

MOHAMMED ARSHAD
v.
STATE OF MAHARASHTRA AND ORS.

NOVEMBER 24, 2006

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

Evidence Act—S.32— Dying declarations—Three dying declaration made by deceased—Role attributed to accused in third declaration did not find mention in first two dying declarations— Accused stated to have assaulted deceased with stick on his back—No such injury was found on his person— Held, he is entitled to benefit of doubt—Penal Code, 1860—ss.302/34.

Penal Code, 1860—ss.302/34—Deceased had an altercation with accused on two earlier occasions about which he had lodged a report— Evidence of eyewitnesses and Doctor, that vital injury could be inflicted with an article which overt act was ascribed to accused —Said weapon recovered pursuant to confession made by him—Conviction of accused upheld.

Prosecutions case was that PW-6 informed PW-11, Police Inspector about incident. When he reached the spot, he came to know that deceased was injured in quarrel with the appellant-Shaukat. Deceased was admitted in the hospital. While in hospital, deceased gave three dying declarations. First dying declaration was made before the Doctor. Second dying declaration was made before the Magistrate which was short one, wherein the deceased named appellant-Shaukat, one Saleem and others, as responsible for the said incident.

A third dying declaration was made before Investigating Officer which was detailed one. Therein he stated that he was doing partnership with appellant-Arshad and he had invested a sum of Rs.60,000 in the said business; that he wanted the said money back from Arshad but he did not pay back. He also narrated two incidents on 8th and 14th March in which altercation had taken place between him and appellant-Shaukat. He further stated that on the fateful day, one Salim stopped him on way and assaulted him with a knife, appellant-Shaukat assaulted him with knife on his chest and stomach while appellant-Arshad assaulted him on back by a wooden stick.

The deceased died three days after the incident. Sessions Judge relied

- A upon the evidence of PW-2, PW-6 and PW-7 as also the dying declarations of the deceased and held both the appellants and Salim guilty for offence u/ss. 302/34 IPC. The High Court upheld the same. Hence these appeals.

Allowing the appeal of Arshad and dismissing the appeal of Shaukat, the Court

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- C HELD: 1.1. Although the appellants and Salim were named in the First Information Report, but, it was only the deceased who could tell about the actual incident. He made three dying declarations. The 1st dying declaration was before the doctor wherein he did not name appellant-Arshad. Although, he named appellant-Shaukat and Salim and stated "others", but there is no reason as to why despite the fact that he had later on described the motive on the part of Arshad, he did not take his name as one of the assailants in his 1st dying declaration. [366-D-F]

- D 1.2. In the dying declaration before the Magistrate, deceased did not state in details the role played by each of the accused, as only three questions were put to him by the Magistrate. It was for the Magistrate to ask for the details of the incident. He did not do so and presumably, therefore, the deceased had no occasion to state about the incident in detail. [366-G]

- E 1.3. The dying declaration before the Investigating Officer is a detailed one. It is not in the question-answer form. He stated about his family at some details, his running of the business in partnership with Arshad as also the incidents which had taken place on 8th, 14th and 17th of March, 1999. The statements made by him corroborated the statements made by the eye-witnesses P.W.6 and P.W.7. [366-H; 367-A]

- F 2.1. It is of some significance to point out that although, the appellant-Arshad is stated to have assaulted the deceased with a stick on his back, no such injury was found on his person. He was not named in the first two dying declarations. He was named only in the 3rd dying declaration. The motive ascribed as against him did not find place in the First Information Report. G Evidently, the deceased made improvement in his 3rd dying declaration before the Police Officer. Keeping in view the backdrop of events, there is no reason as to why appellant-Arshad would not have been named in the 1st or 2nd dying declarations if the motive for his involvement was non-payment of a sum of Rs.60,000/- as was disclosed by the deceased. Thus, he is entitled to benefit of doubt. [365-C; 368-B, C]

