

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Appeal No.102 of 2010

- 1) Ramesh s/o Rangrao Walsange,
Age 32 years,
Occupation : Labour,
R/o Zinnath Society,
Taluka and District Latur.
- 2) Suresh s/o Rangrao Walsange,
Age 37 years,
Occupation : Labour,
R/o Zinnath Society,
Taluka and District Latur.
- 3) Malanbai w/o Rangrao Walsange,
Age 67 years,
Occupation : Household,
R/o Zinnath Society,
Taluka and District Latur. **.. Appellants.**

Versus

- * The State of Maharashtra,
Through S.H.O. Police Station
Gandhi Chowk, Latur,
Taluka and District Latur. **.. Respondent.**

Shri. N.B. Suryawanshi, Advocate, appointed for
appellants.

Shri. S.D. Kaldate, Additional Public Prosecutor, for
respondent.

**CORAM: NARESH H PATIL &
T.V. NALAWADE, JJ.**

DATE : 27th MARCH 2012

JUDGMENT (Per Naresh H Patil, J.):-

1) The appellants were charged for an offence punishable under sections 302,498A read with section 34 of the Indian Penal Code for causing death of deceased Jayashri by pouring kerosene on her person and for setting her ablaze on account of demand of Rs.5000/- and other articles. The appellants were tried in Sessions Case No.30 of 2008. The appellants were sentenced to suffer life imprisonment for offence under section 302 read with 34 of the IPC. The appellants were however acquitted of the offence punishable under section 498A read with 34 Indian Penal Code. The original accused No.4 – Manisha is acquitted of all the charges.

2) In brief, the prosecution case is that deceased Jayashri was married to accused / appellant No.1 Ramesh before about 6 years of the incident. Appellant No.2 Suresh is elder brother-in-law of the deceased. Appellant

No.3 is mother-in-law of the deceased. The prosecution alleges that after few months of the marriage the accused started demanding Rs.5000/- for running grocery shop, golden ring, clothes from the parents of the deceased and on that count started ill-treating the deceased. This was disclosed by Jayashri to her parents but the parents could not satisfy the demand of the appellants.

3) On 15-2-2008 at 9 am, the prosecution case suggests that, accused were asking the deceased why she did not bring Rs.5000/- and golden ring and started abusing and assaulting her. Her husband instigated to set her on fire and her brother-in-law, accused No.2, brought stove and by pouring kerosene on her body from the stove, with intent to kill her, ignited a match stick and set her on fire. The deceased started shouting. The neighbourers came and extinguished fire by pouring water. The deceased was taken to Civil Hospital Latur. Her statement was recorded by Police Sub Inspector Rejitwad. On intimation received, the Special Executive Magistrate also recorded dying declaration of the deceased. The dying declaration recorded by the Police Sub Inspector is at

Exhibit 56 and the dying declaration recorded by the Special Executive Magistrate is at Exhibit 50. Crime was registered at Crime No.32/2008 for offence under sections 307, 498-A read with section 34 of the Indian Penal Code.

4) The police started investigation. The investigating officer seized burnt pieces of clothes from the house of the deceased under panchnama, recorded statements of the witnesses and the accused were arrested. The seized clothes of the accused were sent for chemical analysis. The deceased died on 21-2-2008. Inquest panchnama was prepared. After completing the investigation charge sheet came to filed.

5) The charge was framed on 19-6-2008 against the accused persons. The accused pleaded not guilty and claimed to be tried.

6) We may now proceed to discuss the prosecution case as per narration of the witnesses.

7) PW 1 is Manik Suryawanshi who was called by police to Police Station Gandhi Chowk, is a panch in,

respect of panchnama of seizure of clothes on the persons of the accused Ramesh and Suresh. According to the witness, the clothes were smelling of kerosene. The panchnamas are at Exhibits 27 and 28.

8) PW 2 is Shaikh Ismile Sattar Shaikh, who was also examined as panch. He saw burnt pieces of clothes in the courtyard, they were smelling of kerosene. The article like stove was lying there without any lid. Some quantity of kerosene was lying in the tank. A match box, half burnt clothes and saree, lid of metal were noticed. These articles were seized under panchnama (Exhibit 30). The panch has identified the articles.

