

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

CRIMINAL APPEAL NO.26 OF 2008

1. Vijay s/o. Laxman Jadhav,
Age : 37 years, Occ. Service,
r/o. Kartiknagar, Mayur Park,
Aurangabad
 2. Sow. Savita w/o. Vilas Jadhav,
Age : 33 years, Occ. Household,
r/o. As above
- ..Appellants

Vs.

The State of Maharashtra

..Respondent

Mr.R.S.Deshmukh, Advocate for the appellants

Mr.G.O.Wattamwar, A.P.P. for respondent

CORAM : SANGITRAO S. PATIL, J.
RESERVED ON : AUGUST 11, 2017
PRONOUNCED ON : AUGUST 23, 2017

JUDGMENT :

The appellants – original accused nos.1 and 2 have taken exception to the judgment and order dated 14.01.2008 passed in Sessions Case No.198 of 2006 by the learned Ad-hoc Additional Sessions Judge, Aurangabad convicting them for the offences

punishable under Sections 498-A, 306 and 323 read with Section 34 of the Indian Penal Code ("I.P.C.", for short).

2. The deceased Reena was the wife of appellant no.1 – Vijay. Accused nos.3 and 4 namely, Vilas and Kailas, respectively, were brothers of appellant no.1. Appellant no.2 is the wife of accused no.3 – Vilas and accused no.5 is the wife of accused no.4 – Kailas. All the accused were prosecuted for the offences punishable under Sections 498-A, 302, 323, 306 read with Section 34 of the I.P.C. The learned trial Judge acquitted accused nos.3 to 5 of all the offences. The appellants have been acquitted of the offence punishable under Section 302 of the I.P.C. This part of the judgment and order acquitting the appellants and accused nos.3 to 5 of the said offences has not been challenged by the State/prosecution. As such, the said part of the judgment and order has attained finality.

3. Appellant no.1 has been sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.5,000/- in respect of the offence punishable under Section 306 of the I.P.C. and rigorous imprisonment for two years and to pay a fine of Rs.3,000/- in respect of the offence punishable under Sections 498-A, while appellant no.2 has been sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.4,000/- in respect of the offence punishable under Section 306 of the I.P.C. and rigorous imprisonment for one year and to pay a fine of Rs.2,000/- for the offence punishable under Section 498-A of the I.P.C. Both the appellants have been sentenced to suffer rigorous imprisonment for one month each in respect of the offence punishable under Section 323 of the I.P.C. The substantive sentences of imprisonment have been ordered to run concurrently. The appellants have deposited the amount of fine in the trial Court. The legality and correctness of the impugned judgment and

order convicting and sentencing the appellants for the offences punishable under Sections 306, 498-A, 323 read with Section 34 of the I.P.C. only, is the subject matter of this appeal.

4. Appellant no.1 and the deceased Reena had got married prior to about 9 years of the date of incident that took place in the house of appellant No.1 on 28.02.2016. From that wedlock, they have got a son namely, Sushil and a daughter namely, Akanksha. Appellant no.1 was serving in Police Department. Appellant no.2 was residing with accused no.3 viz.- Vilas, in the house adjoining to the house of appellant no.1.

5. It is alleged that appellant nos.1 and 2 subjected the deceased Reena to cruelty by suspecting her chastity. Appellant no.1 used to severely beat her after consuming liquor. Fed up with that harassment and ill-treatment, the deceased Reena committed suicide by pouring kerosene on her person

on 28.02.2006 at about 4.00 p.m. She was admitted in the Government Hospital at Aurangabad for treatment, where she died on 10.03.2006.

6. The case of the prosecution is depending on the dying declaration (Exh.56) of the deceased Reena recorded by P.H.C. Zine (PW 9) (Exh.54), which was initially treated as F.I.R., on the basis of which crime was registered in Police Station, CIDCO, Aurangabad, for the offences punishable under Sections 498-A, 323, 504, 506 read with Section 34 of IPC and also excerpts (Exh.25) from the diary written by the deceased Reena. The prosecution further relied on the oral dying declaration given by the deceased Reena before her brother and sisters. There were dying declarations Exh.41 and Exh.44 recorded on 02.03.2006 and 07.03.2006, respectively, by the Naib Tahsildar – Rupa Chitrak (PW 7) (Exh.38).

