

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

CRIMINAL APPEAL NO.105/2002

Arun S/o Dinkar Randhave,
Age-34 years, Occu-Labour,
R/o. Pipe Line Road, Hudco,
Ahmednagar

..Appellant
[Orig.Accused No.1.]

Versus

The State of Maharashtra,
Through Police Sub-Inspector,
Topkhana Police Station, Ahmednagar
(Copy to be served to the Govt.Pleader
High Court of Judicature at Bombay
Bench at Aurangabad)

..Respondent

R.S.Shinde, Advocate holding for Mr.V.P.Latange Advocate for
appellant

Mr. A.V.Deshmukh, APP for Respondent-State

**CORAM : V.L.ACHLIYA,J.
RESERVED ON : 30/08/2016
PRONOUNCED ON : 19/10/2016.**

JUDGMENT :-

1] Being aggrieved by the judgment and order dated
08.02.2002 passed in Sessions Case no. 146/2001 by first Ad-

hoc Additional Sessions Judge, Ahmednagar convicting the appellant under Section 498-A and 306 of the Indian Penal Code, the appellant has preferred this appeal challenging the conviction.

2] Before advertng to appreciate the submissions advanced, it is necessary to consider few facts leading to filing of appeal. The appellant was tried alongwith co-accused Sudhakar Dinkar Randhave-accused No.2 the brother of accused no.1 for committing the offence punishable under Sections 304,498-A r/w Section 34 of the Indian Penal Code with the allegations that they subjected Phoolan (hereinafter referred as 'deceased') the wife of accused no.1 to such physical and mental harassmt that she committed suicide on 6/8/2001. They have aided and abetted the commission of suicide by deceased.

3] The prosecution has approached with a case that the marriage between appellant and Phoolan was solemnized in the year 1986. After marriage deceased started cohabiting with appellant. Deceased Phoolan begotten three issues from her wedlock with the appellant. The appellant No.1 was running a tea stall nearby Civil Hospital, Ahmednagar. Since the year 1993 the appellant started raising doubt as to character of his wife Phoolan and making false accusation against her that she was giving money to her parents. The accused No.2 was instigating accused no.1 to ill-treat Phoolan. About 7 to 8 days prior to the incident, the appellant had made a false accusation against the deceased that she had taken out Rs.100/- from pocket of his pant and gave it to her parents. On this count the

accused humiliated, harassed and beaten her in public view which leads to commission of suicide by deceased. She poured kerosene on her person and set her ablaze.

4] On 06.08.2001, Phoolan was admitted in Civil Hospital, Ahmednagar in a burn condition. While she was lying admitted in the hospital, Police Constable Chavan who was on duty in Civil Hospital, Ahmednagar, informed to officer incharge of Police Station, Tofkhana Ahmednagar about the admission of the deceased in burn condition. ASI Dattatray Gaikwad (PW-8), who was then station Home Officer taken note of the information received and instructed Police Head constable Sathe to visit Civil hospital and also arranged to record the dying declaration of Phoolan through Special Judicial Magistrate. Since Special Judicial Magistrate refused to visit Hospital and to record dying declaration, PW-8 instructed Police Sub-Inspector Vasant Kuwar (PW-9) to visit hospital and record complaint of Phoolan. Accordingly PSI Vasant Kuwar visited the hospital and recorded the statement of Phoolan. On the basis of the statement recorded, PW-8 registered offense under Section 498-A, 323, 504 and 506 of the Indian Penal Code against the accused vide Crime No.I-39/2001. On 8/8/2001, Phoolan succumbed to burn injuries. Subsequent to her death the offense under Section 306 of the Indian Penal Code added during the course of investigation. Inquest panchanama was drawn. Dead body of the deceased was referred for postmortem. During the course of investigation statements of Prakash Mirpagar (PW-1) brother of deceased, Mariya Mirpagar (PW-2) mother of deceased, Sonabai Sable (PW-4) and Mamta Waghchaure (PW-5) the

