

PETITIONER:

ABDUL RAZAK HUSSEINSHABIR MOHMED SYED ETC.BALU @ JANARDAN SH

Vs.

RESPONDENT:

STATE OF MAHARASHTRA

DATE OF JUDGMENT: 10/09/1997

BENCH:

M. K. MUKHERJEE, K. T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

Present:

Hon'ble Mr. Justice M.K. Mukherjee

Hon'ble Mr. Justice K.T. Thomas

U.R. Lalit, Sr. Adv., A.M. Khanwilkar, Ms. Punam,
D. Goburdhen, MS. Pinky Anand, Shiv Kumar Suri and
S.M. Jadhav, Advs. with him for the appearing parties.

J U D G M E N T

The following Judgment of the Court was delivered:

Shabir Mohamad Syed

V.

State of Maharashtra

WITH

CRIMINAL APPEAL NO. 1137 OF 1995

Balu @ Janardan Shantaram Shirke

V.

State of Maharashtra

WITH

CRIMINAL APPEAL NO. 615 OF 1997

J U D G M E N T

MUKHERJEE, J.

In Sessions Case No. 122 of 1989 on the file of the Additional Sessions Judge, Fourth Court, Thane, seven persons were arraigned for rioting, five murders and other related offences. While acquitting two of them, the trial Judge convicted the other five under Sections 147, 342/149, 440/34 and 302/149 I.P.C. and sentenced them to different terms of imprisonment, including life, and fine. Aggrieved thereby the five convicts (who were arrayed as A1 to A5 in the trial Court) preferred appeals in the High Court which were dismissed. Assailing the dismissal of their appeals three of them namely A2, A3 and A4 have filed these appeals which have been heard together and this judgment will dispose of them.

2. Briefly stated the prosecution case is as under:-

(a) In the Waldhuni area of Kalyan City the Railway own a number of buildings, rooms of which are allotted to its employees. Eknath Brahmane (P.W.4), is one of such employees who was allotted room No.7 on the ground floor of Building No. 1003. That room was used by the two sons of Eknath, namely, Manohar and Sanjay as their study; and Eknath along

with his other family members lived in a nearby chawl;

(b) Two and a half months prior to the incident with which we are concerned in these appeals, Eknath and his friend Rajesh were arrested for attempting to commit the murder of Baksh Jamalkhan Pathan, brother of Amir Jamal Khan Pathan (A1) and, a week before the incident, they were released on bail. Since the attempt was made to commit the murder of his brother a1 bore a grudge against them.

(c) In the night of October 20, 1988 Sanjay along with his brother Manohar and friends Rajesh, Harshad and Roml were sleeping in their study. At or about 3.45 A.M. they woke up on hearing some noise from outside the window and found their beds splashed. They immediately got up and saw the accused persons pouring petrol inside the room through the window. Thereafter they set the room on fire by throwing an ignited match stick and left bolting the door from outside.

(d) A little when Kanhayalal, a regular milk supplier to the residents of the railway quarters, reached there he detected some fire in room No. 7. He immediately sent information to the family members of Rajesh and to Eknath. On receiving that information they rushed there and found the room locked from outside and fire inside. Eknath unlocked the room and saw Sanjay, Harshad and Romi lying dead on the floor of the room and Rajesh and Manohar in the bathroom in a critical condition. All of them had burn injuries on their persons.

(e) Eknath immediately reported the incident to the Police Station over telephone and arranged to send Manohar and Rajesh to Ulhasnager Central hospital. On receiving the telephonic message Inspector Nanavade reached the spot and having learnt that the condition of Manohar and Rajesh was deteriorating issued direction to S.I. Tulshiram (P.W.20) to get their statements recorded by a Magistrate. Service of Dr. Prem Narayan Talareja (P.W.16), a Special Executive Magistrate, were accordingly requisitioned. He went to the hospital and record their statements (Exh. 59 and 60). A formal complaint of Rajesh was also recorded by S.I. Shripat Malache (P.W.20) and on that complaint Police registered a case and took up the investigation. As the condition of Manohar and Rajesh was serious, they were transferred to K.E.M. Hospital, Bombay where the former died on October 26, 1988, and the later on the following day. On completion of investigation police submitted charge-sheet and in due course that case was committed to the Court of Session.

3. At the outset, we may point out that the prosecution case, to the extent it sought to prove that the above named five boys were set on fire while they were sleeping inside room No. 7 of Railway building No. 1003 and that owing to burn injuries they met with their death stands proved by overwhelming evidence on record. Since, this part of the prosecution case was not challenged by the accused persons in the Courts below we need not detail or discuss the evidence adduced in proof thereof.

