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SALIM GULAB PATHAN

v.

STATE OF MAHARASHTRA THROUGH SHO
(Criminal Appeal No. 1882 of 2010)

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MAY 10, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s. 302 - Murder of wife - By setting her on fire - Statement of deceased implicating the accused - Before three witnesses PWs 1, 3 and 4 immediately after the incident and to police constable (PW6) in the hospital - Doctor certifying that deceased was in fit mental condition to make the statement - Plea of discrepancies in the evidence of PW1 - Conviction by courts below - On appeal, held: Conviction justified in view of the dying declaration and the evidence of PWs 1, 3 and 4 - Dying declaration was admissible - Discrepancies in the evidence of PW 1 not material - Dying Declaration.

Evidence Act, 1872 - s. 32 - Dying Declaration - Dying declaration recorded by Police Officer - Efficacy of - The statement of a deceased recorded by police officer as a complaint and not as a dying declaration, can be treated as a dying declaration, if other requirements in this regard are satisfied.

The prosecution case was that the accused-appellant and his wife were living in the house of PW1 (father-in-law of the accused); that on the incident date, after a quarrel between the couple, the accused poured kerosene on his wife and set her on fire. She came running out of the house in a burning condition. PW1 alongwith PWs 3 and 4 extinguished the fire. The deceased stated to the witnesses that she was set on fire by the accused. She was taken to the hospital where,

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after certification of the doctor (PW2), she made statement before the police constable (PW6). The trial court convicted the accused u/s. 302 IPC. The High Court affirmed the conviction.

In the instant appeal, the appellant challenged his conviction contending that the alleged dying declaration (i.e. the statement of deceased as recorded by PW 6) was unworthy of credence and, that PWs 1, 3 and 4 being related to the deceased were interested witnesses and, as such, not reliable.

Dismissing the appeal, the Court

HELD: 1.1. A dying declaration would not lose its efficacy merely because it was recorded by a police officer and not by a Magistrate. The statement of a deceased recorded by a police officer as a complaint and not as a dying declaration can in fact be treated as a dying declaration, if the other requirements in this regard are satisfied. [Para 9] [938-C-D]

Paras Yadav vs. State of Bihar 1999 (2) SCC 126: 1999 (1) SCR 55; *Balbir Singh vs. State of Punjab* 2006 (12) SCC 283: 2006 (6) Suppl. SCR 636; *Atbir vs. Government (NCT of Delhi)* 2010 (9) SCC 1: 2010 (9) SCR 993 - relied on.

1.2. In a situation where PW 2 (doctor) has clearly certified, both at the time of commencement of the recording of the statement of the deceased as well as at the conclusion thereof, that deceased was fully conscious and in a fit mental condition to make the statement, the said opinion of the doctor who was present with the deceased at the relevant time is acceptable. Coupled with the above, there is the evidence of PW 1, PW 3 and PW 4 that immediately after the incident, the deceased had implicated her husband. In addition, the dying declaration stands fortified by the case

A history of the deceased recorded by PW 2 at the time of
her admission into the hospital. As regards the plea that
having regard to the extent of burn injuries suffered by
the deceased, it was not possible on her part to make the
statement which was recorded by PW-6, no such
B question was put to PW-2 in cross-examination. PW-2
has clearly deposed that the deceased had narrated the
history of the injuries suffered by her in the course of
which she had implicated her husband. PW-2 has also
deposed that the police constable (PW 6) had visited the
C burn ward and had recorded the statement of the
deceased. PW 2 and PW 6 cannot be attributed with any
intention to falsely implicate the accused. [Paras 11 and
13] [940-A-D; 941-A-C]

D 2.1. The collection of sample of earth alone by the
police from the place of occurrence as testified by PW 1
has to be understood in the context of the evidence of
PW 5 who has deposed that in addition to samples of
earth other articles were also seized and collected from
the place of occurrence. Once again, PW 5 is an
E independent witness. The discrepancies in the evidence
of PW 1, therefore, have to be understood as aberrations
or omissions that have occurred due to efflux of time.
[Para 13] [941-C-E]

F 2.2. The fact that the couple was living happily as
deposed by PW 1, PW 3 and PW 4 cannot certainly rule
out the incident, if the same can be established by other
evidence. The burn injuries on the accused besides not
being proved can also be understood to have occurred
G in the exchange that may have taken place after the
deceased had been set on fire. The alleged injuries on the
leg of the accused as claimed by him in his examination
under Section 313 Cr. P.C., remain unproved and
unexplained by the defence. [Para 13] [941-E-F]

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3. The courts below rightly convicted and sentenced the accused-appellant and there is no occasion to interfere with the same. [Para 14] [941-G-H] A

Case Law Reference:

1999 (1) SCR 55 Relied on Para 9 B

2006 (6) Suppl. SCR 636 Relied on Para 9

2010 (9) SCR 993 Relied on Para 10

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1882 of 2010. C

From the Judgment & Order dated 08.02.2007 of the High Court of Judicature at Bombay in Criminal Appeal No. 720 of 2002.

