

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

CRIMINAL APPEAL NO.83 OF 2013

Munnabee w/o Shoukat Tadvī,
Age 32 years, Occu. Household,
R/o Wadhona, Taluka Bhokardan,
District Jalna

.. Appellant

Versus

The State of Maharashtra

.. Respondent

Mr S.G. Ladda with Mr S.J. Rahate, Advocates for appellant
Mr N.B. Patil, A.P.P. for respondent

**CORAM : P.V. HARDAS AND
N.W. SAMBRE, J.**

DATE : 16th June 2015

JUDGMENT (Per N.W. Sambre, J.)

1. The present appeal is directed against the judgment and order passed by the Additional Sessions Judge-1, Jalna on 16th February 2013 in Sessions Case No.20 of 2012 convicting the appellant-accused for an offence punishable under Section 302 of the Indian Penal Code and sentencing her to suffer imprisonment for life and to pay fine of Rs.2,000/-, in default to suffer simple imprisonment for three months.

2. The facts, as are necessary for deciding the appeal in question are as under :

P.W.5 Police Head Constable Kachru Dabhade, on 7th September 2011 while working as P.S.O. at Paradh Police Station received a

statement of Mamtabai, recorded at Buldana Civil Hospital by Police Head Constable P.W.2 – Mahadu Bhagwat on the basis of which he registered an offence punishable under Sections 307 and 323 of the Indian Penal Code and handed over the further investigation to A.P.I. Shaikh. Mamtabai, in her statement to Police Head Constable Bhagwat narrated that about three and half years back she was married to Shoukat. As she was not blessed with any issue, her husband Shoukat performed second marriage with the appellant-accused Munnabee and started residing separately, whereas Mamtabai was residing with her in-laws. She further stated that on 6th September 2011, in the morning at about 10.00 am, second wife of her husband entered her house and asked her to leave the house, start residing at Wakdi and assaulted her with fist blows.

3. It is further narrated by her that said Munnabee again entered her house in the noon at around 12.00 to 12.30 and poured kerosene on her body and set her on fire. As she suffered serious burn injuries, she was shifted to the Government Hospital, Buldana.

4. After registration of the offence, the investigation was entrusted to A.P.I. Shaikh Shanoor Shaikh Hasan, who then visited the spot of the incident, prepared spot panchnama and seized the articles, so also recorded the statements of the eye witnesses. He had arrested accused-appellant Munnabee on 8th September 2011 and subsequent to the death of Mamtabai, Section 302 of the Indian Penal Code was added.

5. Mamtabai suffered 82% injuries which has resulted into her death, as is apparent from the post mortem report.

6. After the investigation was completed and the charge-sheet was filed in the matter, learned Additional Sessions Judge-1, Jalna in Sessions Case No.20 of 2012 framed charge against the appellant at Exh.5/C charging with commission of offence punishable under Section 302 of the Indian Penal Code.

7. The Sessions Court then set the trial into the motion, as the appellant denied the commission of the crime in question.

8. In the present matter, learned Sessions Judge noticed two dying declarations.

9. The first dying declaration Exh.15 was recorded on 6th September 2011 by the Special Executive Magistrate, Nina Shankar Ahire who at the relevant time was serving as Naib Tahsildar, who has deposed as P.W.1 at Exh.13. The learned Sessions Judge noticed another dying declaration at Exh.19 recorded on 7th September 2011 by the Police Head Constable Bhagwat at Civil Hospital, Buldana i.e. Exh.19.

10. After appreciating the evidence brought on record, the learned Additional Sessions Judge has proceeded to convict the appellant, as mentioned herein-above based on the dying declarations Exh.15 and Exh.19, as such present appeal.

11. Heard Mr Ladda, learned Counsel for the appellant and learned A.P.P. Mr Patil.

12. Mr Ladda, learned Counsel for the appellant, while taking this Court through both the dying declarations i.e. Exh.15, the one recorded by the Special Executive Magistrate and Exh.19, recorded by the Police Head Constable, would urge that the consistency in both the dying declarations is absent. So as to evaluate the inconsistency, he has taken us through the wordings employed in the said dying declarations. So as to canvass that both the dying declarations are liable to be discarded in view of law laid down by this Court in the matter of **Suresh s/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra**, reported in **2005 (0) BCI 232** has placed reliance upon observations made in paragraph 9 of the said judgment.

