

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

APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 585 OF 2012

Rajesh @ Raju s/o Nagnath @ Nivrutti
Sardiwal (Pardeshi),
Age 31 years, Occ. Nil,
R/o. Kaka Chowk, Padampura,
Aurangabad.
(at present in Harsool Central Prison,
Aurangabad)

... **APPELLANT**
(Original Accused)

VERSUS

The State of Maharashtra,
(Copy to be served on the
Public Prosecutor, High Court of
Judicature at Bombay,
Bench at Aurangabad.

... **RESPONDENT**

...

Mr. S. S. Kazi, Advocate for Appellant.
Mr. B. L. Dhas, APP for Respondent / State.

...

**CORAM : A. B. CHAUDHARI &
INDIRA K. JAIN, JJ.**

DATED : 09th September, 2015.

JUDGMENT: (Per Indira K. Jain, J.)

. This appeal is preferred by Appellant – Accused

against the judgment and order dated 28th August, 2012, passed by learned Additional Sessions Judge, Aurangabad, in Sessions Case No.171 of 2010. By the said judgment and order, learned Additional Sessions Judge convicted Appellant for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life and fine of Rs.2,000/-, in default, to suffer further rigorous imprisonment for six months. Appellant was also convicted of the offence under Section 506 part (2) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1,000/-, in default, to suffer further rigorous imprisonment for two months.

2 Learned Additional Sessions Judge directed that both the sentences of imprisonment shall run concurrently.

3 For the sake of convenience, we shall refer Appellant in his original status as Accused as he was referred before the Trial Court.

4 Prosecution case briefly stated is as under:

- i. Deceased Sandhya was wife of Appellant. She

was married to Accused in the year 1999. Couple was blessed with two daughters Akshada and Ekta.

- ii. Incident occurred on 24th February, 2010. Sandhya sustained burn injuries and she was admitted to Government Hospital, Aurangabad. Police Head Constable Mr. S. L. Chaudhari was on duty at the hospital. He recorded statement of victim. In the statement Sandhya stated that on 24th February, 2010 at about 08:00 to 08:30 p.m. she was cooking food. That time due to bursting of stove she received burn injuries. On recording statement of Sandhya, Police Head Constable Chaudhari gave information to Kranti Chowk Police Station, Aurangabad. Station Diary Entry No.55 of 2010 was taken at the Police Station. Inquiry was entrusted to Police Head Constable Pathan. On receiving inquiry, Police Head Constable Pathan sent a letter to Taluka Executive Magistrate for recording dying declaration of victim. Accordingly, Mr. K. H. Jagalwar, Naib Tahsildar, Aurangabad went to hospital. He ascertained from Medical

Officer whether victim was in fit condition to make her statement. Dr. Ashvin Borkar was on duty as Medical Officer that time. He examined Sandhya and certified that she was conscious and fit to give her statement.

- iii. Then Naib Tahsildar Mr. K. H. Jagalwar recorded dying declaration of victim. In the said dying declaration Sandhya disclosed that her husband gave her threat of killing her brothers and herself. He was under influence of liquor. He poured kerosene on her person, set her on fire and ran away. Naib Tahsildar then forwarded dying declaration to Kranti Chowk Police Station.
- iv. On the basis of dying declaration recorded by Naib Tahsildar, Crime No.78 of 2010 came to be registered under Sections 307 and 506 of the Indian Penal Code against Accused.
- v. P.I. Sunil Telure was attached to Kranti Chowk Police Station. He received investigation of said crime. On 25th February, 2010, he visited the spot

and recorded scene of occurrence panchanama. From the spot a plastic can, match stick, match box and burn pieces of clothes were seized. On 27th February, 2010 P.I. Telure went to hospital. He inquired from Medical Officer whether victim was fit to give her statement. After Medical Officer certified that victim was able to make her statement, P.I. Telure recorded statement of victim Sandhya. In the said statement, victim disclosed that she has given her statement before Police on 24th February, 2010 in frightened condition. Before P.I. Telure, she disclosed the manner of incident in the same way as was stated before Naib Tahsildar.