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2.2. There is not much substance in the submission that when the Police Inspector P.W.11, made inquiries from P.W.6, the names of the appellants were not disclosed. That was not the occasion where the names could be disclosed as P.W.6 had only informed him about the incident. All the people must have been worried about the deceased. Furthermore, it is not in dispute that the incident took place at about 10.30 p.m., whereas the First Information Report was lodged at about 11.45 p.m. There was, thus, no reason to reject the testimony of P.W.6 in regard to Shaukat. Only because his clothes did not become blood stained, is not of much significance. He only helped the deceased to sit on the motorcycle, and the same may be the reason of his clothes not stained with blood. It is, therefore, unlikely that appellant-Shaukat had been falsely implicated, particularly, in view of the fact that as a sequel to the incident which took place on 8th and 14th March, the deceased had lodged a report. Furthermore, Doctor, P.W.10 in his evidence categorically stated that injury No.2, which was vital, could be inflicted with Article 12 which overt act was ascribed to the appellant-Shaukat. The said weapon was also recovered pursuant to the confession made by him. [367-B, E-H; 368-A]

Balbir Singh & Anr. v. State of Punjab, (2006) 9 SCALE 537 and *State of Maharashtra v. Sanjay s/o Digambarrao Rajhans*, [2004] 13 SCC 314, referred to.

CRIMINAL APPELLANT JURISDICTION : Criminal Appeal No. 1674 of 2005.

From the Final Judgment and Order dated 8-12-2004 of the High Court of Judicature at Bombay, Bench at Aurangabad in CrI. A. No.478 of 2002.

WITH

Criminal Appeal No. 1676 of 2005.

Uday Umesh Lalit, Sanjay R. Hedge, Anil K. Mishra, Vikrant Yadav, Sashidhar, Shamim Hadiar, Sudhanshu Choudhari, K.P. Sayed and Naresh Kumar for the Appellant.

V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. These criminal appeals arise out of a common judgment dated 8.12.2004 passed by a Division Bench of the High Court of Judicature

A at Bombay, Bench at Aurangabad in Criminal Appeal No.478 of 2002.

The appellants, along with one Syed Salim, were tried for commission of an offence under Section 302/34 of Indian Penal Code, 1860 ('IPC', for short) and were directed to suffer Rigorous Imprisonment for life. A fine of a sum of Rs.3,000/- each was also imposed.

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Abdul Karim (P.W.11), at the relevant point of time, was attached with Shivaji Nagar Police Station, Nanded as Police Inspector. He received an information at about 10.45 p.m. that an incident had occurred at Ashrafnagar. He went there in a police jeep and came to know that one Kayyum was injured in a quarrel, which took place between him and one Syed Shaukat. He came to learn that Kayyum was admitted in the Government Hospital. He went there and found him in the 'Out Patient Department' (OPD) in an injured condition. Before him a statement was made by Mohammed Shakeel (P.W.6) which was treated as a First Information Report.

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Since the deceased, Kayyum, was operated, his statement could not be recorded immediately. P.W.11, however, went to the place of occurrence on the next day and recorded statements of some witnesses. He recorded the statement of one Rauf, who was present in the hospital. He also seized the blood stained clothes of the victim.

E

While in hospital, Kayyum gave three dying declarations - one on 17.3.1999 before the attending physician, Dr. Kagane, who was examined as P.W.10. He gave a dying declaration before a Judicial Magistrate on 18.3.1999, which is very short one and is reproduced hereinafter :

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"I. S.B. Shaikh, 4th Judicial Magistrate 1st class, Nanded will ask you few questions and you may answer those without any fear.

Q. 1 What is your name and where do you stay?

Ans. Shaikh Khayum s/o Shaikh Nabisab, r/o Ashraf Nagar, Nanded.

G

Q. 2 How did the incident take place?

Ans. I have been injured by weapons on 17.03.99 in front of the house of Shaukat by Shaukat, Saleem and others.

Q. 3 Who is responsible for the said incident?

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Ans. The above mentioned people are responsible."