13. In addition to above, Mr Ladda would urge that Exh.15, the dying declaration recorded by learned Special Executive Magistrate is liable to be rejected on the count that the contents thereof are not admitted by the deceased to be true and correct to her knowledge, as no such endorsement is present on the said dying declaration. So as to buttress the said argument, he has also taken us through the examination-in-chief and cross-examination of Special Executive Magistrate. He has placed reliance upon the judgment of this Court in the matter of **Dhanraj Jairam Patil Vs. State of Maharashtra**, reported in **2011 (4) Bom.C.R. (Cri.) 16** and in the matter of **Abdul**

Riyaz Abdul Bashir Vs. State of Maharashtra, reported in **2012 ALL MR (Cri.) 2188** so as to substantiate his contention.

14. Learned Assistant Public Prosecutor Mr Patil would urge that the conviction ordered by the learned Additional Sessions Judge is just and proper in the light of the evidence brought on record which points the direct involvement of the appellant in the commission of crime. Mr Patil would further urge that the evidence of the Special Executive Magistrate speaks of involvement of the appellant in commission of crime in question and has urged that the dying declaration which specify the requirement as per law needs to be accepted and as such sought to place reliance upon the dying declaration Exh.19 and prayed for rejection of the appeal.

15. While analysing the above referred submissions of Mr Ladda, learned Counsel for the appellant, it is required to be noted that the dying declaration Exh.15 which is recorded by the Special Executive Magistrate does not contain an endorsement that the contents thereof were explained to the deceased Mamtabai who has admitted the contents thereof to be true and correct. Apart from above, upon scrutiny of the evidence of P.W.1 - Nina, the Special Executive Magistrate who has recorded dying declaration Exh.15 speaks about the certification by the Doctor about the mental condition of patient i.e. deceased Mamtabai Shoukat Tadvī and recording of the dying declaration as narrated to her by said deceased and also stated that the contents are recorded as directed to her by Mamtabai, however, the aspect as regards the explanation of the contents of dying

declaration Exh.15 to deceased Mamtabai by P.W.1 and certification of same to be true and correct, is conspicuously, as such the said dying declaration is required to be disbelieved.

16. Mr Ladda, learned Counsel for the appellant has rightly placed reliance upon the judgment of this Court in the matter of **Abdul Riyaz Abdul Bashir Vs. State of Maharashtra**, reported in **2012 ALL MR (Cri.) 2188** so as to draw support to his submission that there cannot be presumption that the actual exercise of reading over the statement and getting it endorsed to be correct was actually followed. Appropriate support can be drawn from paragraph 8 of the said judgment which reads thus :

“8. On perusal of Exh.63, it appears that in column no. 2 the deponent had given the detailed narration of the incident and has stated that her mother-in-law had exhorted her husband to eliminate Nargis. Nargis got enraged and doused herself with kerosene and when she was changing her clothes, her husband ignited the match-stick and because the neighbours had raised the cries, her husband attempted to extinguish the fire. In column no.5, it is stated that she had sustained burn injuries to her face, both hands, chest and back. The reply to column no.7 is also stated. However, column no.8 pertains to the fact that the statement as recorded was read over to the deponent and proved to be correct as per the say of the deponent. The said column is left blank. To rule out any remote infirmity, it is necessary that there has to be an endorsement that the contents were read over and

admitted to be true and correct. The said column cannot be treated as an empty formality since the deponent is not available for cross-examination. Hence it is a material inherent infirmity in the dying declaration and, therefore, cannot inspire confidence of the Court. It, therefore, appears that the statement was never read over to the deceased and there is no endorsement to that effect. When the declaration was not read over to the deponent and hence not admitted by the deponent to be correct and recorded according to her say, then such a dying declaration cannot be a foundation for sustaining the conviction. Merely because it is mentioned in the printed proforma that the statement is read over to the deponent, it cannot be presumed that the actual exercise of reading over the statement and getting it endorsed to be correct, was actually followed. In fact the said column is blank and, therefore, the said fact cannot be assumed. The learned counsel for the appellant has relied upon the judgment of the Apex Court reported in (2008) 1 Supreme Court Cases (Cri) 679-Shaikh Bakshu and others vs. State of Maharashtra wherein it is held by the Apex court that "there was no mention in the dying declaration that it was read over and explained to the deceased. The trial Court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained". The Apex Court has held that the said view is unacceptable. The learned counsel for the appellant has also relied upon the judgment reported in 2004 ALL MR (Cri) 3220 in the case of Shivaji Tukaram Potdukhe vs. State of Maharashtra wherein it is held that "when the declaration was not read over to Durgabai and she had not admitted the contents thereof to be correct, according to us, the dying declaration cannot be made foundation for sustaining the conviction". We have observed that it is doubtful whether the signature on Exh.63 is that of

