

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
CRIMINAL APPEAL NO.512 OF 2012

1 Ganesh Rama Charhatkar,
age: 24 years, Occ: Education,
R/o Limba Ruie, Tq. and
District Beed.

2 Sushila w/o Rama Charhatkar,
age: 40 years, Occ: Household,
R/o Limbai Ruie, Tq. & District
Beed.

Appellants

Versus

The State of Maharashtra,
through Police Station,
Beed Rural Police Station,
Tq. & District Beed.

Respondent

Mr.N.S.Ghanekar, advocate for appellants.
Mr.S.Y.Mahajan, APP for Respondents.

**CORAM : R.M.BORDE &
K.L.WADANE, JJ.
DATE : 29th March, 2016**

PER COURT:

1 This is an appeal by original accused No.1 Ganesh and accused no.2 Sushila objecting to the conviction and sentence imposed by the Additional Sessions Judge on 24.07.2012 in Sessions Case No.104 of 2011. Both the accused are held guilty for commission of offence punishable under Section 302 read with Section 34 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.500/- each, in default, to suffer simple imprisonment for six months. They are also held guilty for commission of offence punishable under

Section 304-B read with Section 34 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for six months. Accused nos.1 and 2 are convicted for commission of offence punishable under Section 498A read with Section 34 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500/-, in default, to suffer simple imprisonment for six months. The trial Court has directed that all the sentences shall run concurrently.

3 Accused No.3 Rama has been held not guilty for any of the offence and has been acquitted.

4 Accused no.1 Ganesh is husband of deceased Rekha, whereas, accused no.2 Sushila and accused no.3 are the in laws and parents of accused no.1. It is disclosed that marriage of accused no.1 with deceased Rekha was solemnized some three years prior to the date of incident. It is alleged that deceased Rekha was subjected to illtreatment and cruelty soon after $\frac{3}{4}$ months of the marriage. Accused were demanding a sum of Rs.80,000/- for purchasing motor cycle for Ganesh, husband of the deceased. Deceased was being abused on account of her complexion and was blamed for not able to cook food properly.

5 It is alleged that on 04.04.2011 at about 1730 hours, at the matrimonial home of deceased Rekha, while she was cleaning tiles, accused no.2 Sushila abused her saying that she was living in bad condition and was not working properly and they do not

want to cohabit with her. She further shouted that she should be killed. Saying so, accused no.1 Sushila lifted kerosene can of 5 liters and poured kerosene on the person of deceased. Accused No.2 ignited match stick and threw it on the person of deceased Rekha. It is alleged that while deceased Rekha was crying, accused no.3 Rama was at the door, however, he did nothing. Thereafter accused no.1 Ganesh extinguished fire by pouring water on her person and she was taken to Civil Hospital, Beed.

6 Prosecution witness No.3 Ashabai, mother of the deceased and P.W.5 Gorakh, father of deceased were informed. They came to the hospital and upon inquiry, deceased disclosed them that the accused committed the act of setting her on fire. Statement of victim Rekha was recorded initially by Police Head Constable Jagtap. Thereafter Special Executive Magistrate Abhay Maske was called who also recorded her dying declaration at Exhibit-68. Similarly, video recording was done while deceased was disclosing the reason for sustaining injuries to her cousin brother P.W.7 Mohan. The video recording was done by P.W.9 Police Head Constable Ujagare and transcript of the same was prepared by PSI Vilas Kadam – PW 11. Deceased Rekha succumbed to the injuries on 06.04.2011. P.W.11 Vilas Kadam conducted investigation and submitted charge sheet to the Court.

7 Accused, at the trial, pleaded not guilty to the charge and claimed to be tried.

8 In order to bring home guilt of the accused, prosecution examined as many as 11 witnesses, whereas, defence

examined one Shri Shivaji Bhokre, the neighbour. After recording evidence of prosecution witnesses and statements of accused, learned Judge of the trial Court found accused nos.1 and 2 – appellants herein guilty for the charges levelled against them and imposed sentence of imprisonment, as specified in the 1st paragraph.