9) PW 3 is Balaji Jawalgekar, who is father of the deceased Jayashri. According to the witness, she was married with appellant No.1 before six years of the incident. After few months of the marriage the appellants started ill-treating the deceased on account of demand of money, golden ring and other articles. On 15-2-2008 he received a phone call that deceased was burnt. So he rushed to the residence of his daughter at 9.15 a.m. along

with his wife. The deceased was residing in Zinnath Society. He saw that his daughter was lying in the courtyard in burnt condition. Nobody was present there when he went to the spot. The deceased told him that if he would have given Rs.10,000/-, golden ring and clothes then the accused would not have quarreled and the accused would not have set her on fire. She disclosed that on account of demand the accused have set her on fire by pouring kerosene on her person. He further stated that mother of the appellant No.1 had given match box to accused Suresh and accused Suresh by igniting match stick set her ablaze. The deceased stated that in the scuffle her husband - accused Ramesh sustained injury to his left eye brow. The witness took the deceased in a rickshaw to the Civil Hospital Latur.

In the cross examination the witness stated that he was not aware who were residing in which room of the house. The marriage of accused Suresh was performed before marriage of his daughter. Suresh was working in a shop of Neha Fertilizer at Gulmarket, Latur. According to the witness Suresh used to attend his duties from 9.00

a.m. to 10.00 p.m. Suresh was having two children. The witness admitted that, they were financially poor. The witness further admitted that till the incident he never made any complaint about ill-treatment to his daughter. When he reached the house of the deceased he saw some persons gathered there. He was not aware whether neighbours had extinguished the fire. Certain contradictions are also noticed in the evidence of this witness in respect of relations of the appellant No.1 with deceased. The deceased was unconscious when he saw her. The whole body was burnt. Submissions of the defence were denied in respect of cause of death of the deceased.

10) PW 4 is Dr. Mushir Shaikh Shahadula Shaikh. He examined accused Ramesh and noticed that he had contused lacerated wound over frontal region above left eye brow which was having size 1 x 1 x 1 cm caused by hard and blunt object and the injury was grievous in nature. He issued certificate (Exhibit 38). This injury was caused within 24 hours.

11) PW 5 is Vajinath Tulshiram Sude, Head Constable who carried the muddemal articles to the Chemical Analyzer, Aurangabad.

12) PW 6 is Vikrant Gaikwad, who was working as Special Executive Magistrate. He recorded dying declaration of deceased Jayashri. According to the witness, he contacted the doctor who examined the patient and told him to record the statement of the deceased. The doctor had put endorsement. He recorded the statement of the deceased. He narrated the statement given by the deceased before him. According to the witness, the deceased stated before him that accused Ramesh called her mother-in-law, brother-in-law and his wife i.e. sister-in-law. Ramesh and her brother-in-law had taken kerosene from stove and poured it on her body and set her ablaze. A match stick was given by her mother-in-law. According to the witness, the patient was totally burnt. Both palms and feet were burnt. The patient was administered saline. She was suffering with pain and was asking for water. The doctor told an old person, who was sitting near the patient, to convince the patient for giving

statement and not to ask for water. That old person told the victim to make statement. The witness denied that the old person was father of the deceased. The witness stated that the patient was not speaking clearly. As the patient was severely burnt he had obtained impression of toe of the victim. There was no ink put on her toe.

13) PW 8 is Dr. Bhimrao Patil who was working as Medical Officer on 15th February 2008 in Civil Hospital Latur. The deceased was admitted in the hospital. The witness stated that, father of the deceased admitted her in the hospital. As per the history of the patient it was alleged of homicidal burns. PSI Rejitwad wanted to record statement of the deceased. Therefore the doctor examined the patient and had given his opinion about consciousness of the patient. The said opinion is at Exhibit 54. At the time of recording the statement, the witness and the PSI only were present. Thereafter Special Executive Magistrate Mr. Vikrant Gaikwad had recorded the statement and the doctor examined the patient again and given endorsement in respect of her being conscious to record the statement. The second opinion is at Exhibit 50.

According to the doctor the Magistrate obtained thumb impression of the patient. In his cross-examination the witness deposed that in the medical case papers at Exhibit 62 in the history word 'accidental' is scratched and word - 'homicidal' was written. The witness stated that before recording the statement he had not endorsed on the statement about the consciousness of the patient but he made endorsement after recording of the statements by the police and the Executive Magistrate. The patient was prescribed fortwing and phenaraga after recording the statements. The witness was not aware as to which thumb impression of the patient was obtained after recording the dying declaration.

