

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL APPEAL NO. 527 of 1996**

STATE OF GUJARAT

Versus

PRAKASH @ PIDDU MITHUBHAI MULANI & 1 other(s)

Appearance:

MS KRINA CALLA, APP for the Appellant(s) No. 1

HCLS COMMITTEE(4998) for the Opponent(s)/Respondent(s) No. 1,2

MR. HARDIK K RAVAL(6366) for the Opponent(s)/Respondent(s) No. 1,2

CORAM: HONOURABLE MR. JUSTICE A.S. SUPEHIA

and

HONOURABLE MR. JUSTICE M. R. MENGDEY

Date : 04/09/2023

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. The present appeal has been preferred by the appellant - State under Section 378 of the Code of Criminal Procedure, 1973 (herein after referred to as the "Cr.P.C") challenging the judgment and order dated 08.04.1996 passed by Additional Sessions Judge, Kachchh-Bhuj in Sessions Case No.93 of 1994, whereby the respondents have been acquitted for the offence punishable under Sections 302 and 114 of the Indian Penal Code, 1860 (herein after referred to as the "IPC").

2. It is reported that accused no.2 – Raju Mithubhai Mulani has already passed away, and therefore, the appeal has abated qua him. Thus, the appeal is only confined to the accused no.1- Prakash @ Piddu Muthubhai Mulani.

3. At the outset, learned APP has submitted that the judgment of the Trial Court recording the acquittal of the accused is perverse and suffers from the vice of non-application of mind since the Trial Court has failed to appreciate the dying declaration of the deceased as well as the evidence of the

Executive Magistrate and the Doctors. While referring to the deposition of P.W.6 Chaitanyakumar Somalal Kansara, who was examined at Exh.21 on behalf of the prosecution, she has submitted that he has supported the case of prosecution and has categorically deposed that after recording the statement of the deceased implicating the accused, he has recorded the dying declaration. She has submitted that depositions of P.W.6 as well as P.W.11 Dr.Dayalbhai Mavjibhai Bhadra, who was examined at Exh.34 on behalf of the prosecution would reveal that the deceased was in fit state of mind and conscious. It is submitted that the accused no.1 had inflicted a blow on the vital part of the deceased on his neck, cutting the vital vein, which supplies the blood which resulted into death and hence, the Trial Court, without appreciating the aforesaid evidence, has committed an error in acquitting the accused.

4. Learned APP has further referred to the dying declaration at Exh.22, wherein the deceased had categorically named the three accused including the accused no.1 by his nick name Piddu. she has further referred to the complaint given by the deceased Exh.51 on 19.05.1994 naming the accused and the manner in which he was assaulted.

5. Learned APP has further invited attention of this Court to the observations made by the Trial Court in its judgment and submitted that the Trial Court has incorrectly observed that P.W.11 - Dr.Dayalbhai Mavjibhai Bhadra and P.W.14. Dr.Jethalal Govind Padshubiya were required to be examined in affirming the complicity of the accused. She has submitted that such observation is incorrect on the face of record, as P.W.14 -

Dr.Jethalal Govind Padshubiya was examined at Exh.46 on behalf of the prosecution, whereas P.W.11 – Dr.Dayalbhai Mavjibhai Bhadra was examined at Exh.34 on behalf of the prosecution. Thus, it is submitted that in fact, recording of the evidence by the Trial Court itself is perverse hence, the acquittal is required to be reversed.

6. In support of her submissions, learned APP has placed reliance on the judgment of the Apex Court in the case of **Bhajju @ Karan Singh Vs. State of Madhya Pradesh** reported in **(2012) 4 SCC 327** and the recent judgment of the Apex Court in the case of **Irfan @ Naka Vs. State of Uttar Pradesh** reported in **2023 SCC OnLine SC 1060** and asserted that if the dying declaration has been recorded in accordance with law and is reliable and gives cogent and plausible explanation of the occurrence of the events, then such dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. Thus, it is urged by learned APP that the impugned judgment and order may be quashed and set aside and the respondent no.1, who has inflicted fatal blow on the deceased may be convicted for the offence punishable under Section 302 of the IPC.

