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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.112 OF 2014.**

Rajkumar Shivnath Yadav,	]	
aged about 26 year,	]	
residing at Avish Udyog Bhavan	]	
Gala Plastics Chawl	]	... <u>Appellant</u>
	]	
Ringanwada, Nani Daman	]	Ori. accused
	]	
Native of Jamui, Post Padari Bazar,	]	
Thana, Salempur, Dist. Devaria	]	
U.P.	]	

V/s.

Union Territory of Daman & Diu	]	
and anr	]	
Respondents	]	

Ms. Apeksha Vora, appointed advocate for the Appellant.

Shri. Abhishek Bhaduri a/w Shri D.A. Nalavade, for Respondent No.1.

Shri A.S. Shitole, A.P.P., for the Respondent-State

**CORAM : SMT. V. K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

DATE : 3RD JULY, 2015.

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

1. The appellant, who stands convicted for the offence

punishable under Section 302 of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.5,000/- in default to suffer simple imprisonment for six months, by the Sessions Judge, Daman, by his judgment dated 3rd November, 2012, in Sessions Case No.15 of 2011, by this appeal challenges his conviction and sentence.

2. Brief facts of the appeal can be stated as follows :-

On 29.8.2011, at about 10.00 p.m. while P.W.7 PSI Jivani was on duty at Kalariya Out Post, he received a phone call informing him that one lady was found in burnt condition at Evic Industrial Estate, Ringanwada. Hence, he instructed his staff to take that lady to Marwad Hospital and he directly went to the said hospital. There P.W.4 Dr. Sonone, was present on duty. P.W.7 PSI Jivani, confirmed from him that the burnt lady Payal, the wife of present appellant, was in a condition to give her statement. Then he recorded statement of Payal vide Exh.30 in which she stated that her husband poured kerosene on her; set her ablaze and then he went out closing the door from outside. When she shouted, persons residing nearby opened the door, extinguished her fire and brought her to

hospital. P.W.7 PSI Jivani then sent requisition to Special Executive Magistrate, for recording dying declaration of lady. P.W.3 Dhirajlal Tandel, the Executive Magistrate, accordingly recorded her dying declaration at 00.15 hrs vide Exh.15 in which she reiterated whatever she has stated in her statement Exh.30 given before P.W.7 PSI Jivani. The statement of deceased Payal vide Exh.30 was treated by P.W.7 PSI Jivani as F.I.R. and on the basis of the same, he registered C.R. No.87 of 2011 against the appellant, for the offence punishable under Section 307 of the IPC.

3. On the next day, he went to the spot and made spot panchanama Exh.8 in presence of P.W.1 panch Dadulal. From the spot, he collected burnt match stick and match box. On the next day, as it was informed to him that the appellant lady Payal succumbed to the burn injuries, he made inquest panchanama Exh.9 and sent her dead body for postmortem. P.W.5 Dr. Nirankarnath conducted postmortem and gave the cause of death as shock due to 98% deep burn injuries. The postmortem report is collected and is marked as Exh.53. The appellant was arrested and further to completion of investigation, chargesheet was filed in the Court.

4. On committal of the case to the Sessions Court, the trial Court framed charge against the appellant vide Exh.3. The appellant pleaded not guilty and claimed trial.

5. In support of its case, prosecution examined in all 7 witnesses and on appreciation of their evidence, the trial Court was pleased to hold the guilt of the appellant to be proved beyond reasonable doubt and convicted and sentenced him as aforesaid.

6. This judgment of the trial Court is challenged in this appeal by learned counsel for the appellant and supported by learned APP.

7. The case of prosecution is based on the evidence of two dying declarations and also independent testimony of eye witness, P.W. 2 Dadu Saini. The evidence of this witness goes to reveal that he resides near the house of deceased. On the date of incident after taking the dinner, he heard some shouting, hence he came out of his room and saw persons gathered in front of the room of the appellant and deceased.

He also saw that the door of the room of appellant was closed from outside and the appellant was standing near water tab outside room. The persons gathered there opened the door of the room and wife of appellant i.e. deceased Payal fell outside. She was in burnt condition. Then police were called and she was taken to the hospital.

8. In his cross-examination, it is brought on record that there is only one room between his room and that of appellant. It is also brought on record that 10 to 12 persons had gathered there and deceased was demanding water. Further it is brought on record that the door was closed when he came out of his room and after the door was opened by persons gathered there, deceased fell down and she was in burnt condition.