14) PW 8 is Hanmant Rejitwad, Police Sub Inspector. He recorded the statement of the deceased and obtained thumb impression of the patient. He conducted the investigation, drew spot panchnama (Exhibit 30), seized muddemal articles, clothes of the accused and also got the appellant No.1 - Ramesh examined from doctor as he had suffered injuries. The witness admitted that he did not make any entry in the station diary before going for

recording statement. He further admitted that there is no entry in the station diary regarding the inquiry made by him in the civil hospital. Neither he had given written letter to the doctor nor the doctor gave any written opinion regarding recording of the dying declaration. The house of the accused was situated in thickly populated locality. The witness deposed that he tried to record statement of the neighbourers of the accused regarding the incident. Though he enquired in respect of any eye witness being available but found that nobody was available, according to him.

15) We have perused the opinion of the medical officer, who conducted post mortem, in respect of cause of death as "Septic shock due to burns". The post mortem report is at Exhibit 39.

16) The prosecution case is mainly based on acceptance of dying declarations of the deceased Jayashri. The first dying declaration is stated to be recorded by P.S.I. Rejitwad (Exhibit 56) on 15-2-2008. In respect of the incident in question she stated that on 15-2-2088 at about

9 O'clock in the morning the appellants and acquitted accused Manisha were abusing her as she did not bring Rs.5000/- and golden ring. The appellants and Manisha started assaulting her. Thereafter appellants told that they will burn her. Thereafter, brother-in-law poured kerosene from stove on her person stating that she will not be allowed to survive. And with this intention he took out a match stick from the match box and set her ablaze. At that time the neighbourers tried to extinguish the fire. She was completely burnt. The deceased had stated in detail past history in respect of demand and the incident in question happened on 15-2-2008 and summed up the dying declaration with allegations made against the appellants.

17) The second dying declaration is recorded by Special Executive Magistrate, Vikrant Gaikwad. Perusal of the said dying declaration (Exhibit 50) shows that it has endorsement of the doctor at 2.30 pm dated 15-2-2008. The statement is recorded in Question – Answer form. The deceased stated that initially quarrel started on the said date in respect of demand made by the appellants. She

was assaulted. On actual incident of burning the deceased stated that the appellant No.1 after quarrel called mother-in-law, brother-in-law Suresh and the acquitted accused, Manisha-sister-in-law, and thereafter gave them kerosene stove having kerosene in it. She stated that appellant No.1 poured kerosene on her person, the mother-in-law provided matchstick and the brother-in-law set her on fire with the help of match stick. The deceased was studied upto 9th Standard. The further endorsement shows that the statement was recorded between 2.10 to 2.30 pm. The doctor endorsed that the patient was in a position to give statement. There is difference in timing about the endorsements made by the Executive Magistrate and the Medical Officer. According to the Special Executive Magistrate the recording was over by 2.30 pm whereas the doctor endorsed at the bottom of recording of the dying declaration as 3.00 p.m. on 15-2-2008.

18) The clothes of the accused persons were sent for chemical analysis. The CA report shows that kerosene residue were found on the exhibits.

19) The accused too examined defence witnesses. DW 1-Rukmini Naiknaware is neighbour of the accused since last several years. She deposed that appellant Ramesh is working in the shop of plywood. He used to go for his work at about 8.30 a.m. and used to return at about 9.00 p.m. Appellant Suresh was working in the shop of fertilizer. He also used to go at 8.30 a.m. and used to return at about 9.00 p.m. Both the accused were residing separately in two separate rooms. Their house was having four rooms. The relations between accused Ramesh and deceased Jayashri were good, according to the witness. In respect of the incident in question she stated that Suresh and Ramesh had gone to work and the acquitted accused Manisha had gone to Vivekanand school along with her children at about 8.30 a.m. Thereafter at that time the witness saw fire in the house of Jayashri. Nobody was present in the house. The witness saw fire in the room of Jayashri. She went in the room of Jayashri. She saw burnt pieces of clothes there. A stove was also burning. Jayashri shouted and started to come out. The witness poured water from the tank on her body and tried to extinguish the fire. She called other persons from neighborhood.

