

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

**Criminal Appeal No.167 of 2000
With
Criminal Application No.5439 of 2014**

- 1) Mirabai w/o Sakharam Patil
- 2) Sakharam S/o Bhika Patil

Both Resident of Vivare Bkd
Taluka Raver, District Jalgaon. .. **Appellant.**

Versus

* The State of Maharashtra. .. **Respondent.**

Shri. P. N. Kutti, Advocate, for appellants.

Shri. N. B. Patil, Additional Public Prosecutor, for
respondent.

Shri. Ravindra B. Ade, Advocate for applicant in Criminal
Application No.5439 of 2015.

CORAM: T.V. NALAWADE, J.

Judgment reserved on : 27th February 2015

Judgment pronounced on : 3rd March 2015.

JUDGMENT :

- 1) The appeal is filed against the judgment and
order of Sessions Case No.230/1999 which was pending in

the Court of the 3rd Additional Sessions Judge, Jalgaon. The appellants are convicted for offence punishable under section 304-II read with section 34 of the Indian Penal Code and each of them is sentenced to suffer rigorous imprisonment for four years and to pay fine. Criminal Application No.5439/2015 is filed by the husband of the deceased who is also real brother of appellant No.2. He has described the incident which took place behind his back. He had no personal knowledge regarding the incident. Though it is not specifically mentioned, the learned counsel appointed by the husband of the deceased submitted that in view of relationship between the parties, a lenient view be taken. Appellant No.1 is the wife of the appellant No.2. Learned counsel for the appellants argued on merits and in alternative he argued for taking lenient view. Other side is also heard.

2) It is the case of the prosecution that deceased Smt. Ushabai was living with her husband Yuvraj, two sons, aged about 7 and 4 years and daughter aged about 13 years in a rented house from village Vivare, Tahsil Raver. Appellant No.2 Sakharam was living with appellant

No.1 and his issues in the neighbourhood. The incident in question took place on 10-7-1999. On that day the deceased was proceeding to a shop from her residential place and on the way she noticed that Deepak, son of appellant No.1 was giving beating to her son by name Sachin, who was aged about 7 years. She gave two slaps to Deepak after asking as to why Deepak was giving beating to Sachin. Deepak retaliated, gave abuses and he gave even a blow of stick to her.

3) The deceased returned from shop at 5 to 5.30 p.m. and she approached to appellant No.1 for complaining against Deepak. It is the case of the prosecution that appellant No.1 picked up quarrel with the deceased.

4) After this quarrel, deceased wanted to inform about the incident to her husband. She came out of the house for proceeding to the place where her husband had gone. It is the case of the prosecution that when deceased came out of her house, she was in the court yard, appellant Nos.1 and 2 intercepted her and picked up quarrel. It is the case of prosecution that appellant No.2

then held the deceased, appellant No.1 fetched a can of kerosene from her house, appellant No.1 poured kerosene on the person of the deceased and appellant No.1 set fire to the deceased. Deceased started shouting but nobody immediately rushed to the spot to help her.

5) Yuvraj, the husband of the deceased had started returning to his house. On the way he learnt from Sachin about the incident. After reaching the house he made inquiry with the deceased about the incident and the deceased disclosed the incident to Yuvraj. Yuvraj then called a local doctor, Dr. Jawale. Dr. Jawale gave preliminary treatment to the deceased. To Jawale also the deceased disclosed the incident. Considering the extent of burns, he advised Yuvraj to shift the deceased to Government Hospital. Yuvraj shifted the deceased to Rural Hospital Raver. In the hospital also the deceased gave the aforesaid history to the Medical Officer. The Medical Officer informed the police station accordingly. One Police Head Constable, who was Police Station Officer, rushed to the hospital with a social worker and in the presence of the social worker, he recorded the statement of the

deceased. On the statement, endorsement of the Medical Officer about the fitness of the deceased was obtained. Ushabai succumbed to the burn injuries after 3.30 a.m. on the night between 10th and 11th July 1999.

6) On the basis of the aforesaid statement recorded by the police, initially crime was registered for offence punishable under section 307 read with section 34 of the Indian Penal Code. After the death, the crime was converted to one punishable under section 302 read with 34 of the Indian Penal Code. During investigation the spot panchanama was prepared, articles like partly burnt pieces of clothes of the deceased, sample of earth mixed with kerosene were collected from the spot of offence. From the house of the accused a can containing kerosene and a match box came to be recovered. The burnt clothes of the deceased were sent to CA office along with other articles. Statements of some witnesses came to be recorded. Charge sheet came to be filed for the offence punishable under section 302 read with 34 of the Indian Penal Code.

