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

CRIMINAL REVISION APPLICATION NO. 381 OF 2003

Bapu s/o Piraji Khaire,
Age: 45 years, Occu: Agriculture,
R/o. Deorayachiwadi,
Tq. & Dist. Beed

..APPLICANT
(Orig. Complainant)

VERSUS

1. The State of Maharashtra
2. Raosaheb s/o Asruba Waibhat,
Age: 25 years, Occu: Agriculture,
R/o Fukewadi, Post Limbgaon,
Taluka & Dist. Beed
3. Asruba s/o Anna Waibhag,
Age: 61 years, Occu: Agriculture,
R/o as above
4. Masurabai w/o Asruba Waibhat,
Age: 55 years, Occu: Household,
R/o as above
5. Sangita d/o Asruba Waibhat,
Age: 30 years, Occu: Household,
R/o as above

..RESPONDENTS
(No. 2 to 5 are orig.
accused No. 1 to 4)

Mr M. R. Andhale, Advocate for applicant;
Ms R. P. Gaur, Addl. Public Prosecutor for respondent No. 1;
Mr M. V. Salunke & Mr V. D. Salunke, Advocates for respondent Nos. 2 to 5

CORAM : N.W. SAMBRE, J.

DATE : 3rd May, 2016

ORAL JUDGMENT

Heard Mr Andhale, learned Counsel appearing on behalf of the
applicant - complainant; Ms Gaur, learned Addl. Public Prosecutor on

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behalf of respondent no.1 and Mr Salunke, learned Counsel on behalf of respondents no.2 to 5 - accused.

2. The present revision is preferred by the original complainant and father of deceased Sharda.

3. Facts as are necessary for deciding the revision are as under :-

4. Accused no.1 Raosaheb married to the daughter of the applicant, namely, Sharadabai, whereas accused no.2 Asruba and accused no.3 Masurabai are her father-in-law and mother-in-law, respectively. Accused no.4 Sangita is sister of accused no.1 Raosaheb. It is claimed that on 21st April, 1999, the accused persons set Sharadabai on fire, resulting into registration of a crime for offences punishable under sections 498-A, 302 read with section 34 of the Indian Penal Code.

5. It is claimed that all the accused persons are residing together and on 24th April, 1999, as deceased Sharada did not awake early, accused no.3 poured kerosene on the person of deceased and ignited, resulting into deceased Sharada suffering 93% burn injuries. It is claimed that the persons residing in the vicinity tried to extinguish the fire. Atmaram and Laxman carried the deceased to the civil hospital, Beed.

6. Police Head Constable Sahebrao, who was attached to the civil hospital police chowky on 24th April, 1999 received an intimation from Dr.

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Choudhary, Casualty Medical Officer, stating that deceased Sharadabai was admitted in the Burn Ward. Sahebrao, as such recorded statement of deceased on 24th April, 1999, at about 10.10 a.m., which was treated as first information report. Police Head Constable Sahebrao then requisitioned the Taluka Executive Magistrate on 24th April, 1999, requesting to record dying declaration of deceased Sharada, she having received 93% burns. The dying declaration was recorded by the Naib Tahsildar at about 11.00 a.m. on 24th April, 1999 and as such, C.R. No.67 of 1999 came to be registered initially for offences punishable under sections 307, 498-A read with section 34 of the Indian Penal Code. Sharada expired on 26th April, 1999, at about 8.00 a.m., resulting into conversion of offence from section 307 to 302 of the Indian Penal Code.

7. After completion of investigation, charge-sheet came to be submitted to the court of Judicial Magistrate First Class, Patoda, who thereafter committed the case to Sessions Court.

8. Charge came to be framed against the accused vide Exh.9 on 6th June, 2003 and the same was amended vide application Exh.13. The accused pleaded not guilty and claimed to be tried. Their defence was that of total denial. The story of the accused was that, deceased Sharada bolted the door of bed room from inside and the burning candle might have fallen on her, resulting into she catching fire.

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9. Learned Sessions Judge, by his very detailed and analytical judgment, pronounced acquittal of the accused on 30th August, 2003. As such, present revision against acquittal.

10. Heard Mr Andhale, learned Counsel appearing on behalf of the applicant at length. He would submit that the dying declaration (Exh.36) as was recorded initially by the Police Constable and subsequent dying declaration (Exh.43) recorded by the Executive Magistrate ought to have been accepted and relied upon for pronouncing the conviction of the accused persons as there was consistency and the dying declarations were admissible in accordance with law. He would then submit that of the witnesses who were examined, there was complete consistency and ingredients of the offence punishable under section 498-A so also 302 of the Indian Penal Code were very much established. He would then submit that the evidence of the Doctor is incorrectly disbelieved and based on hypothetical considerations the acquittal is ordered by the learned Sessions Judge.