Then she called brother of accused Ramesh and informed about the incident. They rushed to the spot, brought a rickshaw and thereafter took the deceased to the hospital. Jayashri was unconscious and was not talking. Several persons had gathered, according to this witness, at the spot. The statement of this witness was recorded by the investigating officer but she was not examined as prosecution witness.

20) The defence examined DW No.2 Bramhkumar Suwarnkar. He also described the day today routine of the appellants and their family. He described the injuries sustained by the appellant No.1.

21) DW No.3 is Virbhadra Chitkote, who is running a rickshaw. He deposed that appellant Suresh told him that he had to take one patient to hospital. The accused Nos.1 and 2 brought one lady patient and kept in his vehicle and they took the patient to civil hospital Latur.

22) DW No.4 Babarao Kadam. He is landlord of accused Malanbai. The witness deposed that he could produce the rent agreement. The witness denied that

accused Malanbai was residing at Zeenat society. There is entry in the municipal record in respect of tenancy, according to this witness.

23) This Court had appointed Advocate Shri. N.B. Suryawanshi to represent the case of the appellants. In the submission of the learned counsel the dying declarations recorded were not consistent. The deceased was residing in thickly populated area but the prosecution did not examine independent witnesses nor the Investigating Officer recorded statements of independent witnesses. The neighbourers had extinguished the fire when the appellants had gone for work. The prosecution has suppressed real facts from the Court. The counsel submits that evidence of the defence witnesses, if looked into carefully, would show the other side of the story and establish innocence of the appellants. In respect of recording of dying declarations the counsel submits that the endorsements put by the medical officer on the dying declarations were doubtful. There are erasers found in the medical record. The deceased had suffered 92% burns. It was doubtful whether the deceased was in a position to

make such lengthy statements as are brought on record as dying declarations of the deceased. The dying declarations suffer from material inconsistencies which ground alone is sufficient to set aside the order of conviction and sentence.

24) The learned Additional Public Prosecutor submits that whatever inconsistencies pointed out in respect of recording of dying declarations put up at the time of recording of the dying declarations and the endorsements of the doctor are not the material discrepancies, if any. The prosecution has proved its case beyond reasonable doubt. Both the dying declarations are truthful and reliable. They are voluntary in nature. The deceased was not prompted by anybody including her father or near relatives. There was no tutoring in the case. The CA report supports the prosecution case.

25) We have carefully perused the original record, the evidence of the witnesses, the medical opinion, Post mortem report, CA report and the reasonings adopted by the trial Court.

26) After considering the dying declarations recorded by the Police Sub Inspector and the Special Executive Magistrate, we do find material inconsistencies in respect of narration of events of pouring of kerosene on the person of the deceased. These inconsistencies have damaged the prosecution case very severely. The dying declarations are not in consonance with each other but they are at variance. In both the dying declarations the role attributed to the husband is different. The role attributed to the brother-in-law and the mother-in-law is also entirely different. The manner in which the deceased had described the incident in question in detail and the role attributed to the appellants in respect of pouring of kerosene on her person and setting her on fire do not inspire confidence. The dying declarations do not find to be even truthful in nature. It is settled law that in case of multiple dying declarations the same shall be consistent in respect of material aspects of the incident. Though in both the dying declarations the deceased had involved the appellants, named them, but in respect of the role attributed to them in commission of the crime and the exact nature of the incident in question there is a variance

which can be discerned from the perusal of the dying declarations. After considering the prosecution case in its entirety, the physical condition of the patient, the medical opinion, the percentage of burns and the pains suffered by the deceased, we are not fully convinced to hold that the dying declarations inspire confidence to convict all the appellants and sentence them to suffer life imprisonment.

27) The learned counsel for the appellants has referred to following judgments in support of his submissions.