9 During the course of hearing of appeal, on earlier occasion, the Division Bench of this Court, by an order dated 08.01.2016, directed transmission of the record back to the Sessions Judge for recording evidence of Police Head Constable Vijay Jagtap, as a Court witness, who recorded dying declaration of deceased, which was first in time. It is recorded in the order passed by this Court that on 04.04.2011, two different officers recorded two different statements of the victim. It was further observed that both these statements ought to have been proved before the trial Court, however, earlier statement recorded by Police Head Constable Vijay Jagtap was not proved. Even accused-appellant did not make any attempt either to get the statement proved either through cross examination or by prosecution witnesses or by requesting the Court to record evidence of concerned Police Head Constable. This Court has observed that the statement is of vital importance and as such, in exercise of powers conferred under Section 391 of the Criminal Procedure Code, this Court directed the learned Sessions Judge to record evidence of Police Head Constable Vijay Jagtap. It was also directed to the learned Sessions Judge to record deposition of Vijay Jagtap; and to record findings as to whether deposition recorded is believable or not.

10 In adherence to the directions issued by this Court, deposition of Vijay Jagtap was recorded as court witnesses at Exhibit-94 and he has been cross examined by the prosecution. The learned Trial Judge has also recorded his finding in paragraph no.6. The learned Judge has opined that on going through the evidence of witness, it comes to fore that he was on duty at the Police Chowki, Civil Hospital Beed, at the relevant time. He received MLC letter. As a part of his duty, he went to record statement of the victim. It is further recorded by the trial Court that he i.e. police constable appears to have followed standard protocol for recording of statement in such cases. He took the doctor with him and got the patient examined and after satisfying himself about the physical and mental condition of the patient, her statement came to be recorded. It is further observed that the Constable read over contents to the patient and she had admitted its correctness. Again the Constable got examined the victim by doctor and found that she was in a position to make statement. At the time of recording statement of the deceased, the in-laws, who were present there, were directed to move out of the ward. The learned Judge has observed that on perusal of the dying declaration at Exhibit-96, he finds it containing sufficient inculpatory material against the accused. It is further stated that it cannot be said to be favouring the accused. The learned Judge has further observed that deposition of Police Head Constable is believable and as such, the learned Judge has submitted his findings to this Court, as directed.

11 The prosecution, in order to substantiate allegations

against the accused, mainly relies upon the evidence in the form of dying declaration of deceased Rekha, recorded by Naib Tahsildar at Exhibit-67 as well as video recording of oral dying declaration of the deceased, as told to P.W.7 Mohan Mane and recorded by Vilas Ujgare, Police Constable. The transcript of the video recording is prepared by P.W.11- P.S.I. Vilas Kadam and is at Exhibit-56. P.W.5 Ganesh Tawre speaks about the oral dying declaration of the deceased as told to him.

12 The defence has admitted the dying declaration recorded by Court Witness No.1 - Police Head Constable Vijay Sopan Jagtap, at Exhibit-96, which is first in time.

13 P.W.8 Omprakash Sabale is the doctor examined by the prosecution, who has deposed about condition of the patient while her dying declaration was recorded by Naib Tahsildar Shri Abhay Maske. The doctor has deposed that one Constable and Tahsildar approached him and requested to examine the patient by name Rekha who was admitted in the hospital for treatment. The Naib Tahsildar, P.W.10 was intending to record statement of the victim. He claims that he went to the burn ward, examined victim Rekha and endorsed on the paper brought by Naib Tahsildar as regards condition of the patient at 10.00 p.m. He recorded that the patient is conscious and oriented. It is further claimed that the Tahsildar started recording of statement after receiving endorsement and at the conclusion of the statement, he again examined the patient and put his endorsement thereon.