7) The prosecution examined many witnesses to prove the dying declarations of deceased Ushabai. The circumstance like the things recovered during spot panchanama, post mortem report, CA report etc. were brought on record by the prosecution. The defence examined one witness to prove that when the deceased came out of the house, she was in flames. The trial Court has believed the witnesses examined by the prosecution. However the trial Court has held that the act of the accused amounts to offence of culpable homicide not amounting to murder punishable under section 304-II of the Indian Penal Code.

8) Ranjana (PW 1), a neighbour of the deceased, has given evidence on the disclosure made to her by deceased Ushabai. According to her, she rushed to the spot, and she made inquiry with the deceased. According to her, deceased disclosed to her that during incident appellant No.2 had held her and appellant No.1 had set fire to her after pouring kerosene on her person and this can of kerosene was fetched by appellant No.1 from her residential place. Evidence of PW 1 shows that the

deceased was lying in the court yard of the house. Many persons had gathered there. The deceased was the sister of husband of this witness. Though she is a relative, the circumstances that she is living in the neighbourhood and she rushed to the spot are not disputed. Her statement was recorded by police immediately. Her evidence shows that she and her husband had helped Yuvraj for shifting the deceased to Rural Hospital.

9) Yuvraj (PW 6), husband of the deceased, has given evidence that at the relevant time he was returning to the aforesaid residential place. He has deposed that on the way Sachin met him and informed that Ushabai had sustained burn injuries. He has deposed that he rushed to the residential place and when he made inquiry the deceased made the disclosure of the aforesaid nature to him. He has given evidence that he called Dr. Jawale to the spot and Dr. Jawale gave some initial treatment. He has deposed that in the hospital the deceased succumbed to the burn injury after 3.00 a.m. on the night between 10th and 11 July, 1999.

10) The evidence of PW 6 Yuvraj shows that the relations between the accused No.1 and him were good at the relevant time. He has fairly admitted that relations of the deceased and the appellant No.1 were strained. He has admitted that 15 days prior to the incident, appellant No.1 had given a report to police against the deceased and due to that deceased had become angry with appellant No.1. However, no probability is created during the cross-examination of PW 6 that no such dying declaration was given.

11) Dr. Jawale (PW 5) has given evidence that he went to the house of the deceased as he was called by Yuvraj. He has given evidence that deceased made disclosure to him of similar nature. It is brought on record that he did not check the pulse and blood pressure of the deceased. Due to this circumstance, no probability is created that no such disclosure was made to the doctor by the deceased. He was a local doctor and there is no reason to disbelieve this independent witness.

12) Ayubkhan (PW 8), Police Head Constable, has given evidence that he learnt from the Medical Officer of Raver Rural Hospital that the deceased was admitted in the hospital and she had burn injuries. He has given evidence that he made entry in the station diary, he called social worker, Smt. Bora, who is also a member of the Mahila Dakshata Committee and he went to the Rural Hospital. He has given evidence that he gave requisition letter to the Medical Officer for obtaining opinion regarding the fitness of the deceased to give statement. He has deposed that the Medical Officer ascertained about the fitness of the patient and as he gave opinion that the deceased was fit to give statement, he recorded the statement of the deceased. This witness has given evidence that the contents of the statement were read over to the deceased and when she admitted the contents, he obtained thumb impression of the deceased on the statement. This statement, dying declaration, is duly proved as Exhibit 23. It bears signature of PW 8, signature of Smt. Bora and also endorsement of the doctor.

13) Exhibit 23, recorded dying declaration, shows that the deceased disclosed that there was quarrel between her son and the son of the accused. She disclosed that due to this quarrel she had given two slaps to the son of the accused persons. She disclosed that she informed to appellant No.1 about this quarrel between her son and the son of the appellants, but appellant No.1 picked up quarrel with her. The deceased disclosed that she wanted to narrate the incident to her husband and so she came out of the house and then the incident took place. The following things are specifically mentioned in the recorded dying declaration :--

- (i) During the incident appellant No.2 held her;
- (ii) Appellant No.1 fetched a can containing kerosene from her house;
- (iii) Appellant No.1 poured kerosene on her person; and,
- (iv) Appellant No.1 set fire to her by using a matchstick.

The deceased disclosed that primary treatment was given to her by Dr. Jawale.

14) Smt. Kanta Bora (PW 9) has given evidence that Police Head Constable (PW 8) recorded the statement, Exhibit 23 in her presence and so she signed on it. Both, PW 8 and PW 9 are independent witnesses and there was no reason for them to create false record.

