

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO. 676 OF 1995

1. Prakash Bhau Soude
R/o Village Herwad, Tal: Shirol
Dist. Kolhapur.
2. Sou. Vimal Pundalik Chaugule
R/o Village Tardal, Tal: Hatkanangale
Dist. Kolhapur.
3. Sou. Seema @ Sumitra Pargonda
R/o Village chandar, Tal: Chikkodi
Dist. Belgaum

.....Appellants

V/s.

The State of Maharashtra

....Respondent

Mr. Sudhir V. Sadavarte Advocate for Appellant
Mrs. A. A. Mane APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : JANUARY 20, 2016.

JUDGMENT:

Heard. Appellants herein are convicted for offence punishable under section 306 and 498 (A) r/w 34 of Indian Penal Code in Sessions Case No. 32 of 1994 by Additional Sessions Judge, Kolhapur vide Judgment and Order dated 13/11/1995. For offence punishable under section 498 (A) of Indian Penal Code appellants are sentenced to suffer two years of rigorous imprisonment and fine of Rs. 2000/- in default to suffer further rigorous

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imprisonment for six months. For offence punishable under section 306 of Indian Penal Code appellants are sentenced to suffer three years rigorous imprisonment and fine of Rs. 3000/- in default to suffer further rigorous imprisonment of six months. Hence, this appeal.

2) Such of the facts necessary for the decision of this appeal are as follows.

3) Appellant no. 1 got married to Sangita, sometime in the month of March/April 1993. On 29/12/1993 Sangita was admitted in Miraj Mission Hospital as she was sustained burns. One Krishnabai Patil gave telephonic message to the police station that Sangita is admitted in the hospital with burn injuries. Police Head Constable of Miraj Police Station informed to Police Head Constable Gavhane about the same. Police had then submitted a requisition for recording the statement of Sangita by a Special Executive Magistrate. P.W. 4 Jafar who is working as Special Executive Magistrate, Miraj had been to the hospital. He had taken the opinion of doctor Sabale and then recorded the statement of Sangita.

4) It is the case of prosecution that Sangita had informed Special Executive Magistrate that she had got married to appellant no. 1 six months

prior to the date of the incident. She had disclosed that her husband was making grievances that she did not work properly. Her sisters-in-law i.e. appellant nos. 2 & 3 were instigating her husband to quarrel with her. On the previous night also her sisters-in-law and her husband had raised a quarrel with her. Her husband had assaulted her. She was fed up of the ill-treatment and hence, in the morning at about 7.00 a.m., she doused herself with kerosene and set herself ablaze. Her mother-in-law and her husband had extinguished the flames and had admitted her in the hospital. At the time when she was immolated herself, her mother-in-law was milching the cows. Special Executive Magistrate had retain the original copy of the statement recorded by him and had passed on the carbon copy of the said statement to the police station on the basis of which crime no. 87 of 1993 was registered against the accused for offence punishable under section 498 (A) r/w 34 of Indian Penal Code. Investigation was set in motion. On 02/01/1994, Sangita succumbed to the burn injuries at about 10.00 p.m. Thereafter, section 306 of Indian Penal Code was added. After completion of investigation charge-sheet was filed on 22/01/1994. Case was committed to the court of sessions and registered as sessions case no. 32 of 1994. Prosecution examined 7 witnesses

to bring home the guilt of the accused. The case of prosecution mainly rests upon the dying declaration recorded by P.W. 4 and hence, other aspects of the prosecution case need not be considered. It is an admitted fact that Sangita had poured kerosene on herself on 29/12/1993 in her matrimonial home. She was admitted in the hospital by her husband and mother-in-law at about 8.30 a.m. They had immediately given intimation of the said incident to the parents and relatives of Sangita. As soon as she was taken to the hospital, she was admitted in intensive care unit. The admission papers would indicate that her condition was poor at the time of admission itself. Medical case papers of Sangita are produced on record by P.W. 5 doctor Shamsundar Sabale who was treating Sangita at that time. The said case papers are at Exhibit 32. It appears from the case papers that as soon as Sangita was admitted, she was administered anti-biotic as well as injection like Fortwin.

5) P.W. 4 has deposed before the court that after receiving the requisition from the police station, he had been to the hospital at about 11.00 a.m. He had recorded the dying declaration, kept in an envelope under the seal. He had tendered the sealed envelope in the court at the time of recording of his evidence. The same was marked as Exhibit 30 and the envelope was marked

as Exhibit 30 (A). P.W. 4 has further deposed that he had recorded the statement of Sangita in the presence of Dr. Sabale. He had made certain queries to the patient and she had answered the same. He had recorded her statement as per her say. She had admitted the correctness of the dying declaration. Sangita had signed the said dying declaration in his presence. P.W. 4 had prepared one carbon copy of the said dying declaration at the time of reducing the statement into writing. The said carbon copy is at Exhibit 24 and the same was sent to the police station. On the carbon copy of the said statement, he had obtained the endorsement of Dr. Sabale, however, he had not obtained the signature of Sangita on the carbon copy. He had given the carbon copy to police head constable Gavhane.

6) In the cross-examination P.W. 4 has admitted that whole body of patient was covered by a cloth and only her face was visible. There were burn injuries on the face also. Except her face, he had not seen any portion of her body, however, he had seen her right hand when she was signing the dying declaration. He has admitted that her hand was burnt. An explanation is offered by P.W. 4 that he had obtained the signature of Sangia on her original dying declaration after he had removed the carbon and therefore he did not

think it necessary to obtain her signature on carbon copy also.

