

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.8 OF 2008

Sanjay Narayan Kudalkar	]	
Aged about 34 years,	]	
R/o. Satkarya Chawl, Room No.233,	]	
Near Holi Maidan, Dharavi, Mumbai.	]	
[At present lodged in Nasik Jail]	]	 Appellant

Versus

The State of Maharashtra,		
Thru' Dharavi Police Station, Mumbai.	]	 Respondent

Mr. S.V. Kotwal with Mrs. Racheeta Dhuru
for the Appellant.

Mrs. U.V. Kejriwal, A.P.P., for the Respondent-State.

CORAM : P.V.HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 7TH JANUARY, 2015.

ORAL JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :

1. By this Appeal, the Appellant challenges the correctness of the Judgment of conviction and sentence recorded against him by the Court of Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.599 of 2003. The Appellant, by the said Judgment, is acquitted for the offence punishable under Section 498-A of the I.P.C., however, convicted for the offence punishable under Section 302 of the I.P.C. and sentenced to suffer R.I. for life and to pay fine of Rs.1,000/- with a default stipulation to undergo S.I. for two months.

2. Facts, which are necessary, for deciding this Appeal can briefly be stated thus :-

On 13th April, 2003, while PI Maruti Pandurang Patil (PW-7) was on duty along with PSI Sanjay Patil at Dharavi Police Station, Mumbai at about 3:35 p.m., he received information from Police Constable B. No.26939 of Sion Hospital that one lady was admitted in burned condition on Bed No.25 of Ward No.23. Therefore, along with his staff and Special Executive Magistrate Smt. Munny Faisulla Khan (PW-4), he went to Sion Hospital. There he met the Doctor and ascertained that the burned lady by name Aishwarya @ Savita Sanjay Kudalkar, was in a condition to give the statement. When Doctor confirmed it, PSI Sanjay Patil and Smt. Munny Khan (PW-4) recorded the separate statements of Aishwarya, in which Aishwarya stated that, while cooking the food, due to explosion of the stove, she has sustained the burns.

3. PI Maruti Pandurang Patil (PW-7) then along with PSI Sanjay Patil went to the spot and made the Panchanama of the scene of incidence (Exhibit-22) in the presence of Panch Witness Manoj Sakharam Takke (PW-3). At the spot of incidence, which was in the residential room of the deceased and the Appellant, they found the half cooked food and two brass stoves.

4. Meanwhile, the parents of Aishwarya, namely, Shankar Krishnaji Kaniwdekar (PW-1) and Suman Shankar Kaniwdekar (PW-2), on receipt of information about the incident, rushed to the Sion Hospital and made enquiries with Aishwarya about the cause of the burns. According to Prosecution, before them, on 16th April, 2003 she stated that the Appellant has poured kerosene on her and set her ablaze on account of her failure to satisfy the demands of the cash amount.

5. On the basis of this statement made by Aishwarya, on 16th April, 2003 her father Shankar (PW-1) lodged a report at Dharavi Police Station, in pursuance of which C.R. No.87 of 2003 came to be registered against the Appellant for the offences punishable under Sections 498-A and 307 of the IPC. On the same day, PI Maruti Pandurang Patil (PW-7) again took Special Executive Magistrate Smt. Munny Khan (PW-4) and PSI Sanjay Patil to the Sion Hospital to record fresh statement of Aishwarya. In these second statements recorded separately by PSI Sanjay Patil and Munny Khan (PW-4), Aishwarya implicated the Appellant for pouring kerosene on her and setting her ablaze.

6. PI Maruti Pandurang Patil (PW-7) then recorded the statement of Aishwarya's mother Suman Shankar Kaniwdekar (PW-2) and her son-in-law N. Panerkar. On 20th March, 2003, Aishwarya succumbed to burn

injuries and hence the offence was converted to punishable under Section 302 of the IPC. On the same day, PSI Sanjay Patil arrested the Appellant at 5 p.m. After the Inquest Panchnama, the body of Aishwarya was referred for post mortem and the cause of death was found to be septicemic shock as a complication of the burns covering 55% of body surface area. The post mortem was conducted by Dr. Harish Manilal Pathak (PW-5) and the post mortem notes (Exhibit-29) were collected.