11. So as to substantiate his contentions, learned Counsel has invited my attention to the judgment of the Apex Court, in the matter of **Sandeep & anr. vs. State of Haryana**, reported in **2015 ALL SCR 2223**, so as to submit that if there are two dying declarations; one recorded by a police officer and other by the Magistrate after due certification of the fitness of the deceased by the Doctor, the conviction could be based on such dying declarations. Learned Counsel has also invited my attention to the

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judgment of this Court, in the matter of **Shankar s/o Shivappa Patale & anr. vs. Ishaq s/o Bashamiya Bhajiwaale & ors.**, reported in **2015 ALL MR (Cri) 2204**, so as to substantiate his contention that the evidence of the Doctor ought not to have been discarded. He would also rely upon the judgment of this Court, in the matter of **Mirabai w/o Sakharam Patil & anr. vs. The State of Maharashtra**, reported in **2015 ALL MR (Cri) 2546**, so as to substantiate that even if the Doctor has not certified or examined about fitness of the deceased while recording dying declaration, still independently court can analyze and rely upon the dying declaration, provided the same is acceptable in law.

12. Per contra, Mr Salunke, learned Counsel appearing on behalf of respondents no.2 to 5 – accused would submit that the entire evidence brought on record by the prosecution would depict that there was no consistency in the evidence of the respective witnesses. He would then submit that the circumstances as are brought on record so as to connect the accused with the crime in question, are also not reliable. He would submit that the ingredients of sections 302 and 498-A of the Indian Penal Code are not satisfied and the improvements in the evidence of the witnesses could be ascertained upon perusal of the same. According to him, Dr. Choudhary was in-charge of the casualty ward and Dr. Dudhal was in-charge of the Burn ward. He would submit that by examining Dr. Choudhary, the dying declaration cannot be proved, particularly so as to substantiate fitness of mind of deceased Shardabai so as to give dying declaration. He would invite my attention to the judgment of the Apex

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Court, in the matter of **Nirmala Maruti Gunjal & ors. vs. State of Maharashtra**, reported in **2012 (1) Bom. C.R. (Cri.) 18**, so as to substantiate that in an eventuality where the proper Doctor has not ascertained the medical fitness of the victim to make rationale statement, the conviction cannot be based upon such piece of evidence. He has also relied upon the judgment of this Court in the matter of **Pravin vs. The State of Maharashtra**, reported in **2013 (1) Bom. CR (Cri) 572**, so as to submit that in case if there is no corroboration between two dying declarations, the conviction cannot be based on such dying declarations.

13. Having considered rival submissions of the parties and upon analyzing the entire evidence as is brought on record, it is required to be noted that there are two dying declarations brought on record vide Exhs.36 and 43. Exh.16 – the spot panchnama and Exh.22 the inquest panchnama were also admitted by the defence. The case in question is based on the circumstantial evidence. It is brought on record before the learned Court below that there are in all two written dying declarations and one oral dying declaration given by deceased Shardabai to her parents.

14. The prosecution has examined P.W.4 Sahebrao, who recorded Exh.36 dying declaration; P.W.5 Medical Officer Dr. Shivaji Choudhary, who made endorsements Exhs.40 and 41 on the dying declarations recorded by P.W.6 Executive Magistrate at Exh.43.

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15. If the evidence of P.W.6 Executive Magistrate and the evidence of P.W.4 Sahebrao, who recorded the dying declaration at Exh.36 is analyzed in the background of evidence of P.W.5 Dr. Choudhary, it is required to be noted that on Exh.36 P.W.5 Dr. Choudhary has proved his endorsement. He also made an endorsement on Exh.43, as regards mental condition of deceased Sharadabai to give dying declaration. However, he has not produced the case papers. His testimony does not repose confidence as regards whether he has examined the patient in question. It is brought on record that Dr. Dudhal, was in-charge of the Burn ward cases and he was on duty on the day when the incident in question took place. He claimed that he was posted in the casualty room and has not maintained any record about examination of patients held by him. Overall reading of his testimony does not repose any confidence and particularly as regards his claim that he had made endorsements on Exhs.36 and 43 after examination of the patient, particularly when he was posted in the casualty and was not in-charge of the Burn ward. It is then required to be noted that Dr Dudhal who was in-charge of the Burn ward, was not examined by the prosecution. It is then also brought on record that P.W.4 Police Constable Sahebrao was asking the questions to deceased Sharadabai and was recording the answers offered. He then stated that deceased Sharadabai was answering questions quickly and was in fit state of mind. The fact remains that deceased Sharadabai suffered 93% deep burns as is apparent from the evidence of P.W.1 Dr. Avinash Deshpande, who had performed the post mortem. He has stated that deceased had suffered burn injuries on head, neck, face, upper extremity, etc. From the evidence

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of P.W.4 Sahebrao, it could be noted that one more Constable was also sitting and it is brought on record that the relatives of deceased Sharadabai were sitting near her cot when the dying declaration was recorded. It is then required to be noted that after recording the statement at Exh.36, at the end of the dying declaration, no signature was made by Dr. Choudhary and as such, it could be inferred that Dr. Choudhary was not personally present when the dying declaration Exh.36 was recorded.