- vi. Sandhya succumbed to burn injuries on 2nd March, 2010 at about 16:55 hours. Inquest panchanama was drawn. Dead body was sent to Government Medical College and Hospital, Aurangabad for postmortem. During postmortem examination, Medical Officers noticed 100% burns on the dead body. They opined cause of death as septicemia shock due to burns.

vii. After death of victim offence was converted to Section 302 of the Indian Penal Code. Investigating Officer recorded statements of several witnesses. On completing investigation charge-sheet was filed before Chief Judicial Magistrate, Aurangabad, who in turn committed the case for trial to the Court of Sessions.

5 Charge came to be framed against Appellant under Sections 302 and 506 of the Indian Penal Code. Appellant pleaded not guilty to the charge and claimed to be tried. His defence was of total denial and false implication. He submitted that victim sustained burns at the time of cooking due to bursting of stove and died.

6 Prosecution examined in all 11 witnesses to substantiate the guilt of Accused. On going through evidence adduced by prosecution, learned Additional Sessions Judge convicted and sentenced Appellant as stated in paragraph No.1 above. Being aggrieved, Accused has preferred this appeal.

7 We have heard learned counsel for Appellant and

learned APP for State. Considering the facts and circumstances of the case, submissions made on behalf of parties, reasonings recorded by Trial Court and evidence on record, for the below mentioned reasons we are of the opinion that Appellant poured kerosene on his wife Sandhya and set her on fire.

8 Conviction of Appellant is mainly based on ocular evidence of PW-4 Akshada, PW-6 Ekta daughters of Appellant and deceased and two written dying declarations Exhibits 36 and 44.

9 So far as evidence of PW-6 Ekta is concerned, at the outset, it is to be mentioned here that her testimony does not inspire confidence as she has admitted that her sister Akshada told her that her father killed their mother. In the light of admission given by Ekta in her examination-in-chief we find it appropriate to keep her evidence out of consideration.

10 PW-4 Akshada is a child witness. Incident occurred on 24th February, 2010. Evidence of Akshada was recorded in the Court on 8th April, 2011. That time she was 9 years old studying in 3rd standard.

11 On appreciation of evidence of child witness, learned counsel for Appellant vehemently contended that evidence of child witness should be accepted with great caution and general principle is that a person only be convicted if the Court is sure that guilt has been established. In support thereof, learned counsel for Appellant placed strong reliance on—

- (i) **Vitthal s/o Gyanba Gaikwad Vs. State of Maharashtra**¹ and
- (ii) **Anton Luis Piedade Fernandes Vs. State**².

12 We have gone through the above authorities. Though it is an established principle that child witnesses are risky as they are liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of evidence of child witness the Court comes to a conclusion that it is truthful and believable, totally free from tutoring there is no obstacle in any way not to rely upon the evidence of child witness.

13 In the present case before recording evidence of PW-4 Akshada, learned Additional Sessions Judge ascertained that witness understands the meaning of oath and thereupon

1 2005 (4) BOM.L.R. 1454

2 2012 ALL MR (CRI) 2446

administered her oath. It is stated by Akshada that she was studying in 2nd standard when her mother Sandhya died. She stated that her mother was beaten by her father. That time she was present in the house. Her father returned home in drunken condition. Hence quarrel had taken place between her mother and father in the night at 08:00 p.m. She stated that her father poured kerosene on person of her mother and set her on fire. Before setting her on fire, her father beat her mother.

14 Commenting upon the evidence of child witness Akshada learned counsel for Appellant vehemently contended that in view of dying declaration Exhibit 36 recorded by Naib Tahsildar, presence of Akshada in the house is doubtful. He further submitted that victim stated in dying declaration Exhibit 36 that no one was present in the house. We do not find force in the submission of learned counsel for Appellant for the simple reason that it is the Accused who brought in the cross-examination of Akshada that she was watching T.V. at the relevant time in the house. In the piercing cross-examination of Akshada nothing could be elicited to disbelieve her testimony. She stood the test of rigorous cross-examination. There is no reason whatsoever to disbelieve her testimony.

15 Before adverting to another crucial piece of evidence in the form of dying declarations it would not be out of place to mention here that examination-in-chief of PW-4 Akshada was recorded on 8th April, 2011. As can be seen from deposition, on the application of learned counsel for Accused her cross-examination was adjourned till next date. She was cross-examined on 16th April, 2011. Above adjournment granted by Trial Court only discloses that Trial Court was oblivious of specific stipulation containing in Section 309 of the Code of Criminal Procedure which mandates requirement of sessions trial to be carried on a day-to-day basis. No reason or special circumstances have been assigned by the Trial Court to justify grant of adjournment of eight days for cross-examination of a child witness PW-4 Akshada.

