivasa Rao* v. *State of Andhra Pradesh*, [2004] 9 SCC 713, distinguished.**

***Laxman* v. *State of Maharashtra*, [2002] 6 SCC 710 and *Balbir Singh and Anr.* v. *State of Punjab*, (2006) 9 SCALE 537, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1336 of 2005.

From the Final Judgment and Order dated 14.6.2005 of the High Court of Judicature at Bombay, Bench at Aurangabad in Crl. A. No. 256 of 1995.

S.V. Deshpande for the Appellant.

A Asha G. Nair, S.S. Shinde and V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. Appellant is a resident of village Wadigadri. The deceased Vishwanath was also resident of the said village. The deceased like the appellant was a driver by occupation Eight to ten days prior to the date of incident, an altercation took place between them. The appellant allegedly inflicted injuries on him with a knife. However, the matter did not proceed any further. On 24.11.1991, the deceased Vishwanath met the appellant who was then driving a vehicle. A quarrel took place between them in regard to demand of some amount. When Vishwanath was coming to his house, the appellant followed him. He was carrying with him kerosene in a container. He poured kersonse on him and lit a match stick resulting in sufferance of burn injuries by the deceased. Mother of the deceased Kesarbai (PW-8) was sitting in front of the house. She heard his shouts. She also identified the voice of the appellant. She rushed towards her house, found Vishwanath in flames and the appellant running away from the place.

Immediately, thereafter two brothers of the deceased, viz., Baburao and Rama on hearing the shouts came to the place of occurence, extinguished the fire and took the deceased to a Primary Health Centre, Pachod. Vishwanath was found to have suffered 98% burn injuries.

The Medical Officer of Pachod informed the police station. Dhanjai Mahadu Neel (PW-20) recorded the statements of Vishwanath (Ex.19) on 24.11.1991. Vishwanath thereafter was referred to Ghate Hospital for further treatement on 25.11.1991. His statement was again recorded on 26.11.1991 (Ex. 25) by the Head Constable Sahebrao More attached to City Chowk Police Station, Aurangabad. Yet again a statement (Ex. 32) was recorded by Sarveshwar Deshmukh Head Constable of Police Station Gondhi on 27.11.1991 as allegedly the incident had taken place within the jurisdiction of the said Police Station. The services of an executive Magistrate were requisitioned for recording his statement and one Shashikant, an Executive Magistrate yet again recorded the dying declaration (Ex. 34) on 27.11.1999 of the deceased. The deceased, thus, made four dying declaration in all.

The prosecution in support of its case examined ten witnesses.

PW-1 Baburao Narwade was seizure witness. He proved seizure

of a can containing Kerosene and match stick. PW-2 is Dhanaji Mahadu Neel Head Constable who recorded dying declaration of Vishwanath when he was admitted at Primary Health Centre, Pachod. PW-8, as noticed hereinbefore, is mother of the deceased. She deposed that Vishwanath had categorically told her immediately after the occurrence that it was the appellant who had poured kerosene on him and lit the fire.

Prosecution has also brought on record the evidence of doctors before whom dying declaration were recorded and who had certified that the deceased was in a fit state of health at the relevant time.

PW-5 Jalinder was said to be an eye-witness. He, however, did not support the prosecution case wholly. He was declared hostile. The learned Sessions Judge, while discarded the dying declarations as contained in Exhibits 19,25 and 32 in arrving at a conclusion that the appellant was guilty of commission of murder of said Vishwanath, relied upon the dying declaration dated 27.11.1991 (Ex. 34). The reasons assigned for discarding the said dying declaration were:

(i) The same were not in the question and answer form.

(ii) No medical opinion had been recorded in regard to the fact that he was in a fit condition to make the statement.

(iii) No endorsement had been made by the doctor in regard thereto on the dying declarations.

The High Court, however, held the said dying declarations to be reliable. It upheld the judgment of the learned Trial Judge holding the appellant to be guilty under Section 302 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for life.

Mr. S.V. Deshpande, learned counsel appearing on behalf of the appellant would in support of this appeal submit :

(i) The enmity between complainant and the deceased being admitted, the chance of his being falsely implicated cannot be ruled out.