9. This witness is totally independent witness and his evidence, thus, proves the fact that the deceased was found in burnt condition. When the door of her house was opened from outside, she could come out. Though the appellant was very much present outside the house, he did not make any attempt either to open the door or to extinguish the fire. The

persons gathered there did so and lady was taken to the hospital by police.

10. There is then evidence of P.W.7 PSI Jivani, who on the receipt of information about burnt lady, has directed his staff that she be taken to the Marwad Hospital. He directly went to Mzarwad Hospital. There requisition was made to P.W. 4 Dr. Sonone, who was present on duty to give opinion whether lady was in a position to give her statement. Said requisition is produced on record at Exh.21 and as per opinion given on the requisition by P.W.4 Dr. Sonone, Payal was in a position to give statement. P.W. 7 Jivani has then recorded the statement of Payal vide Exh.30 in which she has stated that her husband poured kerosene on her and set her on fire. When she shouted, her husband locked her, he closed the door from outside, then somebody opened the door, extinguished the fire and informed the police. Then she was brought to the hospital. As per evidence of P.W.7 PSI Jivani, after recording of statement was completed, it was explained to her in Hindi language. She admitted it to be correct and then he obtained her thumb impression on the same. As per his further evidence on this statement Exh.30, he has registered offence,

F.I.R. in printed form is at Exh.31 which shows that Crime No.87 of 2011 was registered thereon at 11.30 p.m. By that time, he has from the hospital itself, made requisition to Special Executive Magistrate to record her dying declaration.

11. There is corroborating evidence of P.W.3 Executive Magistrate Dhirajlal Tandel, to whom requisition was made by P.W.7 PSI Jivani, for recording dying declaration of the deceased. He has visited the hospital at about 00.15 hrs. He contacted the Doctor on duty i.e. P.W.4 Sonone and made enquiry with him whether burnt lady can give her statement. P.W.4 Dr. Sonone, came alongwith him near the lady and found that she was conscious and can give her statement. Then P.W.3 Executive Magistrate Tandel asked her name to the victim. She told her name as "Payal Rajkumar". Then P.W.3 Executive Magistrate Tandel asked the lady as to what happened, she told him that her husband has poured kerosene on her and set her on fire; at that time, she and her husband were alone present in the room. Further she told him, on her own, that her husband was interested in the second marriage and that was the cause for setting her ablaze.

12. As per evidence of P.W.3 Executive Magistrate Tandel, he recorded her statement as per her version vide Exh.18. He was writing while she was giving him the answers. After completion of recording of statement, he obtained her thumb impression thereon. In his cross examination, it is further brought on record that after recording was completed, he has explained the contents of the dying declaration to her in Hindi and then she made her left hand Thumb Impression thereon.

13. Thus, there are two dying declarations of the deceased on record vide Exh.30 and Exh.18, which are thoroughly consistent with each other and both are recorded by independent witnesses in their official capacities, without having any reason to implicate the appellant falsely. No evidence is brought on record to show that anyone was present from the side of deceased either to tutor her or influence her against the appellant, in any way.

14. This evidence relating to dying declaration is challenged by learned counsel for the appellant on the ground that P.W.3 Executive Magistrate has not obtained separate

certificate or endorsement of the Doctor on the same, about fitness of the victim. However, the evidence of P.W.3 Executive Magistrate Tandel reveals that he made enquiry with P.W.4 Dr. Sonone, who was on duty and who told him that the patient was conscious and was in a position to give statement. As per his evidence, P. W. 4 Dr. Sonone was also very much present at the time of recording the dying declaration (Exh.18).