13 P.W.10 – Abhay Maske, is the Naib Tahsildar and he

has deposed that on 04.04.2011, he received letter from P.S.O., Outpost, Civil Hospital, Beed at about 9.30 p.m. He was requested to record statement of victim namely Rekha Ganesh Charhatkar, who had sustained burn injuries. Copy of the letter is produced at Exhibit-65. On his arrival to the hospital, he met Dr.Sabale and requested him to show the patient. It is stated that he along with Dr.Sable went to the Burn Ward. He asked relatives of the deceased to go out of the ward. He then requested Dr.Sabale to examine the patient and give opinion as to whether she is in a position to give statement. After the doctor examined patient and recorded opinion as regards condition of the patient, he proceeded to record statement of the deceased. It is claimed by the witness that he introduced himself to the victim and put her certain questions to ascertain as to whether the patient is in a position to answer questions. It is stated that the witness had noted down the answers given by the patient, in his own hand writing. The deceased told to the Executive Magistrate that her marriage took place on 12.04.2008 or 12.04.2007 prior to three years of the incident. So far as matrimonial relations, she told that they were very bad. Deceased told the Executive Magistrate that on 04.04.2011, at about 5.30 p.m., while she was preparing meals and was washing her hands, her mother-in-law told that she is behaving very badly, that she does not work and she should be killed. Saying so, mother-in-law took out the kerosene can and poured kerosene on her person, whereas, her husband ignited match stick and threw it on her person. Her father-in-law was standing outside. She cried for help. Her mother-in-law ran away, whereas, her husband poured water on her person and extinguished fire. Her husband brought her in the hospital and

she was taking treatment in the hospital. The Executive Magistrate deposed that the statement was voluntary one. He read over the statement to her and she admitted correctness thereof.

14 On perusal of the statement, it appears that the Executive Magistrate used printed proforma for recording the statement. Certain general questions were already printed on the sheet of the paper. The endorsement of the doctor on the dying declaration denotes the time as 10.00 p.m. and after conclusion of recording of the statement, the doctor has made endorsement at 10.30 p.m., below the statement. On perusal of the deposition, it appears that although the Executive Magistrate recorded statement of the deceased, original was kept with him and carbon copy was handed over to the Investigating Officer. It is surprising as to why the Executive Magistrate kept original dying declaration with him in stead of handing over same to the Chief Judicial Magistrate.

15 Apart from this, it is surprising that the dying declaration is recorded on printed sheet of paper and questions put to the victim were already printed. In the cross examination, it is stated by the Executive Magistrate that the deceased was surrounded by her relatives. The possibility of deceased having been tutored by the relatives cannot be ruled out.

16 The prosecution has also placed reliance on the deposition of P.W.7 Mohan Mane, cousin of deceased. It is claimed by the witness that he visited the hospital on 04.04.2011 and on reaching the hospital, he put certain questions to the deceased. The video recording of the questions put by the witness and the answers given by the victim was done. On perusal of the

transcript at Exhibit-56 prepared by P.W.11 Vilas Kadam, a conclusion can be drawn that the deceased was suffering severe pains and all the while was requesting the brother to call for doctor. The deceased, it appears that, was persuaded to talk although she was suffering severe pains and she had given answers to the questions put by P.W.7. She has stated in answer to question, 'as to who poured kerosene?', that Sushila poured kerosene and Ganya ignited match stick. The reference to 'Ganya', according to prosecution, she mean 'accused no.1', whereas, 'Sushila' means 'accused no.2'.

17 P.W.3 Ashabai and P.W.5 Gorakh Taware are parents of the deceased. Both the witnesses deposed that deceased Rekha was not being treated well by the accused and their family members. She was being illtreated at the matrimonial home. P.W.5 Gorakh has stated about the oral dying declaration made by victim Rekha to him after his arrival at the hospital, wherein, she implicated her mother-in-law and husband as the culprits.