4. To prove that the three appellants before us, namely Balu @ Janardan Shantaram Shirke (A2) Shabbir Mohammed Sayyed (A3) and Abdul Razak Hussein Pathan (A4) were amongst the miscreants who perpetrated the ghastly crime the prosecution relied solely upon the two dying declarations of manohar and Rajesh which recorded by P.W.16. Some other circumstantial evidence was also pressed into service by the prosecution to sustain the charges against A1 and A5 but as they have not preferred any appeal we need not detail the same. Both the Courts below found that the dying declarations were properly recorded and that it was

absolutely safe to make them the sole basis of conviction

5. To appreciate the comments made by the learned counsel for the appellants against reception of and reliance upon the dying declarations we may first refer to the evidence laid by the prosecution in proof thereof. Dr. Gaikwad (P.W.15), in whose presence the dying declarations were recorded, testified that he was on duty in the Central Hospital, Ulhasnagar from 9 P.M. on October 21, 1988 to 9 A.M. on the following day. At or about 5 A.M. (I.e. October 21, 1988) Manohar Bramhane and Baba were brought to the hospital by constable Chundrate of Mahatma Phule Chowk Police Station, Kalyan. On their examination he found that both of them had burn injuries: the extent of such injuries were 40% and 50% respectively. After preparing their case papers (Exts. 57 and 58 respectively) and admitting them in the hospital, he sent information to the police. At or about 6.30 A.M. a Police Inspector and a Special Executive Magistrate (P.W.16) came to the hospital and enquired of him about the condition of the patients. He then examined the level of their consciousness by asking their names and ages, we brought them to the hospital and as to what had happened to them. He found that they were able to make statements and, accordingly he made identical endorsements in the margin of the two papers in which the dying declarations were to be recorded (Exts. 59 and 60). The endorsements made by him in the margin reads as under;

"Patient is conscious and able to give statement.

6. He next deposed that after he made the above endorsements certifying the conditions of the patients the Special Executive Magistrate got the dying declarations recorded, one after the other, by a constable who was on hospital duty. The Special executive Magistrate put the questions to the patients and answers given by them were recorded by the police constable in 'Marathi'. After the dying declarations were recorded the patients put their signatures on their respective dying declarations. Then he (P.W.15) again examined the patients and found that they were conscious. Accordingly he made another endorsements on the dying declarations which reads as under:-

"Patients is conscious and able to give statement and was to through out his statement which is taken in my presence."

7. In this testimony Dr. Prem Narayan Talareja (P.W.6), the Special Executive Magistrate, stated that on being requested by the Sub-Inspector of Police he went to the hospital at 6.45 A.M.. to record dying declarations of two persons. Reaching there he met Dr. Gaikwad (P.W.15) and enquired of him about the patients and further asked him to verify whether those patients were in a position to give statements. Accompanied by the doctor he then went and reached the patients' beside Dr. Gaikwad examined both the patients by putting certain questions and they were replied correctly. Accordingly Dr. Gaikwad made endorsements about the condition of the patients on two papers and he handed over that to him. On being satisfied about their health, he requested the doctor to call the police constable who was then on hospital duty to write down the declarations of the patients as he (P.W.16) could not write 'Marathi', though he could speak and follow that language. After the constable was brought he (P.W.16) started putting questions in 'Marathi', first to Manohar and the answers give by him were written down by the constable. He followed the same procedure in respect of the other patient. On perusal of the

evidence of the doctor and the Special Executive Magistrate, we find that they corroborated each other and their evidence clearly establishes that both the declarants were conscious and able to make statements. There is nothing on record also to indicate as to why they would depose falsely.

8. That brings us to the contents of the two documents (Exts. 59 and 60). Both the declarants were first asked about their name, address, age, occupation and their residence. Thereafter each of them was asked as to how they received the burn injuries. In answer thereto Manohar told that he along with Romeo, Harshad, Sanjay and Rajesh slept in room No. 7 of building No. 1003 on October 20, 1988 at or about 10.30 P.M. In the following morning at about 3.45 hours he heard the noise of the window and got up. He found some cold liquid falling on his body. At that time he saw the following persons standing in front of the window; (i) Amir Pathan residing at Waldhuni, (ii) Richard Philips residing at Waldhuni, (iii) Baba, brother of Lambu Yusuf, residing at Machhibazar (iv) Sabir, brother of Babadu and (V) Baba Shirke residing at Kalyan Rambaug. They threw petrol through the window of the room which fell on his body as also on the bodies of others. He was lastly by P.W.16 what was the reason for burning them. The answer of Manohar to that was that Amir told them that you people had killed my brother Mohamad and hence I will not keep you alive. Manohar further stated that the above persons were angry about the assault on Mohamad Pathan and hence they conspired together to throw petrol on them. He lastly stated that Amir latched the room from outside and set the fire in the room. As a result, Romeo, Harshad and Sanjay died on the spot, while they were taken to the hospital. The statement made by Rajesh is in conformity with and corroborates that of Manohar so far as the manner of setting them of fire as also the names of the miscreants.