7. As a part of further investigation, on 21st April, 2003, all muddemal articles collected from the scene of offence and also the clothes of the deceased Aishwarya were sent for chemical analysis vide requisition letter dated 21st April, 2003 (Exhibit-37). The statements of other witnesses came to be recorded and then, on completion of due investigation, Charge-Sheet came to be filed in the Court on 5th June, 2003.

8. The Trial Court framed charge against the Appellant vide Exhibit-4 for the offences punishable under Sections 498-A and 302 of the IPC. The Appellant abjured the guilt and claimed trial. He raised the defence of false implication at the instance of the parents of the deceased. A specific plea was raised that the cause of Aishwarya's burns was accidental, as stated by her in her first set of Dying Declarations.

9. In order to bring home the guilt of Appellant, Prosecution examined seven witnesses including parents of Aishwarya, namely, Shankar Krishnaji Kaniwdekar (PW-1) and Suman Shankar Kaniwdekar (PW-2), Manoj Sakharam Takke (PW-3), Panch Witness to the Spot Panchnama, Special Executive Magistrate Smt. Munny Khan (PW-4), Dr. Harish Manilal Pathak (PW-5), who has conducted the post mortem, Dr. Nilesh Bhagwandas Shah (PW-6), who has treated the deceased and has proved the noting on the case paper made by Dr. Abhishek Somani, in which Appellant is again implicated of the offences and, lastly, PI Maruti Pandurang Patil (PW-7), the Investigating Officer.

10. To substantiate his defence, the Appellant also led the evidence of four witnesses, namely, Dr. Sudhakar Ramanna Sannkki (DW-1) to prove that Aishwarya was suffering from some gynaec problem and was taking treatment for the same. His elder brother Shri. Sharad Narayan Kudalkar (DW-2) and his wife Smt. Ranjana Sharad Kudalkar (DW-3), were examined to prove that married life of Aishwarya was peaceful and there was no demand of any amount and no reason for Appellant to set her ablaze. They are also examined to prove that, before them, Aishwarya has attributed the cause of her burns to the accidental fire of the stove.

11. The Trial Court relied on the evidence of the second set of Dying Declarations of Aishwarya recorded by the Special Executive Magistrate Smt. Munny Khan (PW-4) and PSI Sanjay Patil on 16th April, 2003 and also on the oral Dying Declaration made by Aishwarya before her parents. Trial Court further relied upon the noting made by Dr. Dr. Abhishek Somani, tried it to be proved through the evidence of Dr. Nilesh Bhagwandas Shah (PW-6), and, on the basis thereof, held the involvement of the Appellant to be proved beyond reasonable doubt as regards the offence of setting her on fire after dousing her with kerosene for the offence punishable under Section 302 of the IPC and convicted and sentenced him as stated above. The Trial Court, however, did not find the evidence produced on record by the Prosecution sufficient to prove the guilt of Appellant for the offence punishable under Section 498-A of the IPC and acquitted him for the said offence. The Respondent-State has not challenged the said acquittal.

12. As regards charge under Section 302 of the IPC, the entire case of Prosecution is based on the Dying Declarations of the deceased. As stated above, there are multiple Dying Declarations of the deceased recorded in writing by different authorities at different times, coupled with the oral Dying Declaration alleged to be made by Aishwarya before her parents.