7. P.H.C. Zine (PW 9) deposes that on 28.02.2006, he went to the Government Hospital at

Aurangabad after 5.35 p.m. and gave letter (EX.55) to the Medical Officer requesting him to opine, whether the deceased Reena was in a fit condition to give statement. The Medical Officer examined the deceased Reena and opined in writing that she was able to give statement. The letter (Exh.55) bears the endorsement of the Medical Officer that the patient is conscious and is in sound state of mind to give statement. P.H.C. Zine (PW 9) then states that he went to the deceased Reena at about 6.15 p.m., but she told him that she was not mentally prepared to give statement. He then states that on 01.03.2006, he again went to the Government Hospital at about 5.30 p.m. He inquired with the deceased Reena, whereon she told him that she was in a position to give statement. Then he recorded her statement (Exh.56) as per her say. He states that he read over the contents of the said statement to the deceased Reena and then obtained her signature thereon. The said statement came to be treated as F.I.R. and crime came to be

registered against the accused persons in Police Station, CIDCO, Aurangabad. After the death of Reena, it assumed the character of dying declaration.

8. In the dying declaration (Exh.56), the deceased Reena specifically stated that on 28.02.2006 at about 3.00 p.m., appellant no.1 came home after consuming liquor and beat her. She stated that appellant no.1 always used to take suspicion against her character. She further stated that when appellant no.1 and herself were inside their house, appellant no.2 came there at about 4.00 p.m. and alleged that because of her bad character, appellant no.1 started consuming liquor. Appellant no.2 asked appellant no.1 to set her (the deceased Reena) on fire and assured that she would arrange for the second wife for appellant no.1. She further alleged that the deceased Reena would kill appellant no.1 and receive pension. The deceased Reena further stated that appellant no.2 hurled abuses and beat her and left from the house. Appellant no.1 came back and beat her with slaps and

fist blows. Thereafter, she went inside the kitchen room, poured kerosene on person and set herself ablaze. She raised shouts whereon, appellant no.1, accused nos.3 and 5 came there and extinguished the fire by pouring water on her person. Accused nos.3 and 5 took her to the Government Hospital for treatment. This is what the account of the incident given by the deceased Reena.

9. As held in the case of **Ashabai and anr. Vs. State of Maharashtra, 2013(1) Crimes 15 (SC)**, there is neither particular form or procedure prescribed for recording a dying declaration nor it is required to be recorded only by a Magistrate. As a general rule, it is advisable to get the evidence of the declarant certified from a doctor. In appropriate cases, the satisfaction of the person recording the statement regarding the state of mind of the deceased, would also be sufficient to hold that the deceased was in a position to make a statement. It is settled law that if the prosecution solely depends on

the dying declaration, the normal rule is that the Courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated independently on its own merits as to its evidentiary value and one cannot be rejected because of certain variance in the other.

10. Reference may further be made to the judgment in the case of **Laxman Vs. State of Maharashtra, AIR 2002 SC 2973**, wherein it is observed that absence of the certification by a Doctor as to

the fitness of the mind of the declarant, would not render the dying declaration not acceptable. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind when it was made. The certification by the Doctor is a rule of caution. Thus, voluntary and truthful nature of the declaration can be established otherwise.

11. In the present case, P.H.C. Zine (PW 9) specifically states that though the Medical Officer had opined on 28.02.2006 in the evening, that the deceased Reena was in a fit condition to give statement, when he actually met the deceased Reena for recording her statement, she stated that she was not prepared to give statement. Therefore, he did not record her statement at that time. He then states that on the next date, when he again met the deceased Reena and asked her, whether she was willing to give statement, she stated that she was ready to give statement and accordingly, after finding that

she was in a condition to give statement, he recorded her dying declaration (Exh.56). From these facts, it is clear that P.H.C. Zine (PW 9) did not insist upon the deceased Reena to give statement when she was not ready to give it. It is only when she voluntarily offered to give statement on being asked by him that he recorded the dying declaration (Exh.56). It was suggested to this witness that he prepared a false dying declaration (Exh.56) at the instance of the Police Constable - Dnyaneshwar Mete, who is the brother-in-law of the deceased Reena. This suggestion is not at all acceptable. It seems that after P.H.C. Zine (PW 9) recorded the dying declaration on 01.03.2006, on the basis of which crime was registered, Kalpana (PW 1) (Exh.20), Sadhana (PW 2) (Exh.24) and Ashok (PW3) (Exh.26), who are the sisters and brother, respectively, of the deceased Reena, tried to develop a theory of murder of the deceased Reena alleging that in her oral dying declaration given before them, the deceased Reena