16 In **Raj Deo Sharma Vs. State of Bihar**³, the Honourable Supreme Court directed all the High Courts to remind all the Trial Court Judges of the need to comply with Section 309 of the Code of Criminal Procedure in letter and spirit. In fact, High Courts were directed to take note of conduct of any particular Trial Judge who violates above legislative mandate and to adopt such

3 1998 SCC (Cri) 1692

administrative action against Judicial Officer as per law.

17 The above directions were reiterated once again in case of **State of U.P. Vs. Shambhu Nath Singh**⁴. Later in **Akil Alias Javed Vs. State (NCT of Delhi)**⁵ in paragraph No.43 the Honourable Apex Court expressed displeasure and observed thus:

“43. It is unfortunate that in spite of the specific directions issued by this Court and reminded once again in *Shambhu Nath* such recalcitrant approach was being made by the trial court unmindful of the adverse serious consequences flowing therefrom affecting the society at large. Therefore, even while disposing of this appeal by confirming the conviction and sentence imposed on the appellant by the learned trial Judge, as confirmed by the impugned judgment of the High Court, we direct the Registry to forward a copy of this decision to all the High Courts to specifically follow the instructions issued by this Court in the decision in *Raj Deo Sharma* and reiterated in *Shambhu Nath* by issuing appropriate circular, if already not issued. If such circular has already been issued, as directed, ensure that such directions are scrupulously followed by the trial courts without providing scope for any deviation in following the procedure prescribed in the matter of trial of sessions cases as well as other cases as provided

4 (2001) 4 SCC 667

5 (2013) 7 Supreme Court Cases 125

under Section 309 CrPC. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judiciary Academy to achieve the desired result. We hope and trust that the respective High Courts would take serious note of the above directions issued in the decision in *Raj Deo Sharma* which has been extensively quoted and reiterated in the subsequent decision of this Court in *Shambhu Nath* and comply with the directions at least in the future years.”

18 Keeping various principles set out in above decisions in mind when we examine situation that had occurred in present case where PW-4 Akshada a crucial child witness was initially examined on 8th April, 2011 and then without assigning any reason cross-examined on 16th April, 2011 solely at the instance of counsel for the Accused we disapprove the procedure followed by the Trial Court Judge and direct the Registry to take serious note and ensure compliance of the provisions of Section 309 of the Code of Criminal Procedure in letter and spirit.

19 We now advert to dying declarations Exhibits 36 and 44 on which prosecution has placed strong reliance. PW-8 Kalyan Jagalwar was Naib Tahsildar at Aurangabad. On 25th February, 2010, he received a letter from Kranti Chowk Police Station for

recording statement of Sandhya. Copy of letter is at Exhibit 34. On receiving letter Mr. Kalyan Jagalwar reached Ghati Hospital at about 02:00 pm. He sought opinion of Medical Officer as to whether patient was able to make her statement or not. Medical Officer on duty PW-11 Dr. Ashvin Borkar examined Sandhya and found her conscious and in fit state of mind to give statement. Accordingly, doctor made endorsement on letter Exhibit 55. Thereafter, PW-8 Jagalwar made certain queries to victim to ensure whether she was able to give her statement. She answered the queries satisfactorily. Then he recorded dying declaration of Sandhya.

20 In the said dying declaration victim stated that incident occurred on 24th February, 2010 at about 08:00 pm. Her husband came to house under influence of liquor. She stated that he poured kerosene on her person and set her on fire. He then ran away. Neighbours came on hearing shouts. They admitted her in hospital.

21 After recording dying declaration, it was read over to victim. She admitted its correctness. Then Mr. Jagalwar obtained her thumb mark on dying declaration. Said dying declaration is

proved at Exhibit – 36 by Naib Tahsildar.

22 It is apparent from evidence of PW-8 Jagalwar that at the time of recording dying declaration he had removed relatives of victim outside the ward. When dying declaration was recorded Mr. Jagalwar and Medical Officer were present.

