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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1415 OF 2011

Hussain Mohammed Patel	]	
age: 35 years,	]	
residing at : Peth Galli, Gangapur	]	 <u>Appellant</u>
Nashik, District: Nashik	]	Ori. Accused.
[At present lodged in Nashik Central Jail]	]	

Versus

The State of Maharashtra,	]	
Through Gangapur Police Station,	]	 Respondent
District: Nashik	]	

Mr. V. A. Gangal a/w Mr. Anup N. Deshmukh, for
the appellant.
Mr. Arfan Sait, APP for the Respondent-State.

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

DATE : 20th DECEMBER, 2016.

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

1. This appeal is preferred by the original accused, challenging the judgment and order dated 2nd July, 2011, of Additional Sessions Judge, Nashik, in Sessions Case No.155 of 2008, thereby convicting him for the offence punishable under Sections 498A and 302 of the Indian Penal Code, sentencing him to suffer R. I. for one year

and to pay fine of Rs.1,000/- in default to suffer S. I. for three months, on the first count and to suffer life imprisonment and to pay fine of Rs.5,000/- in default to suffer S.I. for three months, on the second count.

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

Deceased Raisa was the wife of appellant. Their marriage had taken place about 7 years prior to the incident. It is alleged that since beginning the appellant was subjecting her to harassment and illtreatment, in order to coerce her to meet his demand of Rs.50,000/- for purchase of Maruti Van.

3. On the day of incident i.e. on 24.1.2008 also, appellant quarrelled with her on the same count and thereafter poured kerosene on her and set her ablaze. The persons residing nearby extinguished her fire and then the appellant himself took her to the Civil Hospital. There her statement came to be recorded by P.W.6 PI Bedarkar and on her statement Exh.33, offence bearing C.R.No.26 of 2008 came to be registered against the appellant. On the same night, her dying declaration came to be recorded vide Exh.31 by P.W.5 Special Executive Magistrate Shri. Burkul at about 10.30 p.m., in the presence of P.W.3 Dr. More. Raisa succumbed to burn injuries, within two hours

thereafter. After completion of usual investigation, P. W.6 PI Bedarkar filed chargesheet against the appellant in the Court of Judicial Magistrate First Class, Nashik.

4. On committal of the case to the Sessions Court, the trial Court, framed charge against the appellant, vide Exh.7. The appellant pleaded not guilty to the charge and claimed trial, raising defence of denial and false implication.

5. In support of its case, the prosecution examined six witnesses and on appreciation of their evidence, trial Court was pleased to hold the guilt of the appellant to be proved beyond reasonable doubt, for the offences punishable under Sections 498A and 302 of the Indian Penal Code and convicted and sentenced him, as aforesaid.

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

7. In our considered opinion, in order to appreciate the rival submissions raised by them, it would be necessary to turn to the evidence on record.

8. The entire case of prosecution is based on the dying declarations of the deceased Raisa. The law is fairly well settled that the conviction can be based on the sole evidence of dying declaration, provided it inspires confidence in the judicial mind and when there are more than one dying declarations, they are consistent with each other.

9. In this case there are two written dying declarations and two oral dying declarations. The first written dying declaration is recorded by P.W.6 PI Bedarkar, who, immediately on receipt of the information rushed to the Civil Hospital and has recorded statement of Raisa vide Exh.33, in the presence of P.W.3 Dr. More. According to his evidence, after reaching hospital, he had approached the Doctor. The Doctor, after examining Raisa gave certificate that she was conscious and fit to give statement. Thereafter in the presence of Doctor, he has recorded the statement of Raisa, in which she has stated that her husband the appellant herein was demanding from her Rs.50,000/- for purchasing Maruti vehicle; as she was unable to give the amount, her husband poured kerosene on her and set her on fire. As per evidence of P.W.6 PI Bedarkar, he has recorded her statement as per her say and then she has put her thumb impression on the said statement.

10. There is corroborating evidence of P.W. 3 Dr. More, who

was on duty in the said hospital from 9.00 p.m. to 9.00 a.m. According to his evidence, Raisa was admitted in burn ward at about 5.00 p.m. The matter was reported to the police. Police had come to record her statement. At about 9.30 p.m., on the request of police, he had examined Raisa and found her to be conscious and in a position to give statement. Accordingly he has made endorsement on the statement of Raisa, as recorded by P.W.6 PI Bedarkar. His endorsement is marked as Exh. 22.