7) Learned counsel for the appellant has rightly submitted that it cannot be believed that Sangita in fact able to scribe her whole name as a signature, especially when she had sustained burn injuries on her right hand. It is also submitted that recording of dying declaration itself is shrouded with mystery for the simple reason that when the statement was recorded by placing a carbon paper, the signature of deponent would find place on the carbon copy also, however, it cannot be believed that the signature was obtained after removing the carbon copy. Police has registered the offence on the basis of the alleged dying declaration which was not signed by the deponent when it was presented to the police. There was no reason for P.W. 4 to retain the original copy of the dying declaration and produce the same at the time of recording of his evidence.

8) It is also submitted that patient had sustained 70% burn injuries. She was administered fortwin injection at about 9.45 a.m. Which has an effect of sedation, moreover the medical case papers at Exhibit 32 would show that patient was given an Otu mask which is natural for the reason that a patient who has sustained about 70% burn injuries would be in difficulty to inhale

and exhale. Upon perusal of evidence of P.W. 4 it is clear that all that the prosecution has proved is that P.W. 4 had recorded the statement of Sangita. P.W. 4 has not deposed before the court as to what was narrated to him by Sangita and therefore learned counsel for the appellant rightly submits that it cannot be said that narration of the deceased which would explain the cause of her death or the transaction in which she committed suicide are not proved and therefore the appellants deserve to be acquitted.

9) P. W. 5 Dr. Shamsundar Sabale has deposed before the court that on 29/12/1993, at about 11.00 a.m. One Special Executive Magistrate had been to the hospital to record the statement of injured patient Sangita wife of Prakash Soude. He had requested the doctor to examine the patient and ascertain the consciousness and fitness to give the statement. P.W. 5 had accordingly examined and allowed the Magistrate to record her statement. Statement was recorded in the presence of P.W. 5. The patient had signed the said statement. It is elicited in the cross-examination that the patient was admitted in intensive care unit. That anti biotic and other treatment was given to her. In the case paper there is no endorsement to the effect that the dying declaration was recorded or that patient was examined soon before dying

declaration was recorded. It is pertinent to note that P.W. 5 has also not deposed before the court that the narration of the dying declaration made by Sangita to the Executive Magistrate.

10) Learned counsel for the appellant rightly submits that it is incumbent upon the prosecution to prove the guilt of the accused beyond reasonable doubt. That although it is on record that Sangita was given Otu mask as soon she was admitted in intensive care unit. There is nothing on record to indicate as to how she could give the dying declaration or that whether she was in position to sign the dying declaration. Moreover, the information was given by a social worker to the police. The relatives had visited the hospital on the same day and the possibility that statement was tutored cannot be ruled out.

11) As against this, learned APP submits that besides the written dying declaration, there is an oral dying declaration to P.W. 1, 2 & 3 as they had visited Sangita in intensive care unit. It is further pertinent to note that statements of these witnesses were recorded by the police only after 31/12/1993 i.e. after condition of Sangita had deteriorated. Learned APP submits that there was no occasion for the witnesses to tutor the statement as they had reached the hospital only at about 3.00 p.m. whereas the dying

declaration was recorded between 11.00 a.m. to 11.30 a.m. Learned APP submits that P.W. 4 & 5 have categorically deposed before the court that statement of Sangita was recorded between 11.00 a.m. to 11.30 a.m. on 29/12/1993. It is also submitted that defence has not asked the witnesses more particularly P.W. 5 as to what would be the effect of fortwin which was administered to her at about 9.45 a.m. The defence has also not asked P.W. 5 as to whether Otu mask was given to the patient soon after the admission or whether it was removed temporarily to enable the patient to give her statement to the Special Executive Magistrate and therefore said submissions need not be taken into consideration.

12) As against this, learned counsel for the appellants submits that it is incumbent upon the prosecution to substantiate their case on the basis of record collected during the course of investigation. Accused has right to silence. That in the statement under section 313 of Code of Criminal Procedure, 1973. Learned counsel further submits that the time of incident also needs to be appreciated, i.e. the time when woman folk would be cooking. All this has to be read in consonance with statement under section 32 of Indian Evidence Act.

- 13) In the case of **Laxman V/s State of Maharashtra** reported in A.I.R. 2002 S.C. 2973, Hon'ble Apex Court has held that :

“The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. Since the accused has no power of cross-examination, the Court insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. The Court, however, has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination”.

The Hon'ble Apex Court has further held that:

“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”.

- 14) All these three ingredients have to be read in conjunction and not in

isolation. In the present case, evidence on record would show that although the statement may be voluntary or truthful but it does not inspire the confidence of the court for the simple reason that the very recording of dying declaration is not proved by the prosecution beyond reasonable doubt.

15) In view of the aforesaid discussion, appeal deserves to be allowed. Hence, following order.

ORDER

- (i) Appeal is allowed.
- (ii) The Judgment and Order dated 13/11/1995 passed by Additional Sessions Judge, Kolhapur in Sessions Case No. 32 of 1994 is hereby quashed and set aside.
- (iii) Appellants are acquitted of all the charges levelled against them.
- (iv) Bail bonds of the appellants stand cancelled.
- (v) Appeal stands disposed of.

(SMT. SADHANA S. JADHAV, J.)