23 Another dying declaration Exhibit 44 was recorded by PW-10 P.I. Sunil Telure. On 27th February, 2010, he had been to Ghati Hospital. He gave a letter Exhibit 43 to Medical Officer and sought his opinion as to whether victim was able to make her statement or not. PW-11 Borkar was Medical Officer on duty. He examined patient and opined that she was conscious and fit to make her statement. Then P.I. Telure recorded statement of victim. In this dying declaration victim narrated the incident almost in the same way as she disclosed to PW-8 Naib Tahsildar. PW-10 P.I. Telure has proved the dying declaration at Exhibit 44.

24 Evidence of PW-8 Naib Tahsildar Jagalwar and PW-10 P.I. Telure is fully corroborated by Medical officer PW-11 Dr.Ashvin Borkar. Nothing substantial could be elicited in cross-examination of PW-8 Naib Tahsildar Jagalwar, PW-10 P.I. Telure and PW-11 Dr.Ashvin Borkar.

25 On appreciation of evidence of these witnesses and both the dying declarations Exhibits 36 and 44 learned counsel for Appellant strenuously submitted that on 24th February, 2010, first dying declaration was recorded. It is at Exhibit 9. In this statement victim stated that she sustained burns due to bursting of stove.

26 It is pertinent to note that Accused admitted the statement of victim and so it was exhibited as Exhibit 9. The crucial question here would be whether Exhibit 9 can be treated as dying declaration of victim. We have examined the record. It is apparent that notice under Section 294(1) of the Code of Criminal Procedure was not given by prosecution. Document was admitted without there being a list under Section 294(2) and without formal proof thereof. There was no compliance of Section 294 of the Code of Criminal Procedure and Criminal Manual Chapter VI paragraph 32 which prescribes the format and list. The Division Bench of this Court to which one of us was a Member (A. B. Chaudhari, J) in **State of Maharashtra Vs. Ajay Dayaram Gopnarayan and another**⁶ had an occasion to deal with such situation. In paragraph Nos.29 and 30 this Court observed thus—

6 2014(1) Mh.L.J. (Cri.) 293

“29. This Court has observed in large number of Sessions Trials having perused the original records of the cases that the notice under section 294 (1) is given by the prosecutors before the Court in a format prepared by them as per their whims. It is also found that such applications are also tendered handwritten and lists are submitted to the Court and the Court has been accepting the said lists mechanically and going ahead with the hearing and orders on Section 294 (1) application. Thus, both the prosecutor as well as Presiding Officer of the Court, ministerial staff and in cases where counsel for the accused gives such application, none cares to see that the format of list under Section 294(2) has been prescribed. In Criminal Manual Chapter VI para 32, such a form is prescribed which reads thus:

“Admission of certain documents directly in evidence without formal proof.

32. Attention of the Magistrates and Judges is invited to Section 294 of the Code of Criminal Procedure, 1973, according to which the particulars of the documents filed before the Court shall be included in a list, in the prescribed form given below, and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such documents and if the genuineness of any document is not disputed such document may be read in evidence in any inquiry, trial or other

proceedings, without proof of the signature of the person to whom it purports to be signed which, however, the Court may in List of documents filed before Court

*Prosecution

By the *accused.

Sr. No.	Particulars of the documents with dates	Pages	Whether original certified copy	By whom prepared	Names of attesting persons whether they are cited as witnesses	Remarks if any
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30. We are not only amazed but are anxious since the said format prescribed by para 32 quoted above is not at all being used either by prosecution or by accused or by the Presiding Officer of the Court and that is the reason why the prosecution or the counsel for the accused have been preparing format and the list contemplated by Section 294(1) as per their own whims. We deprecate such a practice since according to us the format provided by para 32 is prescribed with precision and none of the parties should be allowed to have the format of their own. We also deprecate the practice of exhibiting the documents not included in the list under Section 294 (2) and in this case Exhs.-87and 88 which were not included in the list Exh.-22 contemplated by Section 294(2), Criminal Procedure Code.

We direct the Registry to send the copy of paras 27 to 29 with cover page of this judgment to the Registrar General for being circulated to the Magistrates and the trial Judges. We also direct the Registry to send

the copy thereof to the Principal Secretary, Law and Judiciary, Mantralaya, Mumbai who may supply the printed format of list under section 294 (2), Criminal Procedure Code to the prosecutors in the courts of Magistrates and the Judges, also by putting on website.”

27 In the present case for want of compliance of Sections 294(1) and (2) and para 32 of Chapter VI of Criminal Manual document Exhibit 9 will have to be ignored.