11. On this statement Exh.33, C.R. No.26 of 2008 was registered against the appellant for the offence punishable under Sections 498A and 307 of the Indian Penal Code, at about 10.00 p.m. There is endorsement to that effect of P. S. O. Gangapur Police Station. Further investigation of the case was taken over by P.W.6 PI Bedarkar.

12. In addition to this statement of Raisa Exh.33, which was treated as F.I.R., there is one more dying declaration of Raisa which is recorded by P.W.5 Special Executive Magistrate Shri. Burkul. As per his evidence, on that night Gangapur Police Station, informed him on phone that one woman had received burn injuries; she was admitted in Civil Hospital and he should record her statement. Accordingly, he had been to Civil Hospital and met with the Doctor present. There, police

gave him requisition in writing for recording the statement of Raisa. That requisition is at Exh.30. On the basis of said requisition, he had approached P.W.3 Dr. More, who examined Raisa and issued certificate that she was conscious and fit to give her statement. The said certificate is at Exh.25. As per his further evidence, he then recorded the statement of Raisa after verifying and satisfying himself that she was in a position to give answers to the questions asked by him.

13. His evidence proves that, to the question as to how she sustained burns, Raisa told him that her husband has set her on fire and to the further query as to whether she had complaint against anybody, she told him that she had complaint against her husband. She also disclosed to him that her husband has brought her to the hospital. As per his evidence, he recorded her statement vide Exh.30, in his own hand writing and obtained her thumb impression thereon. P.W.5 Dr. More again examined her and certified that she was conscious and well oriented through out the recording of her statement.

14. This evidence of P.W.5 SEM Shri. Burkul, is fortified by P.W.3 Dr. More, who has deposed that on the same night, the Magistrate has recorded the dying declaration of Raisa at about 10.15 p.m. At that time, the Magistrate had come to him for obtaining his

opinion as to whether Raisa was in a position to make statement. Hence, he had examined Raisa and found that Raisa was conscious and able to give statement. Accordingly, he has given certificate on the statement vide exh.25. After the statement was recorded, again he had examined Raisa and found that she was conscious and able to give statement. Accordingly he has made another endorsement at the end of the said statement vide Exh.26.

15. Thus, both these dying declarations of Raisa, recorded by independent authorities are properly proved by prosecution and they are consistent with each other and together they prove the case of prosecution that it was the appellant who has set Raisa on fire after pouring kerosene on her.

16. In addition to these two written dying declarations, there are two more oral dying declarations, first one was made before P.W.1 Radhabai Kahar, who is residing just in front of the house of appellant. According to her evidence, on the date of incident, she heard quarrel between the appellant and Raisa. Thereafter at about 4.00 p.m, she had heard the shouts of Raisa to save her. Hence she herself and other persons residing nearby went to the house of Raisa and found that Raisa was lying on the floor in burnt condition and saying that her husband had poured kerosene and set her ablaze. As per her

evidence, thereafter appellant took Raisa to the hospital.

17. Then there is evidence of P.W.4, Mohiuddin Kazi, Raisa's uncle, who has deposed about harassment meted out to Raisa at the hands of appellant for bringing cash amount of Rs.50,000/- to purchase Maruti vehicle. He has also stated that as Raisa was unable to bring the amount, appellant used to beat her. As to the incident, he has deposed that at about 4 to 4.30 p.m, he came to know that Raisa had received burn injuries and admitted in Civil Hospital. Hence, he went there and found that Raisa had received excessive burns and she was crying. On enquiry, she told him that quarrel had taken place between her and the appellant. Appellant started beating her, hence she came out of the house. The appellant, however, again dragged her in the house, beat her and poured kerosene on her person and set her ablaze.

18. It must be stated that the evidence of all these five witnesses had remained completely un-shattered and nothing worthwhile is elicited in their cross examination to disbelieve them or to discard their testimony. Their evidence is also consistent, leaving nothing to imagination or conjecture. They have remained truthful to the facts.

19. The only ground on which evidence relating to dying declaration of Raisa is challenged by learned counsel for defence is that Raisa has sustained about 99% burn injuries and she had succumbed to those injuries on the same night at about 11.40 p.m. Therefore, it is urged that if her dying declaration was recorded just few hours before her death, then there is serious doubt about her mental and physical fitness to make the statement.

