

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

CRIMINAL APPEAL NO.154 OF 1996

The State of Maharashtra

APPELLANT

[Orig. Complainant]

VERSUS

Raghunath Ramchandra Sable,
Age 25 Years, Occ. Agri.
R/o. Manoli, Tq. Sangamner,
District Ahmednagar

RESPONDENT

[Orig. Accused]

...
Mr. K.S.Patil, APP for the Appellant – State
Mr. B.R.Warma, Advocate [Appointed] for the Respondent
...

**CORAM : S.S. SHINDE &
A.I.S.CHEEMA, JJ.**

Reserved on : 22.06.2015
Pronounced on : 29.06.2015

JUDGMENT [Per S.S.Shinde, J.]:

1] This Criminal Appeal is filed by the Appellant – State, challenging the Judgment and Order dated 28.12.1995 passed by the 5th Additional Sessions Judge, Ahmednagar in Sessions Case No.09/1995, thereby acquitting the accused for the offence punishable under Section 302 and 504 of I.P. Code.

The prosecution case, in brief, is as under:

2] The deceased Archana was daughter of complainant namely Sahebrao Ramchandra Ghode. Prior to five months of her death, she was married with accused and went to reside at the house of the accused. The accused has three brothers; and they all are residing separately. The accused was continuously disclosing his intention that, Archana was not suitable for him, and hence, he wanted to marry second time. Therefore, Archana, on this count, was subjected to ill-treatment, harassment and beating from the accused. The incident occurred prior to one year on 10.11.1994. On the day of incident, the accused had asked Archana to go at her parent's house because she was not suitable for him, and accused was intending to get marry second time. However, Archana denied to go to her parent's house, therefore, accused got annoyed and poured kerosene on the person of Archana and set her on fire. After setting her on fire, the accused went outside the house. Archana started running out of her house, hence, roof of the house also caught fire. The brother of the accused and accused himself, instead of extinguishing fire on the person of Archana, started

extinguishing the fire of roof. The cousin of the accused has made an attempt to extinguish the fire on the person of Archana with the help of blanket. Archana had sustained burn injuries, therefore, she was taken to Pravara Rural Hospital, Loni, where she died on 14.11.1994. When Archana was admitted in the Hospital, the Special Executive Magistrate Mr. Vikhe has recorded dying declaration of Archana on 11.11.1994. On the basis of dying declaration of Archana, Loni Police Station has registered Crime No. 0/1994 for the offence punishable under Section 307, 504 of I.P. Code, because offence was taken place within the jurisdiction of Sangamner Taluka Police Station. The Loni Police Station had sent papers to the Sangamner Taluka Police Station for further investigation. The P.H.C. Mr. Munde of Sangamner Taluka Police Station, on 11.11.1994, registered crime on the basis of the statement of Archana. API Mr. Bhoite started investigation. Initially, the offence was registered under Section 307 of I.P. Code, however, after death of Archana, same came to be converted under Section 302 of I.P. Code. API Mr. Bhoite, after completing investigation, submitted charge sheet against the accused under Section 302 and 504 of I.P. Code on 17.12.1994.

3] After full-fledged trial, the Trial Court acquitted the respondent. Hence this Appeal.

4] The learned APP appearing for the Appellant – State submits that, the dying declaration at Exhibit-20 recorded by the Special Executive Magistrate of deceased Archana is reliable and truthful and same can form basis for conviction of the Respondent. It is submitted that, the deceased Archana, in her dying declaration, has specifically stated that, husband poured kerosene on her person and set her ablaze. The learned APP further invited our attention to the evidence of the prosecution witnesses, and submits that, the prosecution has proved the contents of the said dying declaration by examining the Special Executive Magistrate, and also Medical Officer. Therefore, the learned APP submits that, Appeal may be allowed.

5] On the other hand, the learned counsel Mr. B.R.Warma submits that, benefit of doubt is rightly given by the trial Court to the accused. It is submitted that, PW-5 Mr. Kiran Trimbak Ingale, who was attached to Loni Hospital at the relevant time, has stated in his examination in chief

that, he examined patient Archana Raghunath Sable, giving the history of accidental burns over the body. He stated in his cross examination that, the history was given by the patient Archana herself about explosion of stove, and hence, she was burnt.