(1) **Kamla v. State of Punjab, 1993 Cri.L.J. 68.** Para 5 of the judgment is relevant which reads thus :-

“5. It is well-settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests. (vide *Khushal Rao v. State of Bombay*, 1958 SCR 552 : (AIR 1958 SC 22)). The ratio laid down in this case has been referred to in a number of subsequent cases with approval. It is also settled in all these cases that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one dying declarations if some

inconsistencies are noticed between one and the other, the court has to examine the nature of the inconsistencies namely whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

(2) **Dandu Lakshmi Reddy v. State of A.P., AIR 1999**

SC 3255. In para 16 of the judgment it is observed thus :

“**16.** Thus the High Court has sidelined such a noticeable discrepancy looming large as between the two different statements made by the same person. When the sphere of scrutiny of dying declaration is a restricted area, the Court cannot afford to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course.”

(3) **Suresh Shrirang Mandawgane v. State of**

Maharashtra, 2010 ALL MR (Cri) 147. A Division

Bench of of this Court has observed in para 6 of the judgment thus :-

“**6.** The law on the point as to how the Court should appreciate the evidence in which there are multiple dying declarations is discussed in the judgment of our High Court in the case of Suresh

s/o Arjun Dodorkar (Sonar) v. State of Maharashtra reported in 2005 ALL MR (Cri) 1599. [Incidentally one of us (P.V. Hardas, J.) was party to the said judgment]. The relevant portion of the said judgment reads as under :-

“In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations there is consistency in respect of the name and the number of accused. However, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declaration and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs.24 and 27 as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. In our opinion, therefore, no reliance can be placed on the dying declarations at Exhs.24 and 27”.

28) Apart from the dying declarations we do not find any cogent and reliable circumstance and chain of events to connect the appellants with the crime. We have carefully looked into such circumstances if any emanating from the prosecution evidence. The prosecution has failed to examine any independent witnesses. Though the Investigating Officer recorded statement of Rukminbai who was independent witness but she was not examined as prosecution witness but, in stead, she was examined as a defence witness. The defence through their evidence has tried to at least project that both the appellants Nos.1 and 2, Ramesh and Suresh, used to attend to their respective jobs and leave house early in the morning at 8.30 a.m. and return late in evening. The acquittal of the sister-in-law Manisha also casts serious shadow on the truthfulness of the dying declarations made by the deceased. There is tendency to involve more persons in the statement made by the deceased. This tendency also requires to be taken into consideration. The fact cannot be denied that the parents of the deceased were present in the hospital. There is evidence on record to show that the deceased was under severe pains, she was administered medicines,

she was consistently shouting. In such situation and physical condition it is highly doubtful whether she was in a position to make such lengthy statements and even if the deceased had made such statements whether they could be relied upon as truthful version of the incident in question.

29) Considering the spot panchnama, the inquest panchnama and the statements of other witnesses we are of the view that the prosecution case is not worthy of reliance. The prosecution has failed to establish its case beyond reasonable doubt. It is unfortunate that a life is lost. The deceased suffered severe burn injuries. But in absence of there being any cogent and reliable evidence it would be unsafe to convict the appellants and sentence them for life imprisonment for causing death of the deceased.

30) The reasonings adopted by the trial Court in respect of appreciation of evidence are not convincing. We are not in agreement with the trial Court for placing reliance on the dying declarations and accepting the

evidence of the prosecution. The benefit ultimately would go to the defence. The appeals deserves to be allowed.

31) The Criminal Appeal is allowed. The judgment and order dated 6-1-2010 passed by Additional Sessions Judge, Latur in Sessions Case No.30 of 2008 convicting the appellants (1) Ramesh Rangrao Walsange, (2) Suresh Rangrao Walsange and (3) Malanbai Rangrao Walsage for an offence under section 302 read with 34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay a fine of Rs.300/- each, in default to suffer rigorous imprisonment for 15 days is quashed and set aside. The appellants – (1) Ramesh Rangrao Walsange, (2) Suresh Rangrao Walsange and (3) Malanbai Rangrao Walsage are acquitted of all the charges. Appellant No.1 – Ramesh is in jail. He be released forthwith, if not required in any other cases. The appellants Suresh and Malanbai are on bail. Their bail bonds stand cancelled. Fine amount if paid, be refunded to the appellants.

32) The learned counsel Shri. N.B. Suryawanshi was appointed to represent the cause of the appellants by the Court. The professional fees of the learned counsel is quantified at Rs.5000/- (Rupees five thousand only).

Sd/-
(T.V. NALAWADE, J.)

Sd/-
(NARESH H PATIL, J.)

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