28 There is one more reason to keep document Exhibit 9 out of consideration. Needless to state that mere exhibition of document does not make it admissible in evidence. It is a settled principle of law that to prove truthfulness of dying declaration person who recorded it must be examined before the Court. Prosecution has not examined Head Constable S. L. Chaudhari who recorded dying declaration Exhibit 9. But same was placed on record alongwith charge-sheet. It was for the Accused to examine Head Constable Chaudhari if at all he wanted to rely upon statement Exhibit 9. Accused did nothing. A simple endorsement is made on the document that it is admitted. In the absence of legal evidence Exhibit 9 cannot be read in evidence. As Exhibit 9 is not duly proved, it does not come to rescue to

Accused. If Exhibit 9 is ignored in its entirety then both the written dying declarations Exhibits 36 and 44 tilt totally in favour of prosecution and sole reliance can be placed on each of these dying declarations.

29 A futile attempt was made on behalf of Appellant to submit that there are material contradictions in both the dying declarations and therefore, no reliance can be placed on the same. According to Accused in Exhibit 36, victim stated that no one was present in the house whereas in Exhibit 44 she stated that she was in the house with her two daughters. Attacking on this contradiction learned counsel for Appellant urged that both the dying declarations are not worth to be believed and no reliance be placed on the same. In respect of two contradictory dying declarations learned counsel relied upon—

- (i) **Sanjay Sakharam Ahire Vs. The State of Maharashtra**⁷
- (ii) **Sou. Radhabai Fattasing Pawar & ors Vs. The State of Maharashtra**⁸
- (iii) **Uttam Prabhkar Bagul & Anr Vs. The State of**

7 2014 ALL MR (Cri) 5162

8 2014 ALL MR (Cri) 4364

Maharashtra⁹

Above authorities relate to contradictory dying declarations wherein in one story of accidental or suicidal fire was disclosed by deceased and in another she stated that her husband poured kerosene and set her on fire.

30 In the case on hand as discussed above statement Exhibit 9 is to be kept out of consideration in its entirety as it was not duly proved. If statement Exhibit 9 is ignored then we find no material contradiction in dying declaration Exhibits 36 and 44. So far as presence of two daughters as stated by victim in second dying declaration is concerned, in view of evidence of PW-4 Akshada and suggestion given to her in cross-examination that she was watching T.V. that cannot be also termed as major variance or contradiction in the statement of deceased.

31 Referring to postmortem report Exhibit 8 learned counsel for Appellant submitted that deceased sustained 100% burn injuries and so it is impossible to believe that she was mentally fit to give her statement. Postmortem report shows 100% burns sustained by victim. There is no absolute rule that in

9 2014 ALL MR (Cri) 3008

case patient sustained 100% burns she would not be mentally fit to give statement. We have considered evidence of Medical Officer who examined patient and made endorsement on both the dying declarations that patient was conscious and fit to give her statement.

32 PW-8 Naib Tahsildar Jagalwar, PW-10 P.I. Telure and PW-11 Dr. Borkar were independent witnesses and they had no reason to falsely implicate the Accused. There is nothing on record to show that investigation was dishonest, guided or defective investigation. In such a case both the dying declarations Exhibits 36 and 44 being found voluntary, truthful and trustworthy will have to be relied upon and there is no reason to discard the same.

33 It is then submitted by Accused that he had sustained burn injuries in an attempt to extinguish fire and in such a case it cannot be said that he has intention to cause death of his wife Sandhya. It is not disputed that Appellant sustained some burn injuries. However, there is no evidence on record to show that burn injuries were sustained by Appellant when he tried to extinguish fire. Sandhya had not stated so in both her dying

declarations. Nor there is other evidence on record to show that burn injuries were sustained by Appellant while extinguishing fire. On the other hand Sandhya stated that her husband ran away, neighbours had come and extinguished fire. It negatives defence of Accused that he sustained burn injuries while extinguishing fire and he had no intention to cause death of his wife.

34 In the light of above and on going through the record, we are of the opinion that there is sufficient evidence to prove beyond reasonable doubt that Appellant poured kerosene on his wife Sandhya and set her on fire which resulted in her death. We find no merit in the appeal. Hence, appeal is dismissed.

[INDIRA K. JAIN, J.]

[A. B. CHAUDHARI, J.]

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