7. In support of her submissions, learned APP has placed reliance on the judgment of the Apex Court in the case of **Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra** reported in **(1973) 2 SCC 793** and submitted that the Trial Court should not have acquitted the accused for a serious offence like murder and such acquittal would tend to lead to a

cynical disregard of the law.

8. Learned APP has further submitted that the Trial Court, while recording the acquittal of the accused, was also impressed upon the compromise arrived at between the accused and sister of the deceased. She has submitted that for a serious offence like the offence under Section 302 of the IPC, a compromise, which is arrived at between the parties cannot be considered and the same cannot dilute such a heinous offence.

9. Mr.Hardik Raval, learned advocate for the respondent no.1 has opposed the present appeal inter alia contending that the acquittal of the Trial Court does not require any interference since the same is precisely passed by the Trial Court after appreciating the evidence.

10. Learned advocate for the respondent no.1 has submitted that the dying declaration recorded by the Executive Magistrate is not required to be believed since there is a dispute with regard to putting of the finger print on such dying declaration. While referring to the FIR produced at Exh.51, which has given by the deceased and to the evidence of the Executive Magistrate (Exh.21), it is submitted by him that there is discrepancy with regard to the putting of signature by the deceased by his left thumb. Thus, he has submitted that such dying declaration should be discarded, as the same has been precisely discarded by the Trial Court.

11. Learned advocate for the respondent no.1 has further referred to the deposition of P.W.11 Dr.Dayalbhai Mavjibhai Bhadra, who was examined at Exh.34 and submitted that his

deposition also does not implicate the accused in any manner. While referring to the dying declaration of the deceased, he has submitted that in fact, the deceased has only referred to the nick name of the accused no.1 as Piddu and there is no evidence to suggest that the accused no.1 is in fact known as Prakash @ Piddu Mithubhai Mulani. He has also invited attention of this Court to the observations made by the Trial Court and urged that the acquittal may not be entertained, as the only evidence is the dying declaration and the same cannot be considered for convicting the present respondent no.1- accused no.1 – Prakash @ Piddu for the offence punishable under Section 302 of the IPC.

12. We have heard the learned advocates for the parties at length and perused the material available on record. The evidence is also scaled by us threadbare. Before we examine the evidence further, it would be apposite to refer to the dying declaration given by the deceased at Exh.22. The same is recorded by the Executive Magistrate (P.W.6). The translated version is incorporated as under:-

“Question:- What has happened to you and why have you come to the hospital?

Answer:- Kali, piddu and Raju were making fun of my sister at eight o'clock at night today and as I prevented them from doing so, Kali and Raju caught hold of me and piddu inflicted knife blow on my throat. I did not have any dispute with them earlier nor I had any altercation. Kali has also threatened to kill me.

The above declaration is read over to me and it is true and correct as stated by me. I have made signature on the declaration to that effect. While recording this statement, no one is standing near my cot.

Recording of dying declaration got over at 23.55.”

13. The dying declaration (Exh.22) categorically refers three names as Kali, Piddu and Raju, who have assaulted the deceased. The role of the present applicant is specifically described by the deceased by stating that “*Piddu has inflicted a blow on his neck by knife*”. P.W.6 Chaitanyakumar Somalal Kansara, who was examined at Exh.21 on behalf of the prosecution has supported the case of prosecution. In his examination-in-chief, he has deposed that on 09.05.1994, at around 11.30 p.m., he was informed by the Aadipur Police Station to record the dying declaration in the form of Yadi and accordingly, he went to Rambaugh Hospital and in presence of the Doctor, he has recorded the dying declaration of the deceased. It is specifically deposed by the Executive Magistrate (P.W.6) that the deceased was fully conscious and he was able to interact. It is deposed that accordingly, a certificate was also obtained by him, and thereafter, he started recording the statement of the deceased on 11.45 p.m. till 11.55 p.m. He has further deposed that he has undertaken the thumb impression of the deceased. On a specific question asked with regard to thumb impression, as recorded in his evidence at Exh.21, the Executive Magistrate has specifically stated that since the accused was unable to put his signature, he has taken his thumb impression. The translated version of questions and answers are incorporated as under:-

“Question:- Why have you obtained thumb impression?”

