

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

Criminal Application No. 6932 of 2014

The State of Maharashtra,
Through PSO Gondli Station,
District : Jalna.

.. Applicant
(Original complainant)

versus

1. Devidas s/o. Baburao Rathod,
Age : 23 years,
R/o. Ganpati Tanda,
Taluka : Ambad,
District : Jalna.
2. Rakhminbai w/o. Baburao Rathod,
Age : 41 years,
R/o. as above.
3. Baburao s/o. Mansing Rathod,
Age : 47 years,
R/o. as above.
4. Kavita w/o. Rohidas Rathod,
Age : 40 years,
R/o. as above.
5. Balu s/o. Malu Rathod,
Age : 35 years,
R/o. as above.

.. Respondents
(Original accused)

.....

*Mrs. S.G. Chincholkar, Additional Public Prosecutor,
for the applicant - State.*

.....

**CORAM : S.S. SHINDE &
A.M. BADAR, JJ.**

DATE : 18TH FEBRUARY 2015

COURT'S ORDER (Per A.M. Badar, J.) :

1. This is an application filed by the State seeking leave to challenge judgment and order passed by the learned Additional Sessions Judge-1, Jalna, on 23-9-2014, in Sessions Case No. 58/2012, thereby acquitting respondents / accused of the offences punishable under Sections 302, 201, 498A, read with Section 34 of the Indian Penal Code.
2. Heard the learned Additional Public Prosecutor appearing for the applicant - State. She vehemently argued that the incident in question took place at matrimonial house of the deceased and in her first dying declaration, she has shown complicity of her mother-in-law as well as husband, but subsequently her dying declaration came to be recorded by Naib-Tahsildar wherein she has attributed role of other respondents / accused persons. According to the learned Additional Public Prosecutor, the dying declarations are consistent so far as case of prosecution regarding murder of deceased Kavita at the hands of respondents / accused is concerned and, therefore, the learned trial court erred in acquitting respondents / accused.
3. With the assistance of the learned Additional Public Prosecutor, we have perused record & proceedings including deposition of witnesses as well as dying declarations of deceased Kavita w/o. Devidas Rathod.

4. We now note few facts leading to the prosecution of respondents / accused.

It is case of the prosecution, that respondents / accused were insisting Kavita to bring an amount of Rs. 1,00,000/- from her parents and were subjecting her to cruelty on account of that demand. According to the prosecution, on 23-8-2011, at village Hadgaon Gondi, accused persons killed Kavita Rathod by setting her ablaze. Death of Kavita occurring on 27-8-2011 because of burns sustained by her on 23-8-2011 is not in dispute. Evidence of PW 6 Dr. Pravin Shankarrao Deshmukh - Autopsy Surgeon, coupled with *post mortem* report shows that Kavita sustained 69 % *ante mortem* burns and died because of burns.

5. Now, let us examine whether deceased Kavita was incinerated by respondents / accused. After sustaining burns, Kavita was taken for medical treatment to Civil Hospital, Beed, for medical treatment. At that hospital, PW 5 Vijay s/o. Sopan Jagtap, Police Head Constable, recorded her dying declaration which is at Exhibit 65. This recording was over at about 12.40 p.m. of 23-8-2011. Perusal of this first dying declaration of deceased Kavita (Exhibit 65) shows that the incident in question happened at wee hours of 23-8-2011. According to this declaration, respondent no.2 Rukhminbai - mother-in-law of Kavita quarrelled with her by asking her as to why she was late in washing and cleaning utensils. Kavita replied that as she had cleaned cattle shed first, she is late in cleaning utensils. Then as per this dying declaration, respondent no.2 - Rukhminbai caught hold of her hair, brought her inside the house. Declarant Kavita further stated that

she informed her mother-in-law that her parents are poor and, therefore, amount of Rs. 1,00,000/- should not be demanded from her. Thereafter, as per this dying declaration of Kavita, respondent no.2 - Rukhminbai sat on her chest and her husband - respondent no.1 Devidas poured kerosene on her person. Dying declaration at Exhibit 65 further shows that then husband of Kavita asked his mother to go out and accordingly respondent no.2 - Rukhminbai went out of that room. Thereafter respondent no.1 Devidas - husband ignited Kavita by means of burning matchstick causing burns to her. Declarant Kavita further stated in this dying declaration at Exhibit 65, that thereafter respondent / accused no.4 Kavita w/o. Rohidas Rathod - her sister in law, extinguished fire by pouring water on her person. It was on the basis of this dying declaration recorded by PW 5 Vijay Sopan Jagtap, Crime No. 176/2011, under Sections 307 and 498A, read with Section 34, of IPC was registered against respondents / accused at Police Station, Gondi.