15) Dr. Ravindra Patil (PW 10) was working as Medical Officer in Rural Hospital Raver at the relevant time. He has given evidence that when the deceased was brought to the hospital at 7.45 p.m. on 10-7-1999 he asked the patient, the deceased, about the incident and the deceased disclosed to him as follows :-

"My relatives tried to burn me and I have complaint against them".

This witness has deposed that after learning about the incident from the deceased he contacted police. He has given evidence that police recorded the statement of the deceased between 8.30 and 8.50 p.m. and his opinion was sought by police about the condition of the patient. He has given evidence that the patient was in a position to give

statement and accordingly endorsement was made on Exhibit 23. His evidence shows that the deceased died at 3.30 hours on 11-7-1999. He also conducted post mortem of the dead body and post mortem report is given at Exhibit 26. It is not disputed that the patient died due to burn injuries.

16) The defence has given suggestion to PW 10 that his evidence does not show that the deceased was mentally fit to give the statement. The doctor has said that his opinion relates to both mental and physical condition of the patient and according to him the deceased was fit to give the statement.

17) The prosecution examined Laxman (PW 7), a panch witness and the Investigation Officer Sonwane (PW 12) to prove the spot panchanama. The spot panchanama is at Exhibit 18. The evidence shows that the spot where the incident took place is situated at the distance of 25 feet from the house of the deceased and it was virtually on the road. The place had become black due to the burning and the pieces of the clothes of the deceased and also

pieces of bangles of the deceased were lying on the spot. The spot had smell of kerosene. The spot panchanama and the evidence does not show that there were similar signs inside of the house of the deceased and towards the house. Thus nothing is brought on the record to create probability that the incident took place inside of the house of the deceased and then she came out, to the aforesaid spot. This circumstance needs to be kept in mind as the defence has examined one witness to show that the deceased came out of her house and she was in flames. Thus the evidence of spot panchanama is consistent with the aforesaid disclosures made by deceased Ushabai.

18) The evidence of the Investigating Officer (PW 12) shows that he had sent the pieces of clothes of the deceased, earth sample and other articles like can of kerosene and match stick to Chemical Analyzer office. The CA report is at Exhibit 32 and it shows that kerosene was found on the clothes of the deceased and also in the earth sample collected from the spot of offence. This circumstantial evidence is consistent with the aforesaid disclosures made by the deceased.

19) On the other hand, the defence witness Govinda, who is aged about 83 years, has given evidence that at the relevant time he was on the terrace of his house. He has deposed that he heard that there was quarrel between the deceased and the appellant No.1. According to him, after starting of the quarrel, the deceased entered her house and when she came out of her house she was in flames. He tried to say that he could not see both the appellants in the mob which had gathered there when the deceased was in flames. He has said that the deceased was hot tampered and she was always quarreling with appellant No.1. As already observed, there is no support to his evidence of any circumstance. His own evidence shows that he did not approach police to narrate the aforesaid incident.

20) Much was argued by the learned counsel for the appellants about the evidence given by Dr. Ravindra and his endorsement appearing on Exhibit 23. The endorsement made by the doctor is as under :-

"Patient was in condition to give statement still statement was over and statement was taken before him."

21) Learned counsel for the appellants submitted that the aforesaid evidence of the doctor is not sufficient to hold that the deceased was really fit to give the statement. He submitted that there is no specific evidence from the doctor about the general condition of the patient which needs to include the checking of pulse, blood pressure etc. The learned counsel submitted that it cannot be inferred on the basis of such evidence that the deceased was really fit to give the statement. On this point learned counsel has placed reliance on some observations made by the Division Bench of this Court in **Criminal Appeal No.292/2006** decided on 21-12-2012 (**Manik Vanaji Gawali v The State of Maharashtra**). The Division Bench of this Court has made some discussion about the manner of appreciation of expert evidence, doctor's evidence, and nature of evidence expected from such expert to show that the deceased was fit to give statement. In the case reported as **AIR 2002 SC 2973 (Laxman v. State of Maharashtra)** the Apex Court has laid down that there is no law that the dying declaration should bear the endorsement of the medical officer regarding fitness of the patient and unless and until such

certification there, the dying declaration cannot be accepted in evidence. The Apex Court has made it clear that absence of certificate would not render the dying declaration not acceptable. This case was decided by five Hon'ble Judges of the Apex Court. This case is not referred by the Division Bench of this Court. Thus, in law, there is no requirement of taking such endorsement on the dying declaration.