9. In assailing the dying declaration, it was first submitted on behalf of the appellants that P.W.16 admitted that he was not authorised to record a dying declaration and hence the Courts below ought not to have placed any reliance upon them. This contention has to be stated only to be rejected firstly, because, our attention has not been drawn to any Rules which require that without empowerment in Executive Magistrate cannot record a dying declaration; secondly, because, even if there is any such Rule absence of such power does not in any way undermine the status of P.W.16 as an Executive Magistrate; thirdly, because there is uncontroverted evidence on record that no other Special Executive Magistrate was readily available for the purpose; and lastly because there is no requirement of law that a dying declaration must necessarily be made to a Magistrate. It appears that the above contention was raised before both the Courts below, and it was negatived in view of the evidence on record and relying on the following passage from judgment of this Court in Ramawati Devi Vs. State of Bihar [A.I.R. 1983 S.C. 164]:

"A statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible under Section 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying

declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case, In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case."

10. It was next contended that as the dying declaration were not made by the two victims at the earliest available opportunity the possibility of their being the outcome of tutoring by interested parties could not be excluded in elaborating this contention it was submitted that prior to the recording of the dying declarations by the Magistrate, the victims were questioned by the Investigating Officers as also by Dr. Gaikwad (P.W.15), but before them they did not mention the names of the miscreants. This connection is also without any substance. From the evidence it appears that both of them were rushed to the hospital in a critical condition and immediate steps were taken by the Investigation Officer to record their statements in details. So far as the doctor is concerned, we have already noticed that it was only after the Magistrate came that he ascertained whether the patients were able to make any statement. In or considered opinion the circumstance which clearly negates an inference that the statements were tutored to implicate the appellants falsely is that there is nothing on record to suggest that either of the two victims or any member of their family had any axe to grind against them (the appellants). This apart, considering the time when, and the manner in which, the incident took place no person, other than the victims could have known the miscreants and, therefore, the question of furnishing their names by others could not have arisen.

11. On behalf of the appellants our attention was drawn to the cross-examination of P.W.15, where he started, inter alia, that one of the patients disclosed his name as 'Rajesh' at the time of recording of his dying declaration, but earlier when his name was asked for filling in his case papers (Ext. 58) he gave his name as 'Baba Tike'. P.W.15 further stated that when two names were stated by the same person he (P.W.15) felt that the said patient might be hallucinating. According to the learned counsel, in view of the above answers given by the doctor it must be said that the patient was not in a position to make a dying declaration and that whatever he told was due to hallucination. This contention also does not merit acceptance for the dying declaration of Rajesh corroborate in all material particulars with that of Manohar including the names of the miscreants which necessarily mean that at the time his dying declaration was recorded Rajesh was in a proper frame of mind, even if earlier he was not so. Having given our anxious consideration to the entire evidence relating to the dying declarations, we are in complete agreement with the Courts below that they can be safely made the basis of conviction.

12. The only other question that remains to be answered is whether from the above dying declarations the identities of the three appellants as the miscreants has been properly and

correctly established. It was submitted on behalf of the appellants that from the vague and cryptic description of the miscreants given in the dying declaration it could not be said that three of them mentioned therein unmistakably referred to the appellants. As earlier noticed, the prosecution sought to establish that of the five miscreants named in the dying declarations Balu shirke referred to A2, Shabir to A3 and Baba (Lambu Yusuf's brother) to A4. Having considered the evidence relating to this aspect of the matter we are of the view that identifications of A2 and A3 stand fully established but not that of A4. So far as A2 is concerned, apart from his name his place of residence was stated in the dying declarations and he was arrested therefrom. Indeed, during the trial it was not even suggested that he was not a resident of the place mentioned in the dying declaration. So far as A3 is concerned, we find that in his examination under Section 313 Cr.P.C. when he was told that he was described as brother of Babdu he denied the same. Relying upon the above answer it was submitted before us that in absence of any other evidence to prove that 'Shabir' mentioned in the dying declarations referred to A3 his identity could not be said to have been established. We do not find any substance in this contention for it was decided in cross-examination of P.W.21 that the address of A3 as given in the charge-sheet was his own house. It was also elicited from him that A3 was the brother of Babadu. There cannot be any manner of doubt, therefore, regarding the identify of A3. As regards A4 he was sought to be identified with reference to his having a brother by the name 'Lambu' Yusuf. When his identification on the basis thereof was assailed before the trial Court, it wrongly took note of the fact that he was described as 'Lambu' and since, according to the trial Court, he was the tallest among the persons who were facing the trial it concluded that he was correctly identified. The conclusion drawn by the trial Court is not only factually incorrect but also presumptive. A4 is therefore entitled to the benefit of reasonable doubt.

13. For the foregoing discussion, we dismiss Criminal Appeal Nos. 1136 and 1137 of 1995 preferred by Shabir Mohamad Syed (A3) and Balu @ Janardhan Shantaram Shirke (A2) respectively and allow Criminal Appeal No. 615 of 1997 preferred by Abdul Razak Hussain (A4). A4 who is in jail be released forthwith unless wanted in connection with some other case.