AMARSINGH MUNNASINGH SURYAWANSHI

v.

STATE OF MAHARASHTRA

SEPTEMBER 27, 2007

[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Penal Code, 1860:

s. 302—Accused causing death of his wife by pouring kerosene and setting her afire—Absconding for about a month—Two dying declarations of deceased implicating her husband—Conviction by trial court—Affirmed by High Court—HELD: Conviction can be based on dying declaration alone, subject to the satisfaction of the court that the same is trust worthy—Nothing has been brought on record to show that death was a result of accident—Plea of accused that there was no intention on his part to cause the death cannot be accepted—Evidence—Dying declaration.

The appellant was prosecuted for causing death of his wife by setting her afire. The prosecution case was that the appellant was unemployed; he was said to be addicted to liquor and used to illtreat his wife who was working as a labourer. On the fateful day, while appellant's wife was serving food to him at about 9 P.M., he took out kerosene from the lamp, poured it on her and set her ablaze. He, thereafter, fled away. On hearing the cries the neighbours came and extinguished the fire. Somebody informed her uncle who visited her the following morning and took her to the hospital. In the hospital, two dying declarations were recorded: first by the Head Constable (PW-6) and the second by the Special Judicial Magistrate (PW-8). The victim died about 15 days after the incident. The appellant was absconding and he surrendered after about a month. Before the trial court, the son of the deceased (PW-2) was examined by the prosecution to prove the commission of offence, but he turned hostile. The trial court, however, on the basis of the two dying

A declarations, convicted the accused of the offence and sentenced him to imprisonment for life. The High Court dismissed the appeal.

In the instant appeal, it was contended for the accused-appellant that with regard to the dying declarations, no certificate was obtained as to the mental condition of the victim to make the statement; that
B the first dying declaration having been recorded in Marathi and the mother tongue of the deceased being Hindi, it created a doubt as to whether the deceased understood the implication of the statement made by her; and that PW-2, the only eye witness, did not support the prosecution case.
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Dismissing the appeal, the Court

HELD: 1. Indisputably, apart from the two dying declarations, no substantive evidence has been brought on record to prove the prosecution case. It is now a well settled principle of law that a
D conviction can be based on the dying declaration alone, subject of course, to the satisfaction of the Court that the same is trustworthy. [Para 13 and 27] [6-H; 9-D]

Ravi Kumar alias Kutti Ravi v. *State of Tamil Nadu,* [2006] 9 SCC
E 240; *State of Rajasthan* v. *Parthu,* (2007) 11 SCALE 460; *Raj Kumar Prasad Tamarkar* v. *State of Bihar and Anr.*, (2007) 1 SCALE 19; and *Virsa Singh* v. *State of Punjab*, [1958] SCR 1495, relied on.

P. Mani v. *State of Tamil Nadu,* [2006] 3 SCC 161; *K. Ramachandra Reddy and Anr.*, v. *The Public Prosecutor,* [1976] 3 SCC
F 618; and *Mehiboobsab Abbasabi Nadaf* v. *State of Karnataka,* (2007) 9 SCALE 473, distinguished

Nallapati Sivaiah v. *Sub-Divisional Officer, Guntur, A.P.,* (2007) 11 SCALE 477, referred to.

G 2. Both the witnesses who recorded the dying declarations satisfied themselves that the deceased answered the questions after understanding the effect thereof. The first dying declaration was recorded by P.W.6-Head Constable. He, before recording the dying declaration, took the opinion of the Medical Officer. He was told that
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the deceased was conscious and fit to make a statement. Only thereafter the statement of the deceased was recorded. The other dying declaration was recorded by P.W.8 who was the Special Judicial Magistrate. Before recording the dying declaration, this witness took the necessary precaution of obtaining the opinion of the medical officer as to whether the deceased was in a fit mental condition to give her statement and having received the answer in the affirmative, he recorded her statement in question and answer form. In the second dying declaration (Exhibit 43), not only the thumb impression of the deceased was taken but endorsement by the medical officer (PW-12) was also made to the effect that the deceased had all along been conscious when her dying declaration was recorded.