Note:- The Defense has raised objection that this is leading question. The objection is rejected as the question is for

seeking clarification.

Answer:- I had read over the statement to him and he stated that the same was true and correct , therefore, the thumb impression was obtained to that effect. He denied to make signature and stated that he does not know to make signature and hence, his thumb impression was obtained.”

14. In the cross-examination, the Executive Magistrate has clarified that he had identified the thumb impression. The Trial Court has disbelieved the evidence of dying declaration (Exh.22) as well as Executive Magistrate (P.W.6) for the reason that it was doubtful whether the thumb impression, which was made on the dying declaration, was of left hand or right hand. Since the Executive Magistrate, in his cross-examination, has stated that the Glucose bottle from which the accused was administered the glucose, the needle was administered in his left hand, whereas in the complaint at Exh.51, the deceased had mentioned that since in the right hand, glucose bottle was being administered, he could not put his signature and hence, he has put the thumb impression on left hand. In the considered opinion of this Court, merely because there is minor discrepancy coming out with regard to the thumb impression whether it was left hand or right hand, the evidence of the Executive Magistrate as well as dying declaration of the deceased could not have been discarded by the Trial Court. The deceased was being treated at the hospital by three doctors i.e. P.W.11 – Dr.Dayal Mavjibhai Bhadra, P.W.12-Vinodbhai Ganesh Bakshi and P.W.14-Dr.Jethalal Govindbhai Padshubiya. P.W.11 – Dr.Dayal Mavjibhai Bhadra, in his evidence recorded at Exh.34, has categorically asserted that the

deceased was conscious and he was well oriented. He has described his injuries on his neck and has stated that such injuries would have been caused by muddamal article no.3 – knife. He has also issued the certificate which was produced at Exh.35, wherein it is revealed that the patient was well oriented, clothes were stained with blood and the certificate further reveals that there was stab wound on the right side of neck at the level of lower end of thyroid cartilage, stabbing C Sharp cutting and injuries were received around half an hour ago. Thus, the evidence of the said doctor indubitably reveals that the deceased had received grievous injuries on his vital part, cutting of his main veins.

15. Thereafter, P.W.12-Vinodbhai Ganesh Bakshi in his evidence at Page No.86, who was serving at Bhuj General Hospital as a Medical Officer and has treated the deceased at 1.00 O'clock in the night, has deposed that the condition of the deceased was very serious and there was excessive bleeding from his neck. After giving treatment, he referred to the ENT Surgeon Dr.Padshubiya. Finally, the deceased was treated by P.W.14-Dr.Jethalal Govind Padshubiya, who was examined at Exh.46 on behalf of the prosecution. The deposition of this doctor reveals that the deceased was administered glucose when he was brought to his hospital at Bhuj viz. G.K.General Hospital in the early morning at 2.00 O'clock on 10.05.1994. He has also described the injuries on his neck and has stated Jugular Vein was absolutely cut and accordingly, necessary surgery was undertaken. In his cross-examination, he has deposed that the operation was undertaken in the morning at 10.00 O'clock till 12.00 p.m. He has specifically denied the suggestion that during

his surgery, the Jugular Vein was cut. He has also denied due to his surgery, the deceased has passed away or his surgery has resulted into his death.