I have been read over the statement given by me and the same is correct. A

Thumb impression of left hand”

Yet again, a dying declaration was made before the Investigating Officer on 19.3.1999, which is a detailed one. Therein, the deceased disclosed that he was running business of fissile stone in partnership with appellant-Arshad and he invested a sum of Rs.60,000/- in the said business. He, however, wanted the said amount back from Arshad. Although, he was assured thereabout, Arshad did not pay him back the same. He furthermore narrated two instances, one of which took place on 1.3.1999. While he was riding a two-wheeler, accidentally it dashed with the motorcycle of Syed Shaukat who was sitting thereupon drinking water. He started abusing him. The matter was reported to the police station, but, on intervention of their parents no report was lodged and the matter was compromised. He narrated the second incident which took place on 17.3.1999 at about 6 O'clock when he and his cousin Mohammed Rais were going to the hotel 'Sailani' together, Syed Shaukat was standing in front of his house and asked as to why he had been looking at him, to which he replied in the negative. Shaukat, allegedly, threatened him saying that that was his last day and asked him to do whatever he could. He went to hotel 'Sailani' and thereafter reported the matter to the police station, of Shivajinagar. He came back to the hotel and discussed the matter with his friends. He, thereafter, having thought that his mother must be worrying, went to his house to tell about the incident to his family members. While returning from the hotel, when he reached in front of a mutton shop, Syed Salim (absconding) came on the road and asked him to wait and as soon as he stopped his motorcycle, he, allegedly, gave a call saying "Shaukat Bhai" and started assaulting him with a knife. At that time Shaukat and Arshad came running. Whereas Shaukat took out his knife and assaulted him in his chest and stomach, Arshad, allegedly, assaulted him on his back by a wooden stick. He, thereafter, started shouting and begged them not to hit him, whereupon several people came running and rescued him. They made him sit on the motorcycle and brought him to the hotel. The motive for alleged commission of the said offence, in his words, is as under: B
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"Therefore, S. Shaukat S. Kasim his brother-in-law S. Arshad s/o S. Hussain who are staying in my lane as I asked for the money in the contractorship of fissile stone (1) S. Shaukat S. Kashim (2) Saleem s/o S. Hussain (3) M. Arshad s/o M. Hussain assaulted me with knife and khanjar and wooden stick on my chest, right side of H

A neck, on right side of my bicep and with an intention to kill me have caused injuries to me. At present my health is good.”

The deceased died three days after the incident.

B Apart from the appellants and Syed Salim, it appears one Syed Maqдум was also prosecuted for commission of the said offence, although, he was not named in the dying declaration of the deceased. He, however, was acquitted. The learned Sessions Judge found the appellants herein as also the said Syed Salim to be guilty of commission of the offence under Section 302/34 IPC. The appeal preferred thereagainst by the appellants herein as also Syed Salim was dismissed. Both the learned Trial Judge and the High Court relied upon the evidence of Farukoddin (P.W.2), Mohammed Shakeel (P.W.6) and Mohammed Rais (P.W.7), as also the dying declarations of the deceased Kayyum.

C Before we advert to the depositions of the said witnesses as also the dying declarations of the deceased, we may notice the injuries suffered by the deceased, which are as under :

- D
- (1) Abrasion at nose anteriorly on left side. Size 2.5 x 1 cm. Brown scarp formed.
 - (2) Stitched wound of 3 stitches (2.5 cm.) at the neck on the right side on the lower aspect. On dissection track directed medially down-wards in right thoracic cavity. Pleura showed corresponding cut of 2.5 cm. (clean cut) with corresponding puncture wound of 2.3 cm. x 0.3 cm. x 1.5 cm. at upper lobe. Blood clots seen in the track and adherent to lung. Evidence of right haemothorax-1600 ml with few blood clots.
 - E
 - (3) Stitched wound at left side second inter-costal space, Mid-clavicular line (3 stitches) 2.5 cm. in length, stitches intact.
 - (4) Stitched wound at left side of chest, seventh inter- costal space anterior axillary (fold), Line (2 stitches intact) 1.5 cm.
 - F
 - (5) Stitched wound on chest right side, seventh inter costal space anterior axillary (fold) 3 stitches 2.5 cm.
 - G
 - (6) Stitched wound on abdomen on right siden Lumber region, (2 stitches intact) 8 cm. above iliac-crest.
 - (7) Stitched wound on abdomen right para medical, vertical, 11 stitches intact (suggestive of laprotomy).
 - H

- (8) Stitched wound over abdomen 2 stitches left side just below umbilicus. A
- (9) Stitched wound on right arm on middle third laterally 4 stitches intact.
- (10) Stitched wound on right elbow laterally four stitches intact. B
- (11) Stitched wound on right wrist medially, six stitches intact.
- (12) Stitched wound on right forearm middle third region medially (2 stitches intact).
- (13) Evidence of veni-section left ankle medially." C

It is of some significance to point out that although, the appellant-Mohammed Arshad is stated to have assaulted the deceased with a stick on his back, no such injury was found on his person.