22) It can be said that in Section 32 of the Evidence Act no procedure as such is laid down for recording dying declaration and it is not made compulsory to obtain the opinion of the medical officer on recorded dying declaration. Only if medical officer is available, it is desirable to obtain such opinion which can help the Court to ascertain as to whether the deceased was really in a position to make such statement. Further, satisfaction of the police officer or the Executive Magistrate who records statement will be important. In many cases there may not be opportunity to take such opinion of the medical officer. In such cases from other circumstances the Court can ascertain as to whether such disclosure was made and the

evidence on dying declaration is acceptable.

23) Learned counsel for the appellant has placed reliance on two more reported cases like (1) **AIR 1999 SC 3455 (Paparambaka Rosamma v. State of Andhra Pradesh)**; and, (2) **AIR 1982 SC 1021 (Kake Singh v. State of M.P.)**. In those cases the Apex Court held that there was suspicious feature to the dying declaration. Further those cases were decided prior to the case of Laxman (cited supra). Learned counsel for the appellants has placed reliance on one more case reported as **2008 AIR SCW 4787 (S. Panneerselvam v. State of Tamil Nadu)**. In this case the Apex Court has observed that if it is noticed that the dying declaration was not made voluntarily, no reliance can be placed on such dying declaration. The facts of the case were totally different. There cannot be any dispute over the ratio of this case.

24) The evidence given in the present case shows that the disclosure of similar nature was made to many witnesses by the deceased. Only two witnesses like the husband of the deceased and the wife of the brother of the

deceased can be called as interested witnesses due to their relationships. The remaining witnesses are independent witnesses and two witnesses are doctors. The evidence of the doctors shows that they were satisfied that the deceased was making disclosure about the incident and so due weight needs to be given to their evidence. Nothing is brought on the record to create probability that the deceased was not conscious and deceased was not fit to make statement. The record of dying declaration shows that it was recorded in the Government hospital and there is evidence to show that the doctor and the social worker were present when the Police Head Constable was recording it. There is evidence to show that she made disclosure voluntarily. There was no reason for the witness and even to husband of the deceased to tutor her as the appellant No.2 is his real brother.

25) This Court has already discussed other circumstances showing that the other evidence is giving corroboration to the dying declaration. The witnesses reached the spot immediately and the incident did take

place on the spot as narrated by Ushabai. There was motive and that also can be seen in the dying declaration and in the evidence of Yuvraj. Thus, it is not possible to discard the evidence of dying declaration given in this case.

26) Learned counsel for the appellants has placed reliance on the observations made by another Division Bench of this Court in **Criminal Appeal No.140/2012 (Vilas Sable v. The State of Maharashtra)** decided on 11-2-2015. In this case the Division Bench has referred cases of the Hon'ble Apex Court and it is observed that burden of proof in criminal case always rests on the prosecution. There cannot be any dispute over this proposition. This Court has no hesitation to observe that the burden is discharged by the prosecution.

27) Learned counsel for the appellants submitted that as the appellants are convicted for offence punishable under section 304-II of the Indian Penal Code, the trial Court ought to have given benefit either of section 360 of the Code of Criminal Procedure or of the provisions of

Probation of Offenders Act, 1958 and that benefit needs to be given in appeal. The discussion already made by this Court and the evidence about the dying declaration show that there was motive behind the act. A can of kerosene was fetched by the appellant No.1 from her house and after pouring kerosene on the person of the deceased she was set on fire. During this incident the appellant No.2 had held the deceased. In ordinary circumstances, on the basis of such evidence any Court could have convicted the appellants for offence punishable under section 302 read with 34 of the Indian Penal Code. The discussion made above shows that it is not possible to infer probability that there was no intention and the offence falls under section 304 Part II read with 34 of the Indian Penal Code. This Court has no hesitation to hold that when the case rests mainly on the dying declaration, in ordinary course, it is not possible to infer that there was no intention of murder. It can be said that the appellants are fortunate that they are convicted for offence punishable under section 304-II of the Indian Penal Code. In such a case even if the husband of the deceased is on the side of appellants-accused, due to his relations with the

accused, that cannot help the accused. When the death takes place in such a case, even relatives of the deceased cannot have much say. In such case it is not possible to give benefit of Probation of Offenders Act. Learned counsel for the appellants has placed reliance on the case reported as **1998 Cr.L.J. 918** (Rajasthan High Court) **(Purkha Ram v. State of Rajasthan)**. The facts of the reported case were different. This Court finds no reason to interfere in the judgment of the trial Court of sentence giving four years rigorous imprisonment.

27) In the result, the appeal stands dismissed. The appellants are to surrender to bail bonds for undergoing the sentence. Criminal Application No.5439 of 2014 is rejected.

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

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