6. On the same day i.e. on 23-8-2011, second dying declaration of deceased Kavita came to be recorded by PW 3 - Rameshwar Vasantrao Gore, Naib-Tahsildar at Civil Hospital, Beed. This dying declaration is at Exhibit 52. On perusal thereof, it is seen that declarant Kavita had allegedly stated that on 23-8-2011, at about 4.00 a.m., she was sleeping inside her house when her father-in-law / respondent no.3 Baburao s/o. Mansing Rathod sat on her chest, her mother-in-law - respondent no.2 Rakhminbai caught hold of her hair, her cousin brother-in-law / respondent no.5 Balu s/o. Malu Rathod caught hold of her both legs, her husband / respondent no.1 Devidas s/o. Baburao Rathod poured kerosene on her person and then her sister-in-law / respondent no.4 Kavita w/o. Rohidas

Rathod set her ablaze by means of ignited matchstick.

7. These two dying declarations of Kavita constitute major part of evidence led by the prosecution against respondents / accused. It is well settled, that dying declaration enjoins sacrosanct status as a piece of evidence as it comes from the mouth of dying person and a sense of impending death prevents such person from making any false statement. However, at the same time, it needs to be kept in mind, that dying declaration is not a deposition in the court. It is neither made in presence of the accused nor it is a statement made on oath. Its credence cannot be tested by means of cross examination. Because of these inherent weaknesses, no initial presumption can be drawn that the dying declaration contains nothing but the truth. Therefore, the court is enjoined with a duty to test the truthfulness of the dying declaration coming before it in evidence. To test the credibility of the dying declaration, the court has to keep in mind various factors including consistency when the case is of multiple or plural dying declaration. In such case, the dying declaration which is first in point of time needs to be preferred and all the dying declarations needs to be consistent in material particulars. The court is required to rule out the possibility of the dying declaration being the result of prompting, tutoring or vindictiveness of the deceased or same being production of imagination of the deceased.

8. If tested on these touchstone, we find that both these dying declarations are giving materially divergent story regarding sustaining burns by Kavita. In the first dying declaration, role of setting her ablaze is attributed by deceased Kavita to respondent no.1 - Devidas, her husband.

This first dying declaration is showing that respondent no.4 - Kavita w/o. Rohidas Rathod had in fact extinguished fire by pouring water on person of deceased Kavita. However, in second dying declaration at Exhibit 52, independent role in incinerating deceased Kavita is attributed to all respondents. First dying declaration of deceased Kavita shows demand of Rs. 1,00,000/- from her and consequent harassment to her, whereas such allegations are conspicuously absent in her second dying declaration. The time of incident is also differing in both these dying declarations. As both these dying declarations are totally inconsistent in material particulars showing different version of the declarant, it is not possible to accept one and to reject another. Since sphere of scrutiny of dying declaration is a limited area, the court cannot sideline such material divergence and, therefore, the learned trial court has correctly rejected both these dying declarations.

9. According to the prosecution, deceased Kavita had made oral dying declaration to her father PW 2 - Sakharam Khema Pawar. However, he has not supported to the prosecution and nothing came on record from his searching cross examination by the learned Additional Public Prosecutor, in order to incriminate respondents / accused. The defence has examined DW 1 - Nilu Mansi Rathod, a neighbour who reached the spot soon after the incident. True it is, that the defence witnesses are also entitled to same treatment as that is given to the prosecution witnesses, but there is nothing in his evidence to espouse cause of the defence.

10. Careful scrutiny of entire evidence of prosecution requires us to hold that the learned trial court has taken possible view in the matter by

holding that the prosecution has failed to establish offences alleged against the respondents / accused. Therefore, we do not see any reason to interfere with the order of acquittal recorded by the trial court.

11. For the foregoing reasons, the Application is rejected. Consequently, leave to file appeal is refused.

(A.M. BADAR)
JUDGE

(S.S. SHINDE)
JUDGE

.....