deceased Nargis since the accused by taking recourse to Section 155 of the Indian Evidence Act has examined an independent witness who has deposed that the signature on the Nikahnama was made by Nargis in his presence and, therefore, in the present case we find that the written dying declaration at Exh.63 cannot be made the sole basis for recording the conviction. Notwithstanding the fact that it was recorded by the Magistrate, the discrepancies in the written dying declaration are such that they would not inspire the confidence of the Court.”

17. So far as the second dying declaration Exh.19 is concerned, the evidence of the witness P.W.2 – Mahadu Bhikaji Bhagwat who has recorded the said dying declaration speaks of an event prior the event of setting Mamtabai on fire that is to say the appellant Munnabee entering the house of the deceased, threatening her, assaulting her which according to P.W.2 was witnessed by Bhikam Tadvī and Saberabee Tadvī who are not examined. Apart from this, the said incident is at all not part and parcel of the earlier dying declaration which was recorded immediately after the incident on 6th September 2011. The second dying declaration was recorded on 7th September 2011 i.e. on the next day. The reading of the contents of Exh.15 and Exh.19 and perusal of the contents of both the dying declarations prima facie demonstrate inconsistency. It is required to be noted that the law laid down by this Court in the matter of **Suresh s/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra** (cited supra), particularly the observations made in paragraph 9 of the said judgment are squarely applicable to the facts and evidence of the present case. This Court has already taken view that in case of

multiple dying declarations there has to be consistency in respect of material aspect of the incident. The said consistency should be in respect of contents, such as name, number of accused, the prelude to the incident and the incident itself. Here, in the present case, the prelude to the incident as narrated in Exh.19, a dying declaration recorded by the Police Head Constable P.W.2 - Bhagwat is absent in dying declaration Exh.15, the one recorded by P.W.1 - Special Executive Magistrate, Nina Aher. As such, there is variance in respect of the incident and this Court will be committing an error in case it accepts the dying declarations at Exh.15 and Exh.19. Merely because an act is attributed to the accused herein in the dying declarations, that does not mean that the said dying declarations are liable to be accepted as reliable piece of evidence in the present case. The cross-examination of P.W.1 Nina Aher speaks about the validity of Exh.15 and as such, this Court is left with no other option but to reject both the dying declarations in view of observations reproduced herein-below in the case of **Suresh Vs. State of Maharashtra**.

“9. A perusal of both the dying declarations reveal that there are inter se variance. In the dying declaration at Exh. 24 Vimal had, stated that the appellant, under the influence of liquor, used to beat her as he was of suspicious nature. She states that when she had asked him to take his dinner, the appellant had quarrelled with her and, therefore, in anger she had gone to sleep. While she was asleep, the appellant had poured kerosene on her-and had set her ablaze. In the dying declaration at Exh. 27 Vimal had stated that in the evening she had sent the daughter of her neighbour for purchasing wheat,

but as the said girl had not gone, she had herself gone and purchased wheat. According to her, the appellant, on his return, asked her as to why she had gone for purchasing wheat and what was the relationship between Vimal and the shopkeeper. The appellant then went out of the house and returned back at about 7.00 p.m. or 7.30 p.m. carrying a small plastic Can of kerosene. Vimal had asked her husband to take his dinner but her husband had said that he would not eat anything prepared by her as she was of loose character. On so saying her husband poured kerosene on her and set her ablaze. It would thus be seen that in respect of the incident there is a major variance though there is a common thread in both the dying declarations that it was the appellant who had set her ablaze. 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, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations 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."

18. As such, the judgment and order dated 16th February 2013 delivered by learned Additional Sessions Judge-1, Jalna in Sessions Case No.20 of 2012 convicting the present appellant for the offence punishable under Section 302 of the Indian Penal Code and directing to pay fine of Rs.2,000/- in default to suffer simple imprisonment for three months, is hereby quashed and set aside. The appellant is acquitted of the offence with which she was charged and convicted. Fine amount, if any, be refunded to the appellant. Since the appellant is in jail, she be released forthwith, if not required in any other case.

(N.W. SAMBRE, J.)

(P.V. HARDAS, J.)

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