13. Now coming first to the oral Dying Declaration of Aishwarya made before her parents, it is deposed by her father Shankar (PW-1) that on 12th April, 2003, he had gone to Gangapur with his younger daughter. On 13th April, 2003, from Gangapur, he made a phone call to his wife Suman (PW-2) and she told him that Aishwarya was burned. After hearing this news, he immediately came to Sion Hospital, where Aishwarya was admitted. She was in complete burned condition. Thereafter, on 16th April, 2003, i.e. after about two days, Aishwarya told him that her husband has set her on fire. She stated the same fact to the Special Executive Magistrate Smt. Munny Khan (PW-4) also and then, on 20th April, 2003, after Aishwarya succumbed to burn injuries, he lodged the report vide Exhibit-16 at Dharavi Police Station. The Report (Exhibit-16), however, discloses that it was lodged on the same day i.e. 16th April, 2003, in which he has stated that on 16th April, 2003 at 11 a.m. Aishwarya disclosed to him that on 13th April, 2003, when she and her husband were alone in the house, at about 3 p.m., her husband raised quarrel on the ground that she was not bringing money for purchasing the house. Then he poured kerosene on her from the can and set her ablaze. She tried to save herself by holding him, but he pushed her away with both the hands. Her father-in-law, with the help of some persons, admitted her in the hospital. However, due to

the apprehension of her husband, she did not disclose these facts immediately and attributed the cause of her death to the accidental fire.

14. The evidence of Aishwarya's mother Suman (PW-2) is also to the effect that when she came to know about Aishwarya sustaining the burns, she rushed to the Sion Hospital. She has deposed that Aishwarya told her that the Appellant poured kerosene on her and set her ablaze and she was pushed by him with his hands when she tried to get his help for extinguishing the fire. However, this witness has not stated when Aishwarya has made this statement to her, whether immediately on the same day or after two days. Her evidence is silent on this aspect.

15. The Prosecution has then relied on the evidence of the Special Executive Magistrate Smt. Munny Khan (PW-4). The evidence of this witness is material because she has recorded two Dying Declarations of Aishwarya, first on 13th and second on 16th. In her examination-in-chief, this witness has stated that on 16th April, 2003, she was called by the Police Officer to record Dying Declaration of Aishwarya. Accordingly, she went to the Sion Hospital and there Aishwarya told her that her husband has set her on fire by pouring kerosene on her as she did not bring money from her parents to purchase house as per the demand of her husband. This Dying Declaration is marked as Exhibit-26. In the cross-examination,

she has admitted that on this Dying Declaration she has not mentioned that the contents thereof were read over to Aishwarya. There is no endorsement also to that effect made on the Dying Declaration.

16. In the cross-examination, she has admitted that on 13th April, 2003 also, she has visited Sion Hospital and recorded Dying Declaration of Aishwarya. Photo-copy of that Dying Declaration was shown to her and she admitted that it was recorded as per the statement given by Aishwarya before her. She had handed it over to PI Maruti Pandurang Patil (PW-7), the Investigating Officer and it was taken by that Officer in his custody. She has further admitted that, in that Dying Declaration, Aishwarya has stated that she had no trouble from any member of her family and she has got burns due to explosion of the stove while she was warming the food. In the said Dying Declaration, she had also stated that she has no complaints against anyone. It is pertinent to note that the Prosecution has not produced the Dying Declaration of Aishwarya recorded by this witness on 13th April, 2003, along with Charge-Sheet.

17. PI Maruti Pandurang Patil (PW-7), the Investigating Officer, has, however, in his cross-examination, admitted the fact that on 13th April, 2003, he has taken the Special Executive Magistrate Smt. Munny Khan (PW-4) along with him and she has recorded the statement of deceased

Aishwarya, but he has not filed the same along with the Charge-Sheet. He has further admitted that, on 13th April, 2003 itself, PSI Sanjay Patil has also recorded the statement of Aishwarya, which was also not filed in the Court along with the Charge-Sheet. In the cross-examination, he has shown readiness to file both the statements of Aishwarya dated 13th April, 2003, which are marked as Exhibits “40” and “41” recorded by Smt. Munny Khan (PW-4) and by PSI Sanjay Patil. He has also admitted that the statement (Exhibit-40) bears the signature of the Special Executive Magistrate Smt. Munny Khan (PW-4) and thumb impression of Aishwarya.

18. In both these statements, Aishwarya has totally exculpated the Appellant from the cause of her burns and further stated that it was on account of the accidental fire while she was warming food.