6] It is submitted that, since the history of accidental burns, was given by the patient herself, and subsequently, she did not anywhere state that, she was threatened by accused or any other person, hence, she gave false history, nor any other reason has been stated by her by giving such history. It is submitted that, the dying declaration suffers from infirmities and cannot form the basis for conviction. It is submitted that, the complainant, in his cross examination, has admitted that, when he visited the house of the accused 2/3 times, he did not notice any ill-treatment and the accused and deceased were staying together happily. It is submitted that, though it was possible for PW-2 to give complaint, the complaint was not given by PW-2. The deceased Archana did not disclose anything to PW-2, though he was present in the Hospital for considerable period with his wife. It is

submitted that, once possible view is taken by the trial Court and accused is acquitted, the Appellate Court is not expected to interfere in the acquittal order, in view of the settled position in law. Therefore, he submits that, Appeal may be dismissed.

7] We have carefully considered the submissions of the learned APP appearing for the Appellant – State, and the learned counsel appearing for the Respondent. With their able assistance, perused the record and proceedings, and in particular evidence of PW1 to PW-5, it appears that, the entire prosecution case rests upon the dying declaration given by Archana, which was recorded by the Special Executive Magistrate Shri Bhagwat Laxman Vikhe. He was examined as PW-1. In his evidence before the Court, he stated about recording of the dying declaration of deceased Archana. He stated that, after he asked the questions to Archana as to how she had sustained said burn injuries, and she in reply stated that, on 10.11.1994 she did work throughout a day in the field, and in the evening at about 6.00 p.m. returned back to home and her husband immediately followed her. She further told that, her

husband had asked her to leave his house and to go to her parents house and started abusing. Thereafter, her husband poured kerosene on her person and set her on fire and went outside the house. He has also further narrated details stated by the Archana in her dying declaration.

8] During his cross examination, he admitted that, about 4/5 relatives of Archana were present near her bed before he could start recording of her statement. He further admitted in his cross examination that, original copy of the dying declaration was given to the Police, and he retained carbon copy which was not sealed. He further stated that, the attestation to thumb impression on his carbon copy was written by him after removal of carbon. The contents of statement of Archana are in different handwriting, and attestation of thumb impression of Archana is in different handwriting. The attestation to thumb impression of Archana was made by the Police. He further stated that, he know that, the Magistrate who has to record statement, he himself has to attest thumb impression. He admitted that, the thumb impression of Archana was not attested by him, either on original

statement, or on the copy retained by him. There are no impressions on carbon at the place where he obtained thumb impression of Archana on his copy.

Upon careful perusal of the evidence PW-1, it is abundantly clear that, he himself did not attest the thumb impression of Archana. When he recorded dying declaration of Archana, he was supposed to attest the thumb impression of Archana. However, as per his version, thumb impression was attested by the Police. Therefore, it creates doubt about genuineness of such thumb impression, which was not attested by PW-1. Though, PW-1 has stated that, he read over the contents of dying declaration to Archana, upon careful perusal of the dying declaration, there is no mention that, the contents of dying declaration were read over to Archana and those are as per her narration. Since the dying declaration is only piece of evidence on which the entire prosecution case rests, the prosecution ought to have led cogent, convincing and unambiguous evidence, which would inspire full confidence of the Court so as to accept dying declaration as a sole basis. Where the entire case of the prosecution rests upon

the dying declaration, the said dying declaration should be of 'sterling' quality since the accused has no opportunity to cross examine the declarant. The Division Bench of the Bombay High Court [Nagpur Bench] in the case of **Tukaram Dashrath Padhen & Ors. Vs. State of Maharsahtra**¹ in para 24 held thus:

24. When the Court is called upon to appreciate the evidence of written dying declaration, the Court has to be extremely cautious and examine with meticulous care the evidence regarding recording of the dying declaration. Merely because witnesses came forward and depose about the recording of the dying declaration, it should not impel the Court to immediately accept the dying declaration. It has to be remembered that the declarant is not available for cross examination and, therefore, the prosecution must prove, apart from the truthfulness of the contents, the factum of the recording of the dying declaration as well as the fact that the declarant was in a fit mental condition to give the statement. Once suspicious circumstances are found in the evidence, the Court should be extremely slow in placing implicit reliance on the dying declaration. It is to be remembered that the conviction can be recorded on the dying declaration alone if the court finds that the dying declaration to be wholly reliable. It is, therefore, necessary for the Court to scrutinize the evidence and place reliance on the dying