Mr. Sanjay R. Hegde, learned counsel appearing on behalf of the appellant in Criminal Appeal No.1674/2005 - Mohammed Arshad would submit that the prosecution case cannot be relied upon inasmuch as : (1) the deceased had not named the appellant in two dying declarations; (2) an improvement was made by the deceased in his 3rd dying declaration, wherein some role was attributed for which no credence can be given. D

Mr. Uday Umesh Lalit, learned Senior Counsel appearing on behalf of the appellant in Criminal Appeal No.1676 - Syed Shaukat, pointed out that Farukoddin (P.W.2) was not an eye-witness. It was furthermore submitted that his evidence as regards the purported statements made to him by the deceased relating to the mode and manner of assault by the appellant and the said Syed Salim had not been believed by the High Court also. The learned counsel urged that Mohammed Shakeel (P.W.6) is also not reliable as although he had helped the deceased to sit on the motorcycle, his clothes did not become blood stained although, admittedly, the deceased received serious injuries and blood was oozing profoundly. Drawing our attention to deposition of Mohammed Rais (P.W.7), the learned counsel would contend that he had introduced one 'Dastiwala' and even his identity as accused No.4 had not been established. It was further submitted that both P.Ws.6 and 7 were interested witnesses, as P.W.6 was a friend of the deceased and P.W.7, admittedly, was related to him. E F G

In the First Information Report as also in his evidence, P.W.6 had named H

A the appellants herein and Syed Salim. He was an eye-witness. He categorically stated that whereas Salim had a khanjar in his hand, Arshad had a wooden stick. He also heard the deceased crying as "Save me", "Do not beat me". He also heard the deceased taking the names of the appellants and Syed Salim, whereupon he rushed to the spot and found them to be assaulting the deceased. The clothes of the deceased were stained with blood. He found
B injuries on his person. After the accused fled away, he helped the deceased to sit on his motorcycle and was taken to the hotel. Mohammed Rais (P.W.7) was another eye-witness. He deposed in regard to the business dealings by and between the deceased and Arshad. He also deposed in regard to the incidents which took place on 8th, 14th and 17th of March, 1999. Fakruddin
C (P.W.2), on the other hand, came to the spot immediately after the occurrence. He is not an eye-witness in the strict sense of the terms but the same is corroborative in nature. He, however, reached the spot immediately after the occurrence. As noticed hereinbefore, his testimony of the fact that the deceased told him about the participation of the appellants and Syed Salim had not been believed by the High Court.

D

It is no doubt true that the appellants and Syed Salim were named in the First Information Report, but, the deceased was the only person who could tell about the actual incident. He, as noticed hereinbefore, made three dying declarations. The 1st dying declaration was before the doctor. He did
E not name Mohammed Arshad, although, he named Syed Shaukat and Sayed Salim.

E

No doubt in his 1st dying declaration he named Shaukat and Salim and stated "others", but we do not find any reason as to why despite the fact that he had later on described the motive on the part of Arshad, he did not
F take his name as one of the assailants in his 1st dying declaration.