neighbours of deceased came to be recorded. Panchanama of scene of offence was prepared in presence of two panch witnesses and the articles lying on the spot were seized and referred to chemical Analyser. On conclusion of the investigation charge-sheet was prepared and filed in the Court of Chief Judicial Magistrate, Ahmednagar. In due course the case was committed to Sessions Court. After committal of case to Sessions Court, the same was assigned to Court of First Ad-hoc Additional Sessions Judge, Ahmednagar. Charge under Section 498-A , 306 r/w 34 of the Indian Penal Code framed against the accused. Both the accused pleaded not guilty and claimed to be tried. In order to prove its case the prosecution has examined nine witnesses and proved certain documents. The accused has not entered into defense. On conclusion of trial the learned Additional Sessions Judge has found the appellant/accused guilty of offence under Section 498-A and 306 of the Indian Penal Code. For committing the offence under Section 498-A of Indian Penal Code the appellant is sentenced to suffer rigorous imprisonment of 18 months and to pay fine of Rs.500/- in default, to suffer simple imprisonment for one and half months. For committing the offence under Section 306 of the Indian Penal Code the appellant has been sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.500/- in default to pay fine, to suffer simple imprisonment for one year. Accused no.2 was acquitted of all the charges. Being aggrieved the appellant has preferred this appeal.

5] I have heard the submissions advanced by the learned counsel for the appellant and the learned APP for the State and

perused the record and proceedings.

6] In order to prove its case the prosecution has examined nine witnesses which includes Prakash Mirpagar (PW-1), Mariya Mirpagar (PW-2), i.e. the brother and mother of deceased. Prosecution has further examined Sonabai Sable (PW-4) and Mamta Waghchaure (PW-5) the neighbours who have not supported the case of the prosecution. Prosecution has examined PSI Vasant Kuwar (PW-9) who recorded the dying declaration of the deceased and conducted the investigation. Prosecution has examined Dr. Ravindra Sonar (PW-7) who examined the deceased and issued certificate of fitness before recording her dying declaration by P.W.8. The prosecution has examined Dr. Pokharna (PW-6) the Autopsy Surgeon who conducted postmortem of dead body of the deceased. Beside said witnesses the prosecution has examined Namdeo Sable (PW-3) as panch witness to prove the spot panchanama. Lastly the prosecution examined PSI Dattatray Gaikwad (PW-8) who registered the offence. Thus if we consider the entire case of the prosecution and the evidence adduced, then case of the prosecution is mainly based upon the oral dying declaration made by deceased to PW-1 and PW-2 and the written dying declaration recorded by PSI Vasant Kuwar (PW-9).

7] The learned counsel for the appellant strenuously contended that the reasons and findings recorded by the trial court are perverse and based upon improper appreciation of evidence. He has submitted that the alleged dying declaration

cannot be treated as truthful so as to form basis to convict the accused. The learned counsel has pointed out number of infirmities in the dying declaration (Exh.33). He has pointed out that though PW-8 has deposed that he visited the deceased and recorded the dying declaration exh.33, but in the cross-examination admitted that dying declaration exh.33 is not in his hand writing. He has deposed that same is in the hand writing of constable who was present with him at the time of recording of dying declaration. He has further pointed out that there is no endorsement of the doctor at the bottom of alleged dying declaration (Exh.33) to show that throughout the recording of the dying declaration the deceased was in a fit state of mind to make statement. There is material variance and inconsistency in between oral dying declarations made to P.W.1 and 2 and written declaration. As per the written dying declaration exh.33, the incident occurred outside the house. Whereas as per spot panchanama the incident appears to be occurred inside the house. It is therefore submitted that the dying declaration which has been treated as a sole basis to convict the appellant can not be treated as truthful to form sole basis to convict the appellant. He has further submitted that the testimony of PW-1 and PW-2 are not at all reliable and unable to be relied in absence of corroboration from independent witness. It is further submitted that the prosecution though examined PW-4 and PW-5 the neighbours, they have not supported the case of the prosecution. He therefore urged to acquit the accused.

8] On the other hand the learned APP has supported the impugned judgment and order. He has submitted that the dying

declaration exh.33 is a truthful dying declaration and same can be safely relied to base the conviction. He has submitted that the reasons and findings recorded by the trial Court are fully in consonance with the evidence on record and there is absolutely no perversity in the judgment so as to call for interference in exercise of appellate jurisdiction.

9] In order to appreciate the submissions advanced I have carefully scrutinized the reasons and findings recorded by the trial court in the light of oral and documentary evidence on record. If we consider the over all evidence then defense of the accused is of total denial and false implication at the behest of PW-1 and PW-2. The conviction of the appellant is mainly based upon the dying declaration exh.33 recorded by PW-9 and the testimony of Prakash PW-1 and Mariya PW-2, the brother and mother of the deceased.