1. 2012 ALL MR [Cri.] 2754

declaration only if the evidence in respect of the recording of the dying declaration is of "sterling" quality. If there are suspicious circumstances the Court should reject the dying declaration and look for other evidences if it is available. Mechanical acceptance of the dying declaration dehors a meticulous scrutiny of the evidence relating to the recording of the dying declaration must be deprecated in the present case as we have pointed out in the light of circumstances stated by us, we do not find the dying declarations to be pieces of evidence which would inspire the confidence of the Court for implicit acceptance. The aforesaid dying declaration, therefore, will have to be left out of consideration.

9] The prosecution examined father of the deceased Archana as PW-2, it is true that, in his examination in chief, he stated that, accused Raghunath was continuously disclosing his intention that, Archana was not suitable for him, and he wanted to marry second time. This fact was stated by Archana to him when she visited his house. He further stated that, the incident occurred prior to one year. At that time he was at his home at Babhaleshwar. Accused Raghunath came to his house at about 11.00 p.m. on the day of incident with message about pain with Archana and she was admitted in the Hospital. Then, he sent his wife with accused Raghunath.

Next day in the morning, he went to the Hospital. He noticed that, Archana was burnt. Except head of Archana, other part of body of Archana was burnt. Archana was in talking condition, and she was able to speak. Archana told him that, she will not live. Except this Archana did not tell anything to him. After four days, Archana died. He admitted in his cross examination that, Archana was living happy married life with accused. 2/3 times he had been to the house of the accused after marriage. He admitted in his cross examination that, he was near Archana for about half an hour in the Hospital. He further stated in his cross examination that, he did not feel necessary to go to the Police, after he had a talk with Archana. He has also admitted in his cross examination that, as and when he visited the house of accused, he was honoured with delicious food. Therefore, if the evidence of PW-2 is considered in its entirety, though he has stated in his examination in chief that, Archana told him that, the accused had intention to marry second time, nevertheless in his cross examination, he stated that, when he visited the house of the accused 2/3 times after marriage, Archana was living happy married life with accused. He further stated that, as and when he visited the house of accused,

he was honoured with delicious food. He did not lodge any complaint, though he was near Archana for about half an hour in the Hospital. She did not tell anything except she will not live.

10] The Medical Officer, who gave an endorsement on the dying declaration, was examined as PW-5. In his examination in chief, he stated that, on 11.12.1994, the Magistrate along with Constable came to him at about 12 noon or 12.15 p.m. Before giving certificate, he examined patient Archana and found that, she was fully conscious and able to give statement. However, in his cross examination, he admitted that, the history was given by the patient Archana about explosion of stove, and hence, she was burnt at about 5.30 p.m. The case papers shown to him are in his handwriting, which are regarding history given by patient Archana. He identified the case papers on which history is given to the C.M.O. by the patient Archana about explosion of stove at 5.30 p.m., and thereafter, she was admitted. He has specifically admitted in his cross examination that, the patient did not give the statement of homicidal burns since the time of her admission till her

death. The Division Bench of the Bombay High Court in the case of **Vilas Vkramsingh Deshmukh & Ors. Vs. State of Maharashtra**² held that, initial version of the accidental burns given by the victim, if not subsequently disowned by giving any reason or such version was under threat. It is one of the attending circumstance, which creates doubt about the prosecution case that, the death is homicidal. As already observed in the facts of the present case also as admitted by the PW-5 Medical Officer that, the history was given by the patient Archana about explosion of stove, and hence, she was burnt at about 5.30 p.m. is vital attending circumstance which creates doubt about the prosecution case that, the death was homicidal.

In the facts of the present case, on close scrutiny of the evidence on record, the dying declaration given by the deceased Archana is not free from doubt for the reasons stated herein above, and *secondly*, the said dying declaration does not get enough corroboration. The Hon'ble Supreme Court in the case of **Khushal Rao Vs. State of Bombay**³ in para 17 held thus:

2. 2013 ALL.M.R. [Cri.] 3145
3. AIR 1958 SC 22

In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities.