19. There is one more piece of evidence on which the Prosecution has placed reliance on the ground that it is also in the form of Dying Declaration. It is the noting made by Dr. Abhishek Somani on 18th April, 2003 in the case papers of Aishwarya. Prosecution has tried to prove this noting by examining Dr. Harish Manilal Pathak (PW-5). He has conducted post mortem only and not treated her. Therefore, as a matter of fact, he cannot be a witness to prove whatever noting is recorded by some other Doctor.

20. Prosecution has therefore examined Dr. Nilesh Bhagwandas Shah (PW-6), who has also treated Aishwarya and has claimed that he can identify the noting made by Dr. Abhishek Somani in the case paper on 18th April, 2003. The said noting is marked as Exhibit-32. As per Dr. Nilesh (PW-6), these are the notes of conversation between Dr. Abhishek Somani and Aishwarya and in the said notes (Exhibit-32), it is mentioned that Aishwarya has attributed the cause of her burns to the Appellant. However, in the cross-examination, he has admitted that he was not present at the time of conversation between Dr. Somani and Aishwarya. The notes (Exhibit-32) are in the handwriting of Dr. Abhishek Somani. He is not aware as to in which language, the conversation took place between Dr. Abhishek Somani and Aishwarya. He also does not know whether the notes (Exhibit-32) were directly written and who else was present in the Ward when Dr. Abhishek Somani made these notes. It need not be stated that mere technical marking of the notes as "Exhibit-32", merely because Dr. Nilesh Bhagwandas Shah (PW-6) has identified the handwriting of Dr. Abhishek Somani thereon, is not sufficient to prove the contents thereof. In the absence of any explanation offered by Prosecution as to why Dr. Abhishek Somani was not examined as a witness, in our considered opinion, therefore, the Trial Court has committed an error in relying upon this piece of evidence as corroborating

piece for subsequent set of Dying Declarations of Aishwarya, implicating the Appellant. This piece of evidence therefore has to be totally excluded from consideration.

21. This leaves us with four written Dying Declarations of Aishwarya. First two recorded on 13th April, 2003 vide Exhibits “40” and “41” by the Special Executive Magistrate Smt. Munny Khan (PW-4) and PSI Sanjay Patil respectively and second set of Dying Declarations recorded on 16th April, 2003 again by the Special Executive Magistrate Smt. Munny Khan (PW-4) and PSI Sanjay Patil, in addition to the alleged oral Dying Declaration made by Aishwarya before her parents. The contents of the written Dying Declarations recorded on 13th April, 2003 and 16th April, 2003 are not only totally inconsistent, but contradictory to each other. If first set of Dying Declarations dated 13th April, 2003 is to be accepted, which exculpates the Appellant, then the second set of Dying Declarations recorded on 16th April, 2003 and oral Dying Declaration made by Aishwarya before her parents implicating the Appellant has to be rejected. They are mutually exclusive and irreconcilable.

22. It has to be stated that consistency in the Dying Declarations, if there are more than one, is the hallmark of its guarantee of being the truthful version of the deceased. As held by the Hon'ble Supreme Court in

MahibooobSab Abbasbi Nadaf Vs. State of Karnataka, AIR 2007 SC 2666, consistency in the Dying Declarations is the relevant factor for placing full reliance thereupon. When the deceased herself had taken contradictory and inconsistent stands in different Dying Declarations, they should not be accepted on their face value. Caution in this behalf is required on the part of the Court. The Court has to be careful to ensure that none of the statement was the result of either tutoring or prompting.

23. The Division Bench of our own High Court in **Suresh Arjun Dodorkar (Sonar) V/s. State of Maharashtra, 2005 ALL MR (Cri) 1599**, has categorically held that when in a case, Court comes across multiple Dying Declarations which are not consistent but contradictory to one another, the Court cannot pick and choose any one set of Dying Declarations.

24. Thus, when there are plural Dying Declarations, they have to be consistent at-least in respect of the material aspect of the incident. In the present case, there is absolutely no consistency. Therefore, in our opinion, as the Court is precluded from picking and choosing one set of Dying Declarations over the another, no reliance can be placed on the second set of Dying Declarations to implicate the Appellant for the offence charged.