S. Mahendran, C.G. Sivakumaran for the Appellant. D

Shankar Chillarge (for Asha Gopalan Nair) for the Respondent.

The Judgment of the Court was delivered by E

RANJAN GOGOI, J. 1. This Appeal is directed against the judgment and order dated 08/02/2007 passed by the High Court of Bombay whereby the High Court has dismissed the Criminal Appeal filed by the appellant and confirmed the conviction recorded against the appellant under Section 302 IPC by the learned Trial Court. Following the aforesaid conviction, the accused-appellant has been sentenced to undergo R.I. for life along with fine. F

2. The short case of the prosecution, inter-alia, is that the deceased Nazabi was wife of the accused-appellant. They were staying in the house of PW 1, Akbar Sheikh, who is father of the deceased. According to the prosecution, at about 8.00 - 8.30 PM of 04.09.2001, PW 1 was sitting outside the house. At that time, there was some altercation going on inside G
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A between the accused-appellant and the deceased. Thereafter, the deceased came out and was sitting with her father. After sometime, the accused-appellant called the deceased inside and locked the door of the house. There was again a quarrel between the accused and the deceased in the course of which
B the accused poured kerosene on the deceased and set her on fire. According to the prosecution, the deceased came running out of the house in a burning condition and was followed by the accused who fled away from there. PW 1 along with PW 3 and PW 5 extinguished the fire and in the presence of the said
C witnesses, on being asked by PW 1, the deceased stated that she had been set on fire by the accused-appellant. Thereafter, according to the prosecution, the deceased was taken to the hospital where her statement was recorded by the doctor who informed the police of the incident. PW 6, Laxman, police
D constable, recorded the statement of the deceased at about 4.30 AM of 05.09.2001. Shortly thereafter at about 9.40 AM, the deceased, Nazabi, died. Inquest was held and the dead body was sent for postmortem examination. Thereafter, the First Information Report (Exhibit 10) was lodged by PW 1, Akbar Sheikh.

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3. After registration of the case, investigation was conducted by PW 5 in the course of which, PW 5 seized from the place of occurrence a plastic can containing kerosene; a match box with two burnt match sticks; broken pieces of
F bangles; samples of earth smelling kerosene; half burnt polyester sari etc. The said items were sent for chemical analysis. The report of analysis confirmed the presence of kerosene in all the said items. At the conclusion of the investigation, charge-sheet was submitted against the accused-
G appellant under Section 302 IPC. Charge under Sec. 302 IPC having been framed against the accused-appellant, the accused pleaded not guilty and wanted to be tried. In the course of trial, 7 witnesses were examined by the prosecution and none by the defence. From the statement made by the accused in his
H examination under Section 313 Cr. P.C., it appears that the

case of the accused-appellant was that the deceased had set herself on fire due to an altercation with her brother, who did not approve of the deceased staying in the house of her father. In fact, according to the accused, he had tried to put out the fire and was attacked by his brother-in-law resulting in injuries, which, the accused claims to have reported to the police. At conclusion of the trial held against the accused, the learned trial court, on the grounds and reasons mentioned, found him guilty of the offence under Section 302 IPC and accordingly, sentenced him to undergo RI for life along with fine. The said conviction and sentence having been affirmed by the High Court in appeal, the present appeal has been filed by the accused upon grant of leave by this Court.