18 It is disclosed from the charge sheet that immediately after admission of the patient i.e. deceased Rekha to the hospital, Vijay Sopan Jagtap, Police Head Constable posted at Outpost in Civil Hospital at Beed received MLC letter from the hospital informing that a patient has been admitted to the hospital who had received burn injuries. On receipt of the letter, he visited the hospital and contacted the doctor. The Head Constable informed doctor that he desires to record statement of the patient and requested him to examine the victim and certify about physical and mental condition of the patient to make statement. The Police

Head Constable recorded statement of the deceased. The deceased, in her dying declaration, disclosed that on 04.04.2011, while she was preparing meals at her residence, her mother-in-law started abusing her. The mother-in-law, during the course of quarrel, asked her to end her life by setting herself on fire. Her husband, who was there, told her that he would not maintain her and that she should earn her livelihood by washing utensils and clothes of other persons. She also told about demand of amount made by her mother-in-law and husband. It is further disclosed by the deceased, in the statement recorded by Police Head Constable, that her father-in-law, mother-in-law and husband always used to beat her and abuse her. She was fed up with the illtreatment meted out to her and as such, she took out kerosene from the can, poured it on her person and set herself on fire. She sustained burn injuries all over the body. She started shouting. Her mother-in-law ran away, whereas, her husband poured water on her person and tried to extinguish the fire. He took her to the Civil Hospital in a white Indica car. She claims that her husband, mother-in-law and father-in-law are responsible for the incidence and as such, she has grievance against them.

19 The dying declaration recorded by Police Head Constable Jagtap was not proved by the prosecution since the prosecution opted not to examine the witness. The defence also did not call Head Constable Jagtap to depose before the trial Court. After the instant appeal reached this Court, the Division Bench of this Court, considering vital importance of the evidence of Police Head Constable Vijay Jagtap as well as necessity of proving dying declaration of the deceased recorded at 7.55 p.m.,

first in time, directed the trial Court to record evidence of Police Head Constable Vijay Jagtap as the Court witness. In pursuance to the directions issued by this Court, Vijay Jagtap was examined as Court witness. The witness has proved the dying declaration of the deceased recorded by him. The witness has stated before the Court that the patient was in a fit condition to make a statement. Before recording of dying declaration, the deceased was examined by the doctor and an endorsement was made on the paper on which statement of the deceased was recorded as regards fitness of the patient to make statement. The witness further deposed that he personally asked 2/3 questions to the victim and on being satisfied that she is in a fit condition to give statement, recorded her statement as per her narration. The statement recorded by the Police Head Constable was read out to victim Rekha. She accepted correctness of it. The Police Head Constable obtained toe impression of her left foot since her fingers were burnt. The witness further deposed that he obtained endorsement of the doctor on completion of statement of the deceased. The Court witness has further stated that at the time of recording of statement of the deceased, though her husband and mother-in-law were present there, he sent them away from the patient and thereafter proceeded to record her statement. The defence has admitted dying declaration Exhibit-96 recorded by Police Head Constable Jagtap. There is nothing to disbelieve version of the Court witness in respect of recording statement of the deceased by him. On perusal of the dying declaration at Exhibit-96, it does appear that deceased made allegations in respect of illtreatment meted out to her by her mother-in-law, father-in-law and husband. She has stated in the dying declaration that since she was fed up

of the consistent illtreatment, she poured kerosene on her person and set herself on fire.

20 Although there are subsequent dying declarations recorded by the Executive Magistrate as well as oral dying declaration of which video recording was done by Police Constable Ujagare as well as the oral dying declarations made before her parents, there is no explanation as to why the witness has changed the version. There is no explanation tendered by the prosecution as to why dying declaration of the deceased recorded at 7.55 p.m. by Police Constable Jagtap, which is first in time, shall not be believed. It is also not borne out from the record that the first dying declaration of the deceased recorded by Police Head Constable Jagtap was as a result of the influence exercised by the husband or her in-laws. Such an inference cannot be drawn because in the said dying declaration, there are allegations about illtreatment meted out to the deceased at the hands of her father-in-law, mother-in-law and husband. It is specifically stated by the deceased in the first dying declaration at Exhibit-96 that she was fed up by the illtreatment meted out to her and as such was compelled to commit suicide.

21 There is absolutely no explanation in the subsequent dying declaration or even in the oral dying declarations as regards the first version stated by the deceased. There is no logical reason as to why the dying declaration recorded by Police Head Constable Jagtap, which has been duly proved, shall be disbelieved.

22 The trial Judge has also communicated his finding,

that the deposition of Police Head Constable Jagtap, who has recorded dying declaration at Exhibit-96, is believable.