10] The prosecution has examined PSI Vasant Kuwar (PW-9) to prove the dying declaration exh.33. He has deposed that on 06.08.2001 he was posted as Day Officer on duty at Police Station Tofkhana. PSI Gaikwad was PSO on duty. He informed him about the information received that one woman by name Phoolan Randhave admitted in Civil Hospital, Ahmednagar in burn condition and requested him to go to hospital and record her complaint. He therefore visited the hospital and gave letter to Casualty Medical Officer with a request to ascertain as to whether the said woman was able to make statement. After seeking the endorsement from the doctor he recorded the statement of Phoolan and identified the same as Exh.33. Her

Statement was treated as a complaint. On the basis of the said complaint initially offence under Section 498-A of the IPC came to be registered vide Crime No.I-39/2001. He further deposed that after registration of offence he carried out investigation of the case and visited the scene of occurrence and in presence of panchas prepared panchanama vide exh.19. He seized one drum of kerosene, some burn pieces of clothes of woman from the spot and further recorded the statement of neighbors and relative of the deceased. He further deposed that the deceased succumbed to burn injuries on 08.08.2001. After preparation of inquest panchanama, he referred the dead body for postmortem. On the basis of supplementary statements recorded on 09.08.2001 he arrested accused No.2, thereafter sent muddemal property to chemical analysis. Subsequent to death of deceased offence under Section 306 of IPC added during investigation. On completion of investigation he submitted charge sheet against the accused.

11] In the cross-examination P.W.9 has categorically admitted that the dying declaration exh.33 which has been treated as a complaint is not in his hand writing and same is in the handwriting of constable. He further admitted that he had recorded the statements of eight witnesses including Dnyaneshwar Gopal Bhise, the neighbour residing in the vicinity of place of incident. He further admitted that in the document titled as "Khabar" dated 08.08.2001 (Exh.42) was received by him during the course of investigation. He further admitted that on the basis of that Khabar Exh.42, PSO Pardeshi attached to the Police Station Tofkhana registered the case of Accidental

Death on 08.08.2001 for conducting inquiry as to cause of death of deceased Phoolan. He further admitted that in the medical certificate Exh.25 the medical officer had put up tick mark in front of the word "accident" as the manner of death of deceased Phoolan. He denied the suggestion that he prepared the complaint-cum-dying declaration Exh.33 in back date by acting in collusion with parents and brother of deceased Phoolan to falsely implicate the accused.

12] In order to sustain the conviction the prosecution has further relied upon the testimony of Prakash PW-1 brother of the deceased. He deposed that the marriage of Phoolan was solemnized with accused no.1 in the year 1986 and for the period of seven years there was no complaint of ill treatment and harassment to his sister and she was treated properly by accused no.1. He deposed that accused no.1 was harassing his sister by taking suspicion about her character. He further deposed that he and his family members persuaded the deceased to go back to her matrimonial house for cohabitation with accused. After she returned to her house for cohabitation accused no.1 again started causing harassment to her at the instance of accused no.2. He further deposed that he had visited accused no.1 at his tea stall and told him that character of his sister was beyond doubt and further asked him not to harass her by raising doubt as to her character. He further deposed that on 06.08.2001 sister of accused no.1 as well as son of sister came to their house and informed that his sister has burn to some extent and therefore he rushed to the hospital along with his parents. In the hospital he met Phoolan. She

disclosed that her husband beaten her by fists and kicks and took her on the road by making her naked and due to such harassment she poured kerosene on her body and set her on fire.

13] In the cross-examination P.W.1 has admitted that the accused no.1 and 2 were residing separately. He further admitted that Sulabai and Shivbai are residing in the same locality and they are related to him as sister of his father. He has admitted that Mamta Waghchaure PW-5 sister of accused was also got admitted in the hospital and she too sustained burn injuries in said incident. He further admitted that he has not lodged complaint till 08.08.2001.

14] The prosecution has examined Mariya PW-2 mother of the deceased. She has deposed that for the period of 6 to 7 years of marriage there was no ill treatment and harassment to her. After 6 to 7 years after the marriage the accused was harassing her by telling that she was giving money to her parents and helping them. She deposed that on 06.08.2001 she visited hospital but her daughter has not disclosed anything to her. In the next sentence she stated that she has stated that she had done correct thing and they should not do anything. Thus if we look into the testimony of the PW-2 then there is nothing substantial brought through her testimony to find support to the case of prosecution. On the contrary the witness has deposed that deceased has stated nothing to her when she visited deceased alongwith her family members.