15. Similarly, evidence of P.W.4 Dr. Sonone also reveals that on the mid-night when P.W.3 Executive Magistrate Tandel came to record dying declaration of the said lady and asked him whether she can give her statement, P.W.4 Dr. Sonone told P.W.3 Executive Magistrate Tandel that she was in a fit condition to give statement. Then both of them went near the lady. P.W. 3 Executive Magistrate Tandel recorded her dying declaration in his presence. At that time he was monitoring her vitals and general condition. He found that she was conscious, oriented and was giving answers to the questions asked by the P. W. 3 Executive Magistrate Tandel. He has further deposed that he was present near the lady all the while recording of statement was going on and she was fully

conscious throughout. After recording was completed, P.W.3 Executive Magistrate Tandel took her thumb impression on the said statement Exh.18

16. In view of this categorical evidence of both P.W.3 Executive Magistrate Tandel and P.W.4 Dr. Sonone, merely due to absence of separate certificate or endorsement on the dying declaration about her fitness, the evidence relating thereto cannot be discarded. Here alongwith satisfaction of Executive Magistrate, there is also endorsement of fitness by P.W. 4 Dr. Sonone, who was present throughout recording dying declaration and was monitoring her condition and was satisfied that she was fully conscious, oriented and in fit condition to give answers.

17. As regards the dying declaration recorded by P.W.7 PSI Jivani vide Exh.30 also, the same objection is raised that there is no separate certificate or endorsement of Dr. Sonone on the said dying declaration. However, in this respect also the evidence of P.W.7 PSI Jivani proves that he has made requisition to the Doctor vide Exh.21 and Doctor has made endorsement thereon that she can give the statement. P.W.4

Dr. Sonone has also deposed to the effect that at about 11.10 p.m., police gave him memo for ascertaining whether Payal was in a position to give statement and on the said memo Exh.21 itself, he has made endorsement that patient can give statement. Thus, it is not the case that the fitness of deceased was not ascertained before recording of her statement by P.W.7 PSI Jivani. The contents of dying declaration Exh.30 also go to reveal that she was conscious and was in a position to give statement. The evidence of P.W.7 PSI Jivani reveals that the contents of statement were read over and explained to her in Hindi language and then only her Thumb Impression was obtained thereon.

18. As per settled position of law also, the endorsement of Doctor on the dying declaration is not *sine-qua non* or a must. What is essential is the satisfaction of the person who records dying declaration, that the declared was in a fit condition to give statement. In this respect useful reference can be made to the observations of Supreme Court in the landmark decision in case of **Laxman -vs- State of Maharashtra, AIR 2002 Supreme Court Cases 297**, wherein it has been held that :-

“Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement, even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

19. The second ground on which the dying declaration (Exh.18) is challenged is that it is not recorded in “question and answer form”. It may be true that the dying declaration Exh.18 is in a narrative form and not in the format of question and answer, but the evidence of P.W.3 Executive Magistrate Tandel reveals that he has asked questions to her and then she gave answers to him. The first question was about her name and she told her name as, “Payal Rajkumar”. The second question was what happened, to which, she told him that her husband poured kerosene on her person and set her on fire. Then she told him that no third person was present at the time of incident and she and her husband alone were present inside the room and the door was closed from inside. Further she told him at her own that her husband was interested in second marriage.

20. Thus, it is clear that though format of question and answer is not used while recording dying declaration, in effect the dying declaration was the result of questions put by P.W.3 Executive Magistrate and the answers given by the deceased. As a matter of fact the Supreme Court has made this legal position abundantly clear in *Laxman -vs- State of Maharashtra*

(supra) by observing that :-

“A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case”.

21. Both these dying declarations are challenged on the further ground that thumb impression of the deceased thereon is not attested. In our opinion, however, when the persons who had taken thumb impression thereon i.e. P.W.3 Executive Magistrate Tandel and P.W.7 have deposed that they have obtained her thumb impression on her statement and Exh.18 and Exh.30 bear her thumb impression, want of separate attestation which was merely a formality cannot constitute a fatal lacuna in the dying declaration. There is also evidence of P.W.4 Dr. Sonone to that effect in whose presence the dying declarations were recorded and thumb impressions of the deceased were obtained thereon. In this respect we would like to refer to the observations of Supreme Court **Rafique @ Rauf and others -vs- State of Uttar Pradesh, (2013) 12 Supreme Court Cases 121**, which are sufficient to dispel on the objections raised by defence counsel to these two dying declarations. In para 24 of judgment, the Hon'ble Apex Court held that :-