11] The prosecution ought to have examined cousin brother of the deceased Archana, since according to the version in dying declaration, he came to rescue her and was instrumental in extinguishing fire. The prosecution also did not examine Maruti Sable, who was present at the time of incident near spot. In fact, these two persons ought to have been examined by the prosecution so as to throw light on the prosecution case.

12] In the light of the discussion in the foregoing paragraphs, in our opinion, the view taken by the trial Court was possible view. The Supreme Court in the case of **Nepal Singh V/s State of Haryana**, in Criminal Appeal No. 383 of 2002 decided on 24.04.2009, held that, in case of acquittal, there is a double presumption in favour of the accused-firstly, the presumption of innocence is available to him-secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened.

Yet in another judgment in the case of **State of A.P. V/s M. Madhusudhan Rao**⁴ the Supreme Court in para 13 held thus :-

“13. There is no embargo on the appellate court to review, reappreciate or reconsider the evidence upon which the order of acquittal is founded. Yet, generally, the order of acquittal is not interfered with because the presumption of innocence, which is otherwise available to an accused under the fundamental principles of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved

⁴ 2009 All MR(Cri) 547 (S.C.)

guilty by a court of law, gets further reinforced and strengthened by his acquittal. It is also trite that if two views are possible on the evidence adduced in the case and the one favourable to the accused has been taken by the trial court, it should not be disturbed. Nevertheless, where the approach of the lower court in considering the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse, then, to prevent miscarriage of justice, the appellate court is obliged to interfere."

Yet in another judgment in the case of **Muralidhar alias Gidda and another Vs. State of Karnataka**⁵ the Supreme Court in para 12 held thus:-

12. The approach of the appellate Court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu Vs.State, AIR 1954 SC 1, Madan Mohan Singh Vs. Stte of U.P., AIR 1954 SC 637, Atley Vs. State of U.P., AIR 1955 SC 807, Aher Raja Khima Vs. State of Saurashtra, AIR 1956 SC 217, Balbir Singh Vs. State of Punjab, AIR 1957 SC 216,

5. 2014 [4] Mh.L.J.[Cri.] 353

M.G.Agarwal Vs. State of Maharashtra, AIR 1963 SC 200, Noor Khan Vs. State of Rajasthan, AIR 1964 SC 286, Khedu Mohton Vs. State of Bihar, [1970] 2 SCC 450, Shivaji Sahabrao Bobade Vs. State of Maharashtra, [1973] 2 SCC 793, Lekha Yadav Vs. State of Bihar, [1973] 2 SCC 424, Khem Karan Vs. State of U.P., [1974] 4 SCC 603, Bishan Singh Vs. State of Punjab, [1974] 3 SCC 288, Umedbhai Jadavbhai Vs. State of Gujarat, [1978] 1 SCC 228, K.Gopal Reddy Vs. State of A.P., [1979] 1 SCC 355, Tota Singh Vs. State of Punjab, [1987] 2 SCC 529, Ram Kumar Vs. State of Haryana, 1995 Supp [1] SCC 248, Madan Lal Vs. State of J & K, [1997] 7 SCC 677, Sambasivan Vs. State of Kerala, [1998] 5 SCC 412, Bhagwan Singh Vs. State of M.P. [2002] 4 SCC 85, Harijana Thirupala Vs. Public Prosecutor, High Court of A.P., [2002] 6 SCC 470, C. Antony Vs. K.G.Raghavan Nair, [2003] 1 SCC 1, State of Karnataka Vs. K.Gopalakrishna, [2005] 9 SCC 291, State of Goa Vs. Sanjay Thakran, [2007] 3 SCC 755 and Chandrappa, Chandrappa Vs. State of Karnataka, [2007] 4 SCC 415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate Court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed

in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial Court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate Court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate Court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate Court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial Court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate Court in the judgment of the trial Court.

[Underlines supplied]

13] In the light of discussion in the foregoing paragraphs, Appeal sans merit; and hence dismissed. We quantify Rs.6,500/- towards fees payable to Mr. B.R. Warma, learned Advocate appointed to represent the Respondent.

Sd/-

[A.I.S.CHEEMA, J.]

Sd/-

[S.S. SHINDE, J.]

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DDC