[Para 13, 16, 17 and 24] [7-A, F, G, H; 8-A, H; 9-A]

3. PW-6 categorically stated that before him the deceased gave statement in Marathi language although the mother tongue of the deceased was Hindi. The same does not make any difference as she being resident of Maharasthra for a long time was proficient in both the languages. Admittedly, the appellant(her husband) is a Marathi. The said dying declaration was not in question and answer form, but it was not necessary. The witness had categorically stated that he had been asking questions to which the deceased was giving replies.

[Para 15 and 21] [7-D-E; 8-E-F]

4. P.W.2 was the son of the appellant. He had remained with the relatives of the appellant for six years before he came to the court for deposition. If he has gone back from his statement made under Section 161, Cr.P.C., and has not supported the prosecution case, the same, by itself would not lead to the conclusion that the prosecution has failed to prove its case. [Para 34] [12-F-G]

5. There cannot be any doubt whatsoever that the appellant had not been able to prove his alibi. He did not examine any witness to support his case. He did not offer any explanation whatsoever as to why he was absconding for about a month. In a situation of this nature where admittedly the husband, wife and children were residing in one room, the prosecution having been able to prove that apart from the minor children, at the time of occurrence it was the accused and the

deceased alone who were residing in the house, it was for him to prove as to how the deceased met her death. The cause of death is not in dispute. Nothing has been brought on record to show that the death was a result of any accident. The fact remains that the kerosene was put on her body and fire was lit. The plea of the accused that there was no intention on his part to cause her death cannot be accepted. He must be held to be aware that such an act was likely to cause death in the ordinary course of nature.

[Para 35, 36 and 37] [12-H; 13-A-D]

Virsa Singh **v.** *State of Punjab,* **[1958] SCR 1495, relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 97 of 2006.

From the final Judgment and Order dated 19.07.2005 of the High Court of Judicature of Bombay Bench at Aurangabad in Criminal Appeal No. 576 of 1996.

S.D. Singh, Vijay Kumar, Vishwajit Singh and Makarand D. Adkar for the Appellants.

Chinmoy Khaladkar and Ravindra Keshavrao Adsure for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. (1) Appellant is before us being aggrieved by and dissatisfied with the judgment dated 19.7.2005 passed by a Division Bench of the Bombay High Court, Aurangabad Bench, in Criminal Appeal No. 576 of 1996 dismissing the appeal preferred by him against the judgment and order of conviction and sentence dated 7.9.1996 of the learned Additional Sessions Judge, Jalna under Section 302, I.P.C. in Sessions Case No. 24 of 1991.

(2) Kamlabai, the deceased, was married to the appellant 15 years prior to the incident which took place at about 9.00 p.m. on 7.6.1990. The couple had five children - two daughters and three sons - all being minor at the material time. Appellant was not doing any work. He was said to be addicted to liquor. Deceased used to work as a labourer in

Bajrang Dal Mill. A

(3) It is the case of the prosecution that she had all along been ill-treated by her husband. On the fateful day of 7.6.1990, she came from work at about 6.30 p.m. She had prepared food. At about 9 p.m. when she was serving food to the appellant, he took out kerosene from the lamp, poured it on her and set her ablaze. He, thereafter, fled away from the place. B

(4) On hearing her cries, the neighbours came and extinguished the fire. But she was left at lurch. It appears that somebody informed her uncle-Laxmansingh who visited her next day morning. He took her C to the Civil Hospital, Jalna.

(5) The said incident having been reported to the police authorities, the Officer In-charge of the Police Station asked the Head Constable Sitaram to visit the hospital. He visited the hospital at about 8.45 p.m. and recorded the dying declaration of the deceased which was marked D as Exhibit 37 before the learned trial Judge. On the said basis, a First Information Report was lodged. Another dying declaration was recorded by the Special Judicial Magistrate at about 3.15 p.m. on the same day. The said dying declaration was marked as Exhibit 43 before the learned Sessions Judge. E

(6) We may notice that the deceased breathed her last on 22.6.1990, i.e., about 15 days after the incident.