23 As such, we deem it appropriate to accept the dying declaration recorded by Police Head Constable Jagtap at Exhibit-96. In the facts and circumstances of this case, we are of the considered opinion that from amongst multiple dying declarations, the version stated by deceased in her dying declaration at Exhibit-96 as told to Police Head Constable Jagtap is acceptable. The dying declaration has to pass test of reliability and in case where there are multiple dying declarations and acceptance of one of the dying declarations, the version stated in the other dying declarations shall have to be necessarily rejected. In our opinion, no reliance can be placed on the dying declaration recorded at the subsequent point of time by the Executive Magistrate at Exhibit-67. The subsequent changed version of the deceased is at the instance of her close relations who were surrounding her. In the matter of **Kushal Rao Vs. State of Bombay, reported in AIR 1958 SC 22**, the Supreme Court has observed thus:

“In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But, once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the Court, after

examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then without corroboration, it cannot form the basis of a conviction.”

24 There is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. Primary effort of the Court is to find out, whether the dying declaration is true. If it is true, no question of corroboration arises. It is the duty of the Court to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination.

25 In the instant matter, there are multiple dying declarations placed on record. The first one is recorded by Police Head Constable Jagtap and proved in accordance with principles of Evidence act. It has not implicated the accused as the persons who have set the deceased on fire, though they may be responsible for commission of offence under Section 304-B. The subsequent dying declaration, however, implicates the accused and points them as the authors of burn injuries. The dying declaration, which is first in time, which has been duly proved, does not deserve to be rejected. There is no explanation forthcoming as to why there is deviation in the story nor the prosecution has taken any effort to explain the inconsistencies. On perusal of the dying declaration recorded by Police Head Constable Jagtap, which is first in time at Exhibit-96, appears to be natural. It does not exonerate accused in its entirety, however, disclose that death of

the deceased is not natural and she was subjected to illtreatment at the hands of accused for a long period. As a result of illtreatment meted out to her, deceased was compelled to put an end to her life. According to us, therefore, conviction and sentence imposed by the learned trial Judge for offence punishable under Section 302 read with Section 34 of the Indian Penal Code needs to be quashed and set aside and conviction and sentence imposed by the learned trial Judge for offence under Section 304-B read with Section 34 of the Indian Penal Code, deserves to be maintained.

26 Since the accused are being held guilty for commission of offence punishable under Section 304-B read with Section 34 of the Indian Penal Code, we do not deem it necessary to impose separate sentence for offence punishable under Section 498A read with Section 34 of the Indian Penal Code. The offence under Section 304-B, in a way, is aggravated form of offence under Section 498-A of the Indian Penal Code. We do not propose to impose separate sentence in respect of offence punishable under Section 498-A read with Section 34 of the Indian Penal Code, although the order of conviction is maintained.

27 For the reasons recorded above, appeal is partly allowed.

(a) The order of conviction recorded by learned Additional Sessions Judge, Beed, against accused nos. 1 and 2 in respect of offence punishable under section 302 read with section 34 of the Indian Penal Code and imposition of sentence to suffer rigorous imprisonment for life and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for six months, is quashed and set

aside.

(b) Conviction and sentence imposed by learned Additional Sessions Judge, Beed, against accused nos. 1 and 2 in respect of offence punishable under section 304-B read with section 34 of the Indian Penal Code and imposition of sentence of seven years and to pay fine of Rs. 500/- each, in default to suffer further simple imprisonment for six months, is maintained.

(c) In view of the fact that accused have been held guilty for offence punishable under section 304-B read with section 34 of the Indian Penal Code and sentenced for a period of seven years imprisonment and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for six months is maintained, no separate sentence is awarded in respect of offence punishable under section 498-A read with section 34 of the Indian Penal Code, although order of conviction is maintained.

(d) Muddemal property, being worthless, be destroyed after appeal period is over.

Criminal Application No.3425 of 2012 stands disposed of.

K.L.WADANE
JUDGE

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R.M.BORDE
JUDGE