16. It is then noted from the evidence as is brought on record, that P.W.4 Sahebrao used a ball pen for writing the statement of Sharadabai at Exh.36 and the signature of P.W.4 is not by the same pen, however, by a different pen, which rather creates suspicion. The fact remains that P.W.4 Sahebrao had not stated anything about accompaniment of his subordinate Mr Tipperse with him while recording the dying declaration.

17. There is enough material brought on record to depict that the document Exh.36, the dying declaration, is doubtful document and cannot be relied upon for basing conviction of the accused persons.

18. So far as evidence of P.W.6 Executive Magistrate Mitthu Dhakne is concerned, it is brought on record that he had recorded the dying declaration of deceased Sharadabai which is at Exh.43. It is then required to be noted that he had received the communication Exh.37 and made endorsement on the same about its receipt. After his visit to the Burn ward, pursuant to the said communication, he had claimed that the Doctor and

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himself were present for recording the dying declaration. It is then claimed that after Dr. Choudhary made an endorsement that the patient was in fit state of mind, he had recorded the dying declaration. He stated that it is Dr. Choudhary, who had first examined the patient and then made endorsement. He also narrates that after recording the statement Exh.39 he had obtained toe impression of left leg of Sharadabai and read over the contents of the statement to her, which she had admitted to be correct.

19. Dr. Choudhary then, in clear terms, has admitted that he had not maintained any record nor produced any record so as to substantiate his claim that deceased Sharadabai was hospitalized in casualty ward and he had given treatment to her.

20. It is then required to be noted that P.W.6 Executive Magistrate Dhakne has stated that he along with P.W.5 Dr. Choudhary went to the Burn ward and then recorded the statement, after asking the relatives of Sharadabai to leave the ward. The fact remains that Dr. Dudhal was in-charge of the Burn ward and not Dr. Choudhary and Dr. Choudhary had no occasion to certify state of mind of deceased Sharadabai. It is also brought on record that on that day Dr. Dudhal was on duty.

21. In view of above, having taken cumulative effect of the evidence tendered by P.W.5 Dr. Choudhary, P.W.6 Executive Magistrate/Naib Tahsildar Mitthu and P.W.4 Sahebrao, who recorded dying declaration at Exh.36, it could be inferred that there is no consistency in the story that is

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sought to be put-forth, particularly when the dying declaration Exh.36 claimed to have been recorded in the casualty ward by P.W.4 in the presence of P.W.5 Dr. Choudhary. P.W.6 Executive Magistrate Mitthu in his statement has stated that he had recorded the dying declaration in the Burn ward of which Dr. Dudhal was in-charge and was on duty, who had not certified the state of mind of Sharadabai and it is P.W.5 Dr. Choudhary, who had certified the same. In view of above, the inconsistency as is brought on record, particularly in the matter of recording of dying declaration, in absence of any official record in relation to the dying declaration maintained by P.W.5 Dr. Choudhary, in my opinion, the acquittal ordered by observing that the dying declarations cannot be believed for the reasons, appears to be just and proper and does not call for any interference.

22. Apart from above, it is to be noted that the evidence of other witnesses, i.e. P.W.2 Dharma Pawar and P.W.3 Mahananda also does not repose any confidence, particularly when P.W.2 Dharma has admitted in cross-examination that while deceased was screaming, they were unable to understand the wordings. It is then noted that no other lady was present near the bed of Sharadabai, whereas P.W.3 Mahananda claimed that she was present and offered water to Sharadabai. There are certain material omissions and contradictions in the evidence of P.Ws. 2 and 3 and as such said evidence is required to be discarded so as to call for conviction.

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23. I have considered the evidence of P.W.4 Sahebrao, P.W.5 Dr. Choudhary and P.W.6 Executive Magistrate – Mitthu, on the aspect of dying declarations at Exhs.36 and 43 and the evidence of P.W.2 Dharma and P.W.3 Mahananda on the aspect of oral dying declaration and I hardly find any support from the judgments cited by Mr Andhale, so as to establish the case of the prosecution against the accused persons beyond reasonable doubt.

24. Having taken over-all view of the matter, in my opinion, the acquittal of respondents no.2 to 5 – accused as is ordered, does not call for any interference, particularly in the light of the scope of revisional jurisdiction. It is then to be noted that accused no.2 Asruba now must be above 75 years of age, whereas accused no.3 Masurabai of the age of 70 years.

25. In the above background, in my opinion, no case for interference in the revisional jurisdiction for reversing the acquittal of respondents no.2 to 5 – accused is made out. Thus, Criminal Revision fails and stands rejected. Rule stands discharged.

(N.W. SAMBRE, J.)

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