(ii) PW-8 being an interested witness, the learned Sessions Judge as also the High Court should not have placed reliance on her deposition.

(iii) The courts below failed to take into consideration the plea taken by the appellant in his examination under Section 313 of the Code of Criminal Procedure which reads as under:

"Why the Prosecution witnesses are deposing against you?

A Ans: Deceased Vishwanath was unemployed. He was having habit of liquor. His mother has, partitioned the agricultural land to her sons, excluding him. On that count Vishwanath was having dispute with her mother. Due to that Vishwanath immolated himself. But to avoid from the prosecution all the witnesses are deposing falsely against me."

B (iv) The brothers of the deceased, viz., Baburao and Rama having been named in the dying declarations and their statements having been recorded by the Investigating Officer, there was no reason as to why the prosecution did not examine them.

Dying declarations which were four in number were made before different C authorities including a magistrate. The Executive Magistrate Shashikant was examined as PW-6. The learned Trial Judge was not correct in discarding the said dying declarations. It is now well-settled that a dying declaration if found to be acceptable the same need not be described to be in question and answer form.

D In *Laxman* v. *State of Maharashtra,* [2002] 6 SCC 710, the law has been laid down in the following terms:

"....Normally, therefore, 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 eyewitnesses state E that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying delclaration is not acceptable. A dying declaration can be oral or in writing and any adequate method F of communication whether by words or by signs of othwerwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure G authenticitiy it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value H or weight has to be attached to such statement necessarily depends

on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

It was further held:

"...It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration..."

In *Balbir Singh and Anr.* v. *State of Punjab,* (2006) 9 SCALE 537, it is stated:

"The law does not provide that a dying declaration should be made in any prescribed manner or in the form of question and answers. Only because a dying declaration was not recorded by a Magistrate, the same by itself, in our view, may not be a ground to disbelieve the entire prosecution case. When a statement of an injured is recorded, in the event of her death, the same may also be treated to be a first Information Report."

In all the dying declarations the appellant had been named, there does not exist any inconsistency therein dying declaration although are more than one, but being not contradictory to and inconsistent with each other, there is no reason as to why reliance should not be placed thereupon; it may be true that the Court while considering the credibility of such dying declarations seek corroboration. PW-8 in her evidence categorically stated that the deceased had stated that it was the appellant who has poured kerosene. The deceased was seen in flames by her. Accused was seen running away from this place.

A Brothers of the deceased who came immediately after the occurrence were not witnesses to the occurrence. Their non-examination did not prejudice the appellant as they neither saw the incident nor saw him running away from the scence of occurrence. They merely extinguished the fire and took the deceased to the hospital. Non-examination of these two witnesses might have assumed importance if the prosecution case was otherwise doubtful.

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Dying declarations were found to be reliable both by the learned Trial judge as also the High Court. We also see no reason to differ with the opinion of the courts below.

C Submission of Mr. Deshpande that the appellant was inimically disposed of toward the deceased is not a matter which by itself would lead to a conclusion that the prosecution case should not be believed. He had a motive to commit the offence. He has caused injuries to the deceased ten days prior to the incident. He picked up quarrel with him even on the date on which offence took place. The offence took place near the house of the deceased. D He in his dying declaration not only named the appellant but also given other details which were vital in nature. PW-8 may be the mother of the deceased but only beacuse she is an interested witness the same would not mean that her testimony should be discarded on that gorund.

Submission of Mr. Deshpande that the appellant in his examination E under Section 313 of the Code of Criminal Procedure, had made out a case of self-immolation by the deceased and that he falsely had been implicated cannot be given any credence as no such case was made out. Even to PW-8, no such suggestion had been given.

F Mr. Deshpande has placed strong reliance on *Lella Srinivasa Rao* v. *State of Andhra Pradesh,* [2004] 9 SCC 713 wherein in the first dying declaration, the appellant therein was not named. She was named only in the second dying declaration. It was in the aforementioned context, this Court opined that the first dying declaration was not reliable. The said decision cannot be said to have any application in the instant case.

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For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly.

N.J. Appeal dismissed.

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