(7) Despite the appellant having been named in the First Information Report, in the aforementioned two dying declarations, he F could not be arrested as he was absconding. He surrendered only on 5.7.1990.

(8) Before the learned trial Judge twelve witnesses were examined on behalf of prosecution. Apart from P.W.2-Vinod son of the deceased, G no other witness was examined by the prosecution to prove the act of commission of the offence. He, however, turned hostile. It also appears that other prosecution witnesses also did not support the prosecution case.

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(9) We may, however, notice that the defence of the appellant was that at the relevant time he was in Bombay. In support of the said defence, however, he did not examine any witness.

(10) Learned trial Judge upon consideration of the materials on record, recorded a judgment of conviction against the appellant. He was sentenced to undergo rigorous imprisonment for life. Appeal preferred by him has been dismissed by the High Court by reason of the impugned judgment.

(11) Learned counsel appearing on behalf of the appellant would submit;

(i) none of the two dying declarations Exhibits 37 and 43 being reliable, the learned trial Judge as also the High Court committed a serious error in recording a judgment of conviction against the appellant;

(ii) no certificate having been obtained to the effect that the deceased was in a fit mental condition to make the said statement, the dying declaration should not have been relied upon;

(iii) one of the dying declarations having been recorded in Marathi language and another in Hindi, a doubt is created as to whether the deceased understood the implication of the statements made by her;

(iv) P.W.2-Vinod was the only eye-witness to the incident and he having not supported the prosecution case, the impugned judgment is wholly unsustainable;

(v) The learned trial Judge as also the High Court failed to apply their mind in regard to various infirmities in the prosecution case.

(12) Mr. Chinmoy Khaladkar, learned counsel appearing for the State, on the other hand, supported the impugned judgment.

(13) Indisputably, apart from the two dying declarations, no substantive evidence has been brought on record to prove the prosecution case. We will at the outset consider as to whether the said two dying

declarations are trustworthy in nature. The first dying declaration was recorded by P.W.6-Head Constable Sitaram. He before recording the dying declaration took the opinion of the Medical Officer. He was told that the deceased was conscious and fit to make a statement. Only thereafter the statement of Kamlabai was recorded.

(14) We have been taken through the deposition of Sitaram. It may be true that on the body of dying declaration, he did not mention as to whether the left thumb or the right thumb impression had been taken, but as has been noticed by the learned trial Judge that her left hand fingers being burnt and there being only some burn injuries on the right hand, only inference which could be drawn was that in the absence of any material having been on record to show that the thumb impression of the deceased was a forged one, it was the right thumb impression.

(15) The said witness categorically stated that he did take down the statement of the deceased in Marathi language although the mother tongue of the deceased was Hindi. Both the witnesses knew Hindi. They also knew Marathi. Before P.W.6- Head Constable Sitaram the deceased gave her statement in Marathi, which was recorded in the said language. The first dying declaration was not in the question and answer form, but it was not necessary. The witness had categorically stated that he had been asking questions to which the deceased was giving replies.

(16) The other dying declaration, as noticed, hereinbefore, was recorded by P.W.8-Sharad who was the Special Judicial Magistrate. He was asked by P.W.6 to record the dying declaration of the deceased. Before recording the dying declaration, this witness took the necessary precaution of obtaining the opinion of the medical officer as to whether she was in a fit mental condition to give her statement and having received the answer in the affirmative, he had recorded the statement of the deceased in question and answer form.

(17) In the said dying declaration (Exhibit 43), not only the thumb impression of the deceased was taken but endorsement of the medical officer was also obtained to the effect that she had all along been

A conscious when her dying declaration was recorded and an endorsement to that effect was also made by Dr. Shantilal who examined himself as P.W.12.

(18) From the evidence of Dr.Shantilal, it appears that the deceased had suffered superficial to deep burns being to the extent of 43-45%.She B died of septicaemia with shock due to extensive burns with cardio respiratory failure.

(19) The only contradiction which appears to have been brought on record in his deposition is that on the first day of the examination he stated C that he had made the endorsement after the dying declaration was recorded, but after he was recalled for re-examination and cross-examination he stated that he had made his signature on the margin of blank paper on which the dying declaration was recorded.