4. Learned counsel for the appellant has contended that the principal basis of the conviction recorded against the accused is the statement of the deceased recorded by PW 6, the police constable which has been treated by the courts below as a dying declaration. Pointing out the evidence of PW 1, it has been urged that this witness has categorically stated that the deceased had not spoken to anybody while in the hospital and, in fact, the police had not come to meet the deceased at any time after her admission in the hospital till her death. In view of the aforesaid evidence, according to the learned counsel, the alleged dying declaration becomes unworthy of credence. Such a view, according to the learned counsel, is strengthened by certain other facts which have been proved by the evidence of the other prosecution witnesses. In this regard, the evidence of PW 1 that the police had collected only samples of earth from the place of occurrence and no other articles had been seized from the said place has been pointed out in contra distinction to the evidence of PW 5 that they had also seized broken bangles, a half burnt sari and a can of kerosene from the place of occurrence. The evidence of PW 1 that the deceased had suffered extensive burn injuries on both her legs and hands has been pointed out to question the authenticity of the left thumb impression of the deceased allegedly appearing

A in the dying declaration. The fact that the accused and the
deceased were living happily, as deposed to by PW 1, PW 3
and PW 4, has also been relied upon by the learned counsel
to demolish the prosecution case. Learned counsel has pointed
out that the evidence of PW 1, PW 3 and PW 4, particularly,
B the statement made by the deceased that she had been burnt
by her husband should not be accepted by the Court as the said
witnesses are related to the deceased and are interested
witnesses. No reliance, therefore, can be placed on the said
evidence either as evidence corroborating the alleged dying
C declaration or as independent evidence in support of the guilt
of the accused.

5. The learned counsel for the appellant has also
vehemently contended that in the present case, the evidence
of PW 2 would go to show that the deceased had suffered burn
D injuries to the extent of 92%. Learned counsel has pointed out
that, according to the prosecution, the said burn injuries were
caused at about 8.00 - 8.30 PM of 04.09.2001. The evidence
of PW 2, according to the learned counsel, established that the
deceased was brought to the hospital at 3.15 AM of
E 05.09.2001. She is alleged to have made the dying declaration
between 4.30 and 5.30 AM whereafter she died at about 9.40
AM. Pointing out the aforesaid details, learned counsel has
contended that it is extremely doubtful as to whether the
deceased was in a position to make the statement which was
F allegedly recorded by PW 6 as a dying declaration. The
endorsements made by PW 2, both at the beginning and
conclusion of the recording of the statement of the deceased,
to the effect that she was conscious and in a position to make
the statement has been seriously contested by the learned
G counsel. It is argued that the prosecution story has been
engineered at the instance of the nephew of PW 1 who is a
lawyer and the certification of the doctor is per-se unbelievable.

6. Opposing the contentions advanced on behalf of the
accused-appellant, learned State Counsel has vehemently
H contended that the dying declaration recorded by PW 6 is a

true and voluntary account of the circumstances in which the deceased had died. In fact, referring to the case history narrated by the deceased at the time of her admission in the hospital (Exhibit-12), learned counsel has pointed out that even at that time the deceased has implicated her husband which was further elaborated in the dying declaration recorded by PW 6. PW 2, the doctor as well as PW 6 the police constable, according to learned counsel, are independent persons who will have no occasion to falsely implicate the accused. It has been pointed out that PW 2 in his deposition had very clearly stated that after recording the case history as narrated by deceased at the time of her initial medical examination, namely, that she was burnt by her husband, he had informed the police. Thereafter, according to PW 2, PW 6 had come to the burn ward where the deceased was admitted and on being certified by him that she was fully conscious and fit to make a statement, the dying declaration was recorded. PW 2 has identified his handwriting and signatures containing the aforesaid endorsements (Exhibit-13) and has also identified the certification made by him on completion of the recording of the statement of the deceased (Exhibit-14). He has also identified the signatures of the police constable (PW 6) in the aforesaid statement of the deceased.

7. Learned counsel has also argued that the said dying declaration had been corroborated by PW 1, PW 3 and PW 4 before whom the deceased has narrated the same version immediately after the incident. The dying declaration also has been corroborated by the case history of the patient (the deceased) recorded by PW 2 at the time of her admission into the hospital. The evidence of PW 1, that the deceased did not speak to anybody in the hospital and that the police had not come to the hospital, have been sought to be explained by the learned counsel as mere inconsistencies/omissions which do not affect the core of the prosecution case. In short, the learned State Counsel has submitted that the dying declaration made by the deceased does not suffer from any infirmity so as to

A throw any doubt as to its credibility. As the same finds sufficient corroboration from the evidence of PW 1, PW 2, PW 3 and PW 4, there is no justification for not relying on the same. Learned counsel, has submitted that the dying declaration which is duly corroborated is a sufficient and safe basis for the conviction
B of the accused.

8. The principles governing the admissibility of a dying declaration as a valid piece of evidence, though no longer res-integra, may be usefully reiterated at this stage.