15] Section 32 of the Indian Evidence Act is an exception to hearsay evidence and it deals with the statements of declaration made by a person, relating to cause of his or her death or the circumstances leading to such death. Dying declaration made by person on the verge of his/her death has a special sanctity as it is presumed that at such solemn moment person is most unlikely to make any untrue statement and the shadow of death is by itself guarantee of truth of the statement of the deceased regarding circumstance leading to his/her death. But the dying declaration like any other evidence has to be tested by the touch stone of credibility to be acceptable as the accused does not get an opportunity of questioning veracity of such statement by cross examination. Dying declaration if found to be voluntary, truthful and free from any doubt then only it can be made sole basis to convict the accused. The best test to be applied to guarantee the truthfulness of the dying declaration is to seek corroboration from other evidence. It is therefore, incumbent upon the prosecution to prove that the dying declaration as relied is untainted and truthful. So also the Court has to be on guard that the statement of deceased was not a result of tutoring prompting or stretch of imagination. The Court is also expected to see that the deceased was in fit state of mind. In case the Court is satisfied that the declaration was true and voluntary, it can base its conviction without seeking further corroboration. However, the Court has to take such decision based upon facts of the case before it.

16] On due consideration of the evidence of witnesses mainly relied to base conviction of appellant, I am of the view that the prosecution has miserably failed to prove charge under Section 498-A and 306 of IPC. As discussed the deceased was

admitted in the hospital on 06.08.2001. Till her death no attempt was made to record her dying declaration through the independent person such as the Executive Magistrate. The dying declaration (Exh.33) recorded by PSI Vasant Kuwar which forms the basis to convict the appellant itself suffers from so many infirmities and raises serious doubt as to its truthfulness. It raises serious doubt as to really such dying declaration was made by the deceased and recorded by PW-9. In the cross-examination PW-9 has categorically admitted that dying declaration exh.33 is not in his hand writing. He has categorically stated that the same is in the handwriting of constable. He has not disclosed the name of the constable in whose handwriting the dying declaration Exh.33 has been recorded. So also the person who recorded the dying declaration neither cited as witness nor examined by prosecution. This raises a serious doubt as to whether really PSI Kuwar visited the hospital and recorded dying declaration as deposed by him.

17] It is pertinent to note that though PW-9 has deposed that he gave letter exh.27 to doctor with a request to examine Phoolan and certify as to whether she was in fit condition to make statement and thereafter the doctor has examined and gave certificate, but no such certificate appears to be endorsed over the dying declaration Exh.33. There is an endorsement dated 06.08.2001 recorded over letter Exh.27 by CMO whereby the Medical Officer certified that patient can give statement. The time of making endorsement has been mentioned as 11.30 a.m. It is pertinent to note that as per the contents of the letter Exh.

27 the deceased was admitted in burn condition at 10.30 a.m. The endorsement of the doctor is shown to be made at 11.30 a.m. PSI Gaikwad P.W.8 has deposed that on 06.08.2001 at about 10.30 a.m. he received the telephonic information from police constable Jadhav that a woman by name Phoolan admitted in a hospital in burn condition. Therefore he deputed police constable Sathe to visit the hospital and take further steps to record her complaint. After 5-10 minutes police constable Sathe came back and informed him that Sub-Judicial Magistrate D'Melo, has refused to come and record statement. He therefore instructed Police Constable to issue letter to him to record the statement of Phoolan. Thereafter he took note in the station diary. After 15 minutes police constable Sathe came back and informed him that D'melo has even refused to accept the letter and said that he would come at 4.30 p.m. Thereafter, he requested PSI Kuwar P.W.9 to visit hospital and record the complaint. If we consider this sequence of event which had taken place after 10.30 a.m. onwards then it is difficult to believe that PSI Kuwar visited hospital and recorded dying declaration of deceased. at 11.30 a.m.

18] According to P.W.7, he examined the patient at 11.35 a.m. It is therefore difficult to believe that PSI Kuwar recorded dying declaration of deceased at 11.30 a.m. P.W.7 has not stated a single word that the PSI Kuwar P.W.9 met him and requested to ascertain health condition of the deceased to record the statement of deceased Phoolan. It is interesting to note that on letter exh.27 the doctor has made endorsement at 11.30 a.m. which reads as "*patient gave statement*". On dying

declaration Exh.33 which was initially recorded as statement of deceased, in the top margin there is writing in the form of request letter (without mentioning the name of person/officer to whom same is addressed) wherein it is written as to whether Phoolan (deceased) resident of pipeline Hudco, Ahmednagar, is in a position to make statement. The request is not addressed to anyone including Medical Officer. There appears to be endorsement made by Medical Officer below the said writing in the open space which reads as "*Phoolan can give statement*". The time of making endorsement has been noted as 11.40 a.m. Thus, it is visible from naked eye that statement which was recorded as a complaint tried to be subsequently given shape of dying declaration by subsequently introducing in the open margin of the complaint said writing and endorsement of medical officer in back date. Exh.33 cannot be treated as dying declaration, i.e. voluntary disclosure made by deceased at the verge of death bed and recorded exactly in the words of the deceased as to circumstances leading to the cause of death of deceased. In this view the dying declaration exh.33 being suspicious it cannot be treated as basis to convict the appellant.