16. A combined reading of the aforesaid doctors, who had treated the deceased would reveal that he was admitted in a serious condition with fatal wound on his neck and ultimately, he succumbed to such injuries. It is also revealed that the deceased was in a fit state of mind and was well oriented and accordingly, the Executive Magistrate has also recorded that after asserting such state of mind, his dying declaration was recorded. The deceased had given a complaint on 09.05.1994 narrating the incident therein. He has specifically stated that on 09.05.1994, at around 10.00 p.m., when he was present at his home, his elder brother – Bharat informed him that when their sister - Sarla was coming at home, near the temple, there were three persons present in which the accused – Piddu, his brother Raju and Kali Mohandas were teasing her and also using abusive language and he went to the place along with Ratan Manohar (P.W.2) and at that time, when he warned the accused not to tease her sister, all of them got agitated. It is further stated in the complaint that the accused – Raju and Kali grabbed him, whereas accused – Piddu took out his knife and inflicted blow on his neck. He has further stated that thereafter, lot of people gathered there, listening to hue and cry and he was taken to the rickshaw at Rambaugh Dispensary. Thus, as per the cause stated in the complaint, the deceased was assaulted by the accused when he confronted them not to tease his sister. Thus, complaint (Exh.51) read in juxtaposition with his dying declaration (Exh.22), the complicity of the accused no.1 is

established beyond reasonable doubt. The Executive Magistrate has also stood the rigors of the cross-examination and has supported the case of prosecution.

17. The Trial Court has impressed upon the compromise arrived at between the parties. The P.W.3 Sarla Krishnamurti, sister of the deceased, who was examined at Exh.18 on behalf of the prosecution and P.W.2 – Ratan Manohar, who was examined at Exh.17 on behalf of the prosecution have not supported the case of prosecution in view of compromise. At this stage, we may also refer to glaring error committed by the Trial Court in recording the dying declaration (Exh.22) that the prosecution has not examined witnesses P.W.11 – Dr.Dayalbai Mavjibhai Bhadra and P.W.14. Dr.Jethalal Govind Padshubiya. Such finding is not only incorrect, but perverse since the very same Trial Court has examined P.W.11 – Dr.Dayalbai Mavjibhai Bhadra as well as P.W.14. Dr.Jethalal Govind Padshubiya and it is further recorded by the Trial Court that though P.W.11 – Dr.Dayalbai Mavjibhai Bhadra has issued certificate at Exh.22, he was not examined as a witness. Since we find that the dying declaration of the deceased does not in any manner suffer with any infirmity and is not tainted with any vice, as per the decision of the Apex Court in the case of **Bhaju @ Karan Singh (supra)**, such dying declaration is admissible and can certainly relied upon by the Court and could form the sole piece of evidence resulting the conviction of the accused. The Supreme Court in the case of **Bhaju @ Karansingh (supra)** has has observed thus:-

“22. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that [Section 32](#) of the Indian Evidence Act, 1872 (for short 'the Act') is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of [Section 32](#) makes the statement of the deceased admissible, which is generally described as a 'dying declaration'.

23. The 'dying declaration' essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

24. Once the Court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring 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 by other evidence.”

18. In the present case, there are two dying declarations in the form of FIR 09.05.1994 (Exh.51) as well as Exh.22, which is recorded by the Executive Magistrate, Gandhidham. As per the deposition of the P.W.17, the accused have surrendered themselves in the Police Station along with knife. The Investigating Officer especially deposed that accused – Prakash @ Piddu, Raju had come to the Police Station and accordingly,

he had undertaken the necessary panchnama at Exh.54, which reveals the name and the first part of the panchnama records that they have stated their names as Prakash @ Piddu, aged about 19 years, Resident of Adipur and accordingly, deposited the knife used in the offence. We may also refer to the FSL report produced below Exh.60, wherein the blood of the deceased has been found on the knife. A Rampuri knife in sample no.1 shown the presence of blood group "A" which is pitch matches with the blood group of the deceased (Sample No.7). The Trial Court has ignored such vital evidence and hence, in our considered opinion, with recording a perverse finding, the Trial Court has acquitted the present respondent no.1 from the offence punishable under Section 302 of the IPC. Hence, we set aside the acquittal recorded by the Trial Court. However, whether the conviction should be recorded under Section 302, 304(I) or 304(II) of the IPC, we would like to hear the accused no.1 – Prakash @ Piddu Mithubhai Mulani. Hence, the present appeal is ordered to be listed on **26.09.2023**. Registry is directed to issue bailable warrant of Rs.10,000/- to be served through concerned Police Station on the accused no.1.

(A. S. SUPEHIA, J)

(M. R. MENGDEY, J)

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