20. However, we are not inclined to accept this submission in the face of categorical evidence of P.W.3 Dr. More, who has examined her, at the time of recording both the dying declarations and has made endorsements to the effect that he found her to be conscious and in a fit state to make the statement. As regards second dying declaration recorded by P.W. 5 SEM Shri. Burkul, at 10.15 p.m. he has made endorsement even after recording was complete, thereby indicating that he was not only present at the time of recording statement, but he has also satisfied himself that even after recording was complete, Raisa was conscious and was in a position to give such statement. Therefore, merely because Raisa had sustained 99% burns and has succumbed to burns within few hours after recording of her dying declaration, it cannot be accepted that she was not in a position to give such statement especially when an independent expert witness like P.W.3 Dr. More, who has examined her, has certified about her fitness

and absolutely nothing is elicited in his cross examination to challenge his evidence.

21. In this respect, learned APP has rightly placed reliance on the observations of the Apex Court, in the recent decision of **Ramesh and ors -vs- State of Haryana, Criminal Appeal No.2526 of 2014**, decided on 22.11.2016. In that case, the victim was brought to the hospital with 100% burn injuries notwithstanding, the Doctor found that she was in a conscious state of mind and was competent to give statement. The Magistrate has taken due precaution and in fact the Medical Officer remained present when the dying declaration was being recorded. In the light of the facts, it was held that such dying declaration cannot be discarded, merely by going to the extent of burns with which she was suffering, particularly when the defence has not been able to elicit anything from the cross examination of the Doctor that her mental faculties had totally impaired, rendering her incapable of giving a statement.

22. It was further held in paragraph No.32 that mere fact that she has suffered 100% burns would not, *ipso facto*, lead to the conclusion that the deceased was unconscious or that she was not in a proper state of mind to make a statement, especially when there was no challenge to the statement on the ground that it was not made

voluntarily or it was made by extraneous circumstances or was the result of tutoring.

23 In the instant case also, in view of the specific certificates given by P.W.3 Dr. More, about fitness of Raisa and his presence being proved at the time of recording of both the dying declarations coupled with his endorsement to that effect, totally rules out the possibility of Raisa being not in a position to give such statement. Moreover, in this case also, no such challenge is raised to her statement, on the ground that it was not made voluntarily or it was made by extraneous circumstances or was the result of tutoring.

24. In our considered opinion, therefore, there is absolutely no reason to discard her dying declarations. Though learned counsel for appellant has relied upon the decision of Hon'ble Apex Court, in case of **Darshan Singh @ Bhasuri and ors -vs- State of Punjab (1983) 2 SCC 411**, the facts of the said decision clearly prove that in that case on account of bullet injury vital organs of the deceased like the peritoneum, stomach and spleen were “completely smashed”. Hence there were remote chances of his remaining conscious after receipt of such injuries. Therefore, it was held that dying declaration of the deceased, recorded in such condition, cannot be relied upon as he could not possibly have been in a position to make any kind of

intelligible statement. As against it, in the present case, Raisa has sustained burn injuries, there is nothing on record to show that her vital organs or parameters had failed. Conversely as certified by P.W.3 Dr. More, she was conscious and in a position to make statement till her death.

25. In this case, learned APP has also placed reliance on the other circumstantial evidence like C.A. Report exh.36 which proves that kerosene residues were found on the clothes of the appellant, for which no explanation is offered by the appellant. There is also spot panchnama proved through the evidence of P.W.6 PI Bedarkar showing that kerosene can found on the spot; further there was gas stove and no kerosene stove was found to probabalise the defence of appellant that due to busting of stove, Raisa has sustained burns. As a mater of fact, this false explanation offered by appellant also constitutes one more link in the chain of circumstances proved against the appellant.

26. In the present case. the postmortem report exh.23 proved through the evidence of P.W.3 Dr. More, also goes to prove that Raisa has sustained burn injuries to the extent of 99%, on Head, neck and face, chest and abdomen, back, right upper limb, left upper limb, right lower limb and left lower limb. This extent and situs of burn injuries,

also rules out the possibility of accidental burns.

27. Here in the case, therefore, we are convinced that there is more than ample evidence on record to prove the prosecution case. It is trite that dying declaration is substantive piece of evidence and can be held the basis of the conviction; once the Court is convinced that dying declaration is made voluntary or it was not made by any extraneous circumstances and given in a fit state of mind and faculties. We have therefore, no hesitation to uphold the judgment of trial Court and confirm the conviction and sentence of the appellant, for the offences punishable under Sections 302 and 498A of the Indian Penal Code.

28. The appeal, thus, being devoid of merits, hence stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V. K. TAHILRAMANI, J.]