19] It is pertinent to note that offence is shown to be registered with police station Tofkhana on 06.08.2001 at 12.30 a.m. U/s 498-A, 323, 504,506 of IPC vide Crime no.I-39/2001. However, on 08.08.2001 after receipt of intimation of death of deceased Phoolan, the same was treated as accidental death. To conduct the enquiry into cause of her death, the Accidental Death was registered and caused inquiry under Section 174 of Cr.P.C. Therefore, if the offence was already registered, and under

investigation with Police Station Topkhana, there was no reason to register Accidental Death and cause inquiry under Section 174 of Cr.P.C. ordered on 08.08.2001. This leads to draw inference that deliberate attempt has been made to register the offence in back date by giving shape to complaint exh.33 as the dying declaration made by deceased on 06.08.2001. In an attempt to give shape to allege statement as dying declaration, the endorsement of doctor was obtained in back date at the top of the paper in a blank space. There is no endorsement at the end of the alleged dying declaration Exh.33 to show that the Medical Officer has examined Phoolan and found the deceased conscious throughout recording of the dying declaration. P.W.7 has also not deposed that he had examined the deceased on conclusion of the dying declaration and again issued certificate.

20] The dying declaration Exh.33 relied by the prosecution to base the conviction also cannot be treated as truthful for the reason that in the certificate Exh. 25 issued by P.W.7, he has mentioned the cause of death as accident. The certificate was issued on 8/8/2001 at 5.30 p.m. i.e. after the death of the deceased. The certificate was issued by same medical officer i.e. P.W.7 who alleged to have earlier examined the deceased and made endorsement on Exh.33 that deceased was in fit state of mind to give statement. Thus, the certificate at Exh.25 establishes that till 8/8/2001, the death of the deceased was treated as accidental and no case was registered for offence under Section 498-A and 306 of IPC. In this view, the conviction awarded by trial Court solely based upon dying declaration Exh. 33 is not sustainable.

21] So far as oral testimony of P.W.1 is concerned, same is found to be full of omissions and contradictions and in complete variance with testimony of P.W.2. P.W.1 has deposed that he alongwith his parents visited deceased in hospital and inquired as to how incident has occurred. According to P.W.1 deceased had disclosed that accused had beaten her with fists and kicks and in naked condition brought her on the road and due to such harassment, she poured kerosene on her person and set her ablaze. Although P.W.1 has deposed that his parents were with him when he met Phoolan and she made such disclosure but P.W.2 the mother of P.W.1 has deposed that deceased has said nothing and further said that deceased had told to them that she did correct thing and they should not do anything. Thus the testimony of P.W.1 is in complete variance and in contradiction with the testimony of P.W.2.

22] It is pertinent to note as per oral dying declaration alleged to be made to P.W.1 the deceased has stated that she was beaten by accused by means of fists and kicks and brought on road in a naked condition and due to harassment so caused she committed suicide. In dying declaration Exh.33 the deceased has stated that she poured kerosene on her person and set her ablaze on the ota outside her house, Whereas the spot panchanama Exh.19 reflects that the incident of pouring kerosene and setting ablaze had taken place inside the room. Some burnt pieces of clothes found inside the room as well as on the ota outside the house. Thus on overall appreciation of evidence on record, in my view, the dying declaration Exh.33

cannot be treated as truthful to base the conviction. Similarly, the testimony of P.W.1 and 2 being close relatives of the deceased cannot be safely relied, in absence of corroboration from independent witness.

23] In the result, reasons and findings recorded by trial Court are not sustainable in law as same are perverse and based upon improper appreciation of evidence and liable to be set aside.

24] In this view, I am inclined to allow the appeal. Accordingly, Appeal is allowed. The impugned judgment and order is set aside. Fine amount, if any deposited, same be refunded to the appellant/accused.

(V.L.ACHLIYA,J.)

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