25. In the alternate, as held by the Hon'ble Supreme Court in **M.V. Satyanandam Vs. Public Prosecutor, A.P. High Court, AIR 2004 SC 1708**, where there is a plurality of Dying Declarations, it is the duty of the Court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. Court has to examine the evidential value of each statement on its own merit and to decide whether it could be acted upon unless there is material to show that it is inherently improbable or made under pressure or otherwise.

26. The two sets of Dying Declarations in the present case are, if considered on this touch stone also, then it becomes difficult to accept or choose the second set of Dying Declarations as reflecting the true state of affairs or appearing in conformity with Prosecution case. The second set of Dying Declarations implicating the Appellant is made three days after the incident. Trial Court has held that Aishwarya has explained in her second set of Dying Declarations as to why she has put up the story of accidental burn in her first set of Dying Declarations. The reason for the same was that she had apprehension or fear of her husband as none of her relative was present with her at that time. Whoever was present with her and brought her to the hospital were her father-in-law and the relatives of her husband. Therefore, there is probability that she might have put up

the case of accidental burn. It appears that the Trial Court has accepted this plea.

27. However, the major flaw in this plea is that she met her mother immediately on the same day of the incident and her father on the next day of the incident. Then there was no reason for her to fear or to keep quiet. However, the report implicating the Appellant is given by her father on 16th April, 2003. Hence, there is inordinate delay in lodging the complaint against the Appellant. It is also unbelievable that after Aishwarya has implicated the Appellant for setting her ablaze, her parents will keep quiet and not take any recourse to Police. Therefore, as regards the oral Dying Declaration of Aishwarya before her parents, either she did not disclose or her parents did not report immediately. It does not appeal to reason that Aishwarya will not disclose to her parents immediately or on next day if it was a fact. Therefore, evidence as regards oral Dying Declaration of Aishwarya relating to Implicating the Appellant is bereft of judicial credence and has to be discarded.

28. In this fact situation, the possibility of the second set of Dying Declarations, being the outcome of influencing or tutoring by her parents, cannot be ruled out.

29. Moreover, the manner in which this second Dying Declaration (Exhibit-26) is recorded, without their contents being read over and admitted to be correct by Aishwarya, also gives cause for discarding it as a piece of evidence admissible in law.

30. There is one more aspect also which creates doubt about the truthfulness of second set of Dying Declarations, i.e. the Spot Panchnama, proved through the evidence of Manoj Sakharam Takke (PW-3) and PI Maruti Pandurang Patil (PW-7). It reveals that there were two stoves on which half cooked food was kept. According to PW-3 Manoj, some cooked *rice*, *chapatis*, *fish* and *salad* were on the spot, which supports the first set of Dying Declarations that while cooking or warming the food on the stove, Aishwarya suffered the accidental burns.

31. Trial Court has also relied on the fact that the extensive nature of the burns were upto 55% and that too on the back along with other portion of the body, which, according to Trial Court, makes it necessary to draw the inference that it was on account of someone else dousing her with kerosene and setting her ablaze. However, it is difficult to accept this submission because in case of homicidal burns, the extent of burn injuries would have been much more and in that case, even the head and the hair including the face would have got burned. Moreover, it is brought on

record through the evidence of all the witnesses that smell of kerosene was not noticed or kerosene residues were not found at the time of post mortem or otherwise. Therefore, the case of Appellant setting her ablaze after dousing her with kerosene has to be rejected.

32. Hence, after giving our anxious consideration to the material on record, we are of the opinion that Prosecution has not been able to establish the charge levelled against the Appellant beyond reasonable doubt. The evidence led by the Appellant of his witnesses is even if not considered, the failure of the Prosecution to prove the charge is apparent in view of the multiple mutually exclusive and contradictory Dying Declarations brought on record. As a result, the Appellant is entitled to the benefit of reasonable doubt. Accordingly, Criminal Appeal is allowed and the conviction and sentence of the Appellant is hereby quashed and set aside and the Appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the Appellant, be refunded to him. Since the Appellant is in Jail, he be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]