C 9. In *Paras Yadav Vs. State of Bihar*¹ and also in *Balbir Singh Vs. State of Punjab*², it has been held that a dying declaration would not lose its efficacy merely because it was recorded by a police officer and not by a magistrate. In *Paras Yadav* case (supra), it has been held that the statement of a
D deceased recorded by a police officer as a complaint and not as a dying declaration can in fact be treated as a dying declaration if the other requirements in this regard are satisfied.

E 10. In *Atbir Vs. Government*³ (*NCT of Delhi*) after an elaborate consideration of several decisions of this Court, the following propositions have been laid down with regard to the admissibility of a dying declaration:

"22. The analysis of the above decisions clearly shows that:

- F (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
- G (ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

1. [1999 (2) SCC126.

2. [2006 (12) SCC 283.

H 3. [2010 (9) SCC 1.

- (iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration. A
- (iv) 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 a rule of prudence. B
- (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence. C
- (vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction. C
- (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected. D
- (viii) Even if it is a brief statement, it is not to be discarded. E
- (ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail. E
- (x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration." F

11. Elaborate arguments have been advanced by the learned counsel for the appellant that having regard to the extent of burn injuries suffered by the deceased, it was not possible on her part to make the statement which was recorded by PW 6. In this regard, it will be sufficient to observe that no such

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A question was put to PW 2 in cross-examination. No expert opinion to that effect or any such view of any of the learned authors of acknowledged works on the subject have been cited before us to enable us to come to such a conclusion. In a situation where PW 2 has clearly certified, both at the time of commencement of the recording of the statement of the deceased as well as at the conclusion thereof, that deceased was fully conscious and in a fit mental condition to make the statement we will have no occasion not to accept the said opinion of the doctor who was present with the deceased at the relevant time. Coupled with the above, there is the evidence of PW 1, PW 3 and PW 5 that immediately after the incident the deceased had implicated her husband. In addition, the dying declaration stands fortified by the case history of the deceased recorded by PW 2 at the time of her admission into the hospital.

D 12. Viewed against the above evidence there are, indeed, certain statements in the evidence of the prosecution witnesses which may appear, at first blush, to be in favour of the accused, namely, that the accused and the deceased were living happily together; that the police had not come to visit the deceased in the hospital at any time before her death; that the deceased did not speak to anybody while in hospital; that only samples of earth were taken by PW 5, that the deceased had suffered burn injuries on both hands besides the fact that accused had also suffered some injuries.

F 13. A close reading of the evidence of the prosecution witnesses which we have undertaken leaves us satisfied that each of the aforesaid statement stands out in isolation and does not constitute a cohesive version of the prosecution case. That apart, several of the aforesaid statements can be reasonably understood in a manner different from the one that the appellant contends. That the deceased did not speak to anybody in the hospital and that the police did not visit the deceased in the hospital as stated by PW 1, has to be understood in the light of and balanced with the conflicting versions of PW 2 and PW 6 before any final conclusion can

be reached. PW 2 has clearly deposed that the deceased had narrated the history of the injuries suffered by her in the course of which she had implicated her husband. PW 2 has also deposed that the police constable (PW 6) had visited the burn ward and had recorded the statement of the deceased. PW 6, in his evidence had clearly disclosed that before meeting the deceased, PW 6 had spoken to PW 1 and another relation of the deceased. PW 2 and PW 6 cannot be attributed with any intention to falsely implicate the accused. The story of the nephew of PW 1 being involved in concocting the prosecution version stands unsupported by any evidence whatsoever. Similarly, the collection of sample of earth alone by the police from the place of occurrence as testified by PW 1 has to be understood in the context of the evidence of PW 5 who has deposed that in addition to samples of earth other articles were also seized and collected from the place of occurrence. Once again, PW 5 is an independent witness. The above discrepancies in the evidence of PW 1, therefore, have to be understood as aberrations or omissions that have occurred due to efflux of time. The fact that the couple was living happily as deposed by PW 1, PW 3 and PW 4 cannot certainly rule out the incident if the same can be established by other evidence. The burn injuries on the accused on which much argument has been made, besides not being proved can also be understood to have occurred in the exchange that may have taken place after the deceased had been set on fire. The alleged injuries on the leg of the accused as claimed by him in his examination under Section 313 Cr. P.C. similarly remain unproved and unexplained by the defence.

14. The above discussions lead us to the conclusion that the conviction of the accused-appellant as recorded by the courts below has been rightly made. We will, therefore, have no occasion to interfere with the said conviction as well as the sentence imposed on the appellant. The appeal consequently is dismissed.

K.K.T.

Appeal dismissed.