(20) Learned trial Judge, in our opinion, has rightly ignored the D aforementioned minor contradiction having regard to the fact that he was examined after more than six years after the date of making the aforementioned endorsement.

(21) So far as the submission of learned counsel that the first dying E declaration was recorded in Marathi and the second dying declaration in Hindi is concerned, the same, in our view, does not make any difference as she was proficient in both the languages. Her mother tongue being Hindi she evidently knew that language, but the same would not mean that she being resident of Maharasthra for a long time would not know the Marathi F language. Admittedly, the appellant(her husband) is a Marathi.

(22) The deceased, as noticed hereinbefore, suffered superficial to deep burn injuries and as such injuries were on the organs such as hands, fingers, legs, etc. She did not suffer any burn injury on the upper part of the body. She suffered agony and pain throughout the night of 7.6.1990.

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(23) We have noticed hereinbefore that on both the occasions the medical officer certified that she was in a fit mental state to give her dying declaration.

(24) Both the witnesses who recorded her dying declarations satisfied

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themselves that the deceased answered the questions after understanding the effect thereof. A

(25) Learned counsel submited that in the dying declaration dated 8.6.1990, the deceased in answer to the question as to who was at home, disclosed that besides she and her husband nobody else was there, although according to the prosecution case, P.W.2 Vinod was present. B

(26) It may be noticed that while answering the question which was posed to her, namely, when the incident happened who was at home? In answer thereto she had stated "I and my husband were there nobody else was there" which evidently would mean that no outsider was present. It is not the case of the appellant that children on the date of occurrence were residing somewhere else. C

(27) It is now a well settled principle of law that a conviction can be based on the dying declaration alone, subject of course, to the satisfaction of the Court that the same is trustworthy. D

(28) In *Ravi Kumar alias Kutti Ravi* v. *State of Tamil Nadu*, [2006] 9 SCC 240, this Court held as under :

> "5. ... The dying declaration is admissible upon consideration that the declarant has made it in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to the falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Notwithstanding the same, care and caution must be exercised in considering the weight to be given to these species of evidence on account of the existence of many circumstances which may affect their truth. The court has always to be on guard to see that the statement of the deceased was not the result of either tutoring or prompting or a product of imagination. The court has also to see and ensure that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy itself that the deceased was in fit mental condition to make the dying declaration, has to look for the medical opinion. Once the court is satisfied that the declaration was true and voluntary, it undoubtedly, can base its E F G H

A conviction on dying declaration without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely the rule of prudence."

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(29) Learned counsel appearing on behalf of the appellant, however, has strongly relied upon a decision of this Court in *P. Mani* v. *State of Tamil Nadu*, [2006] 3 SCC 161. In that case this Court noticed the factual matrix thus:

C "12. .....The incident admittedly took place inside a small room. It had two doors. The prosecution witnesses knocked on both the doors. Their call to the deceased to open the door remained unanswered and only then they took recourse to breaking open the door. According to them, not only the appellant herein was with D them at that point of time, but also he took part in dousing the flames. Indisputably, he took the deceased to the hospital. If the version of the deceased in her dying declaration is accepted as correct, the witnesses and in particular the neighbours would have lodged a First Information Report and in any event would not have E permitted the appellant to take her to the hospital."

"14. *Indisputably conviction can be recorded on the basis of dying declaration alone but therefor the same must be wholly reliable.* "

F (emphasis supplied)

The said decision,therefore, is of no assistance to the appellant as apart from the fact that factual matrix of the matter was different, as a proposition of law it has clearly been laid down that conviction can be based on dying declaration alone.

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(30) In *K. Ramachandra Reddy and Anr* v. *The Public Prosecutor*, [1976] 3 SCC 618, whereupon reliance has been placed this Court came to the conclusion that the prosecution case was not reliable at all. A large number of discrepancies were also found in the evidence H of the doctor vis-a-vis the Magistrate who had recorded the said dying

declaration. It was noticed:

> "11.....The magistrate P.W. 11 who recorded the dying declaration has admitted that the injured was suffering from pain and he was not in a position to sign and so his thumb impression was taken. The magistrate further admitted that the injured was taking time to answer the questions. The magistrate further admitted that the injured was very much suffering with pain. In spite of these facts the magistrate appears to have committed a serious irregularity in not putting a direct question to the injured whether he was capable mentally to make any statement."