“We also wish to add that as on date, there is no statutory prescription as to what manner or the procedure to be followed for recording a dying

declaration to fall within the four corners of Section 32(1) of the Evidence Act. The presence of Magistrate; certification of the doctor as to the mental or the physical status of the person making the declaration, were all developed by judicial pronouncements. As has been repeatedly stated in various decisions, it will have to be found out whether in the facts and circumstances of any case the reliance placed upon by the prosecution on a statement alleged to have been made by the deceased prior to his death can be accepted as a dying declaration, will depend upon the facts and circumstances that existed at the time of making the statement. In that case it would mainly depend upon the date and time vis-à-vis the occurrence when the statement was alleged to have been made, the place at which it was made, the person to whom the said statement was made, the sequence of events, which led the person concerned to make the statement, the physical and mental condition of the person who made the statement, the cogency with which any such

statement was made, the attending circumstances, whether throw any suspicion as to the factum of the statement said to have been made or any other factor existing in order to contradict the statement said to have been made as claimed by the prosecution, the nexus of the person who made the statement to the alleged crime and the parties involved in the crime, the circumstance which made the person to come forward with the statement and last but not the least, whether the said statement fully support the case of the prosecution”

22. Here in this case all the attending circumstances and the evidence of independent witness P.W.1 Dadulal Saini fully support the contents of the statement. Nothing contrary is brought on record to disbelieve its contents, truthfulness or credibility.

23. According to learned counsel for the appellant considering 98% burn injuries sustained by the deceased, it cannot be said that her condition was fit to give such

statement. She has also relied upon the judgment of Apex Court in **Darshan Singh and others -vs State of Punjab, 1983 CRI L.J. 985**, to submit that, “when it is said that a conviction can rest on a dying declaration, it is implied that it must inspire confidence so as to make it safe to act upon it. If the medical evidence reveals that the vital organs of the deceased were affected, then such dying declaration cannot be relied upon”.

24. There cannot be two opinions about this legal proposition. However, in the present case, the evidence on record does not reveal that deceased was not in a condition to give statement. Merely on the basis of the fact that she has sustained 98% burns, it cannot be inferred that she was not in a fit condition to give statement. The evidence of P.W.4 Dr. Sonone who was attending her since the time of admission reveals that he was satisfied about her consciousness and fitness. He was also present throughout recording of her dying declaration by P.W.3 Executive Magistrate Tandel and was constantly monitoring her vitals and general condition. He was ensuring that she was fully conscious, oriented and was giving answers to the questions asked by the Executive

Magistrate. In such situation, it cannot be accepted that she was not in a position to give the statement on her own accord.

25. It is also pertinent to note that she has succumbed to her burns on the next day morning at about 9.25 a.m. and not immediately after recording of dying declaration. There is evidence of P.W.5 Dr. Nirankarnath, to that effect who has conducted postmortem on her dead body on the next day evening. Though in his cross-examination, it is brought on record that due to burnt carbon particles in trachia, a person may not be able to speak fluently, the evidence of P. W. 4 Dr. Sonone, who has attended her is more important than the general opinion given by the Doctor who has conducted postmortem. The evidence of P.W.4 Dr. Sonone proves that she was in position to give statement and was very much audible. He has carefully examined her to dispel all doubts about her physical fitness to give statement. No such suggestion is put either to P.W.3 Executive Magistrate Tandel P.W.7 PSI Jivani or even to P.W.4 Dr. Sonone that she was finding it difficult to speak or she was not audible.

26. Thus, both dying declarations need to be accepted

and acted upon to be truthful and voluntary account of the incident as given by the deceased. They are recorded within a gap of about one hour and are thoroughly consistent with each other. Both of them attribute categorical role to the appellant of pouring kerosene on her and setting her on fire as he was interested in second marriage. Each of the dying declaration is in itself sufficient to prove guilt of the appellant. Even if for the sake of argument, dying declaration recorded by P.W.7 PSI Jivani is excluded from consideration as the scribe thereof is not examined, absolutely no reason is pointed out as to why dying declaration Exh.18 recorded by P.W.3 Executive Magistrate Tandel should not be believed and accepted.

27. There is also corroborating evidence of P.W.2 Dadu Saini about presence of the appellant outside the room near water tab, while deceased was burning in the room. The conduct of the appellant of closing the door from outside and not opening it when she was shouting, neither extinguishing her fire, nor taking her to hospital is further proving to be an additional incriminating circumstance against the appellant. His conduct rules out the possibility of suicide or of

accidental burns.

28. In our considered opinion, therefore, the trial Court has rightly held the guilt of the appellant to be proved beyond reasonable doubt. The appeal hence holds no merit, consequently stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]

[SMT. V.K.TAHILRAMANI, J.]