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The comments made by the learned counsel that in the dying declaration before the Judicial Magistrate he did not state in details the role played by each of the accused, cannot be accepted as only three questions were put to him by the learned Judicial Magistrate, out of which only question Nos.2
G and 3 are relevant. It was for the learned Magistrate to ask for the details of the incident. He did not do so and presumably, therefore, the deceased had no occasion to state about the incident in detail in his dying declaration before the learned judicial Magistrate. The dying declaration before the Investigating Officer, which was recorded on 19.3.1999, is a detailed one. It
H is not in the question-answer form. He stated about his family at some details,

H

his running of the business in partnership with Arshad as also the incidents which had respectively taken place on 8th, 14th and 17th of March, 1999. The statements made by him corroborated the statements made by the eye-witnesses - Mohammed Shakeel (P.W.6) and Mohammed Rais (P.W.7). Submission of Mr. Lalit that testimony of P.W.6 should not be believed, cannot be accepted. Only because his clothes did not become blood stained, in our view, is not of much significance. He only helped the deceased to sit on the motorcycle, and the same may be the reason of his clothes not stained with blood. There was, thus, no reason for us to reject the testimony P.W.6 in regard to Shaukat. It may be true that P.W.7 named one 'Dastiwala'. He, however, explained the same stating :

"....We reached the house. Kayum said that he would go back to hotel. Kayum left the house with Yamaha Motor Cycle, I followed him. I was on the bicycle. In front of house of Pasha, Salim stopped Kayum. Thereafter Salim, Shaukat, Arshad and Dastiwala were beating Ayub with stick Khanjar and Knife. I ran away after seeing them. I again say that I ran towards Kayum."

He, however, stated :

"....It is true that a person returning from 'Haj' pilgrimage wears white scarf (Dasti). It is not true that Suleman Pirani was always wearing white scarf."

We also do not find much substance in the submission of Mr. Lalit that when the Police Inspector Abdul Karim - P.W.11, made inquiries from Mohammed Shakil - P.W.6, the names of the appellants were not disclosed. That was not the occasion where the names could be disclosed as P.W.11 had only informed him about the incident. All the people must have been worried about the deceased. Furthermore, it is not in dispute that the incident took place at about 10.30 p.m., whereas the First Information Report was lodged at about 11.45 p.m. It is, therefore, unlikely that appellant - Syed Shaukat had been falsely implicated, particularly, in view of the fact that as a sequel to the incident which took place on 8th March he had lodged a report and in respect of the incident which took place on 14th March, the deceased had lodged a report.

Furthermore, Dr. Rajendra Kagane - P.W.10 in his evidence categorically stated that injury No.2, which was vital, could be inflicted with Article 12 which overt act was ascribed to the appellant. The said weapon was also

A recovered pursuant to the confession made by him.

We, therefore, do not find any merit in the appeal preferred by Syed Shaukat.

B So far as the appeal preferred by Mohammed Arshad is concerned, we are of the opinion that he is entitled to benefit of doubt. He was not named in the first two dying declarations. He was named only in the 3rd dying declaration. No injury by stick was found on the back of the deceased. The motive ascribed as against him did not find place in the First Information Report. Evidently, the deceased made improvement in his 3rd dying declaration before the Police Officer.

C Keeping in view the backdrop of events, we fail to see any reason as to why appellant Mohammed Arshad would not have been named in the 1st or 2nd dying declarations if the motive for his involvement was non-payment of a sum of Rs.60,000/- as was disclosed by the deceased.

D This Court in *Balbir Singh & Anr. v. State of Punjab*, (2006) 9 SCALE 537 relying upon several decisions of this Court including *State of Maharashtra v. Sanjay s/o Digambarrao Rajhans*, [2004] 13 SCC 314 and *Muthu Kutty & Anr. v. State by Inspector of Police, T.N.* [2005] 9 SCC 113 held :

E “We are of the opinion that whereas the findings of the learned Sessions Judge as also the High Court in regard to guilt of Appellant No.1 must be accepted, keeping in view the inconsistencies between the two dying declarations, benefit of doubt should be given to Appellant No.2. We, however, uphold the conviction and sentence of both the Appellants under Section 498-A IPC.”

F For the reasons aforementioned, while allowing Criminal Appeal No.1674 of 2005, Criminal Appeal No.1676 of 2005 preferred by Syed Shaukat is dismissed. Appellant Mohammed Arshad shall be released forthwith, if not required in connection with any other case.

D.G.

Crl. A.No. 1674 of 2005 allowed and
Crl. A.N. 1676 of 2006 dismissed.