(31) In *Mehiboobsab Abbasabi Nadaf* v. *State of Karnataka,* (2007) 9 SCALE 473, this Court held:

> " 6. Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied."

Recently, in *State of Rajasthan* v. *Parthu,* (2007) 11 SCALE 460, it was held:

> " (12) It is now a well settled principles of law that a judgment of conviction can be recorded on the basis of the dying declaration alone subject of course to the satisfaction of the Court that the same was true and voluntary. For the purpose of ascertaining truth or voluntariness of the dying declaration, the Court may look to the other circumstances. Apart from the fact, as noticed hereinbefore, that the homicidal nature of death was not disputed by the respondent herein and furthermore as he in his statement under Section 313 had raised a positive defence that she died of an accident, we are of the opinion the High Court adopted a wrong approach. It is not disputed that the deceased and the appellant were living separately from their family. It has also not been

A disputed that at the time when the incident occurred, the respondent was in his house together with the deceased. It is furthermore not in dispute that after the incident took place, the respondent was not to be found. He was arrested only on 20-6-1995. If the deceased and the respondent were together in their house at the B time when the incident took place which was at about 10 O'clock in the night, it was for the respondent to show as to how the death of the deceased took place."

(See also *Nallapati Sivaiah* v. *Sub-Divisional Officer, Guntur,* A.P.-(2007) 11 SCALE 477)

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(32) Learned counsel would submit that it was obligatory on the part of both P.W.6 Head Constable Sitaram and P.W.8 Special Judicial Magistrate-Sharad to satisfy themselves that the deceased was in a mental condition to make her statement and to prove the said fact it was obligatory D on their part to put a question in that behalf to the deceased. .

(33) In this case as noticed hereinbefore, when the dying declaration was recorded by P.W.6 Head Constable Sitaram, he consulted the doctor and recorded the dying declaration only after he satisfied himself on the basis of the advice given to him that the patient was in a fit mental condition E to give her statement. So far as dying declaration recorded by P.W.8 Special Judicial Magistrate-Sharad is concerned, we have noticed hereinbefore that he took all the precautions and in fact a medical officer was present when the said dying declaration was being recorded.

F (34) P.W.2 Vinod was the son of the appellant. He had remained with the relatives of the appellant for six years before he came to the court for deposition. If he had gone back from his statement made by him under Section 161, Cr.P.C., and did not support the prosecution case, the same, in our opinion, by itself would not lead to the conclusion that the G prosecution has failed to prove its case.

(35) There cannot be any doubt whatsoever that the appellant had not been able to prove his alibi. He did not examine any witness to support his case. He did not offer any explanation whatsoever as to why for about a month he was absconding. In a situation of this nature where admittedly

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the husband, wife and children were residing in one room, the prosecution having been able to prove that apart from the minor children, at the time of occurrence it was he and the deceased alone who were residing in the house, it was for the appellant to prove that how the deceased had met her death. This aspect of the matter was considered by this Court in *Raj Kumar Prasad Tamarkar* v. *State of Bihar and Anr.*, (2007) 1 SCALE 19.

(36) The cause of death is not in dispute. What was contended by the appellant was that the death was not homicidal in nature but it was a result of an accident. Yet again, nothing has been brought on record to show that the death was a result of any accident.

(37) The fact remains that the kerosene was put on her body and fire was lit. We, thus, cannot accept the plea of the learned counsel appearing on behalf of the appellant that there was no intention on the part of the accused to cause her death. He must be held to be aware that such an act was likely to cause death in the ordinary course of nature. (See *Virsa Singh* v. *State of Punjab*, [1958] SCR 1495).

(37) For the reasons aforementioned we do not find any merit in this appeal. The appeal is dismissed accordingly.

R.P. Appeal dismissed.