stated that the appellants and other accused persons poured kerosene on her person and set her ablaze. Sadhana (PW 2) is wife of Police Constable - Dnyaneshwar Mete. If P.H.C. Zine (PW 9) had acted under the influence of Dnyaneshwar Mete, he would have tried to support the case of the sisters and brother of the deceased Reena about her homicidal death, and Dnyaneshwar Mete would have asked him to record dying declaration of the deceased Reena accordingly, if he really had been in a position to influence P.H.C. Zine (PW 9). Dying declaration (Exh.56) speaks of the suicidal death of the deceased Reena. As such, it is clear that P.H.C. Zine (PW 9) recorded the dying declaration (Exh.56) honestly and fairly, as stated by the deceased Reena.

12. Rupa Chitrak (PW 7), Naib Tahsildar states that she recorded the dying declaration (Exh.41) of the deceased Reena on 02.03.2006 so also the dying declaration (Exh.44) on 07.03.2006 after getting it verified from the medical Officer that the deceased

Reena was in a fit condition to give the statement. Thus, on 02.03.2006 and on 07.03.2006 also, the deceased Reena was in a fit condition to give the statement, as seen from the endorsements made by the Medical Officer on the letters Exh.39 and Exh.43 given by Rupa Chitrak (PW 7) to the Medical Officer. The deceased Reena died on 10.03.2006. In the circumstances, the satisfaction of P.H.C. Zine (PW 9) about the fitness of the deceased Reena to give statement on 01.03.2006, can be said to be well founded.

13. There is nothing on record to show that when P.H.C. Zine (PW 9) recorded the dying declaration (Exh.56), anybody else had influenced the deceased Reena to give statement in a particular manner involving any particular person in the incident in question. The dying declaration (Exh.56), thus, was given by the deceased Reena voluntarily without being influenced by anybody else when she was in a fit condition to give the statement.

14. It has come in the evidence of Anil (PW 6) (Exh.32), Panch Witness and A.P.I. Divekar (PW 10) (Exh.60) that they seized a note-book from the house of appellant no.1 vide panchnama (Exh.33) on 05.03.2006. Sadhana (PW 2) and Ashok (PW 3), sister and brother respectively, of the deceased Reena were shown excerpts (Exh.25) of that note-book, whereon they positively state that the same were in the handwriting of the deceased Reena. The contents of the excerpts (Exh.25) disclose as to how the appellants used to harass and illtreat the deceased Reena. It is stated that appellant no.2 had poisoned the ears of appellant no.1 against the deceased Reena on 13.02.2005, as a result of which appellant no.1 had beaten the deceased Reena by fists, kicks and stick. He pressed her throat. She stated that appellant no.1 kicked on her waist alike a dog. At that time also, she lifted stove in her hands and expressed that she herself would end her life because of the beating given to her. It is further stated

that after some altercation with appellant no.2, appellant no.2 also beat the deceased Reena severely and pressed her mouth.

15. In the further noting dated 26th October, the deceased Reena stated as to how, appellant no.1 had lost his senses under the influence of liquor. She noted that appellant no.1 had dashed his vehicle somewhere else. These excerpts (Exh.25) from the note-book corroborated the dying declaration (Exh.56) on the point that appellant no.1 was habituated to consume liquor and that he was subjecting the deceased Reena to cruelty.

16. The learned Counsel for the appellants submits that the excerpts (Exh.25) of the note-book were not sent to the handwriting expert for getting it confirmed, as to whether they are in the handwriting of the deceased Reena only. He submits that the sisters and brother of the deceased Reena did not make available any admitted handwriting of

the deceased Reena. Therefore, according to him, the said excerpts cannot be used against the appellants. This contention cannot be accepted. Sadhana (PW 2) and Ashok (PW 3) being sister and brother, respectively, of the deceased Reena were the persons, who, in the natural course, were acquainted with her handwriting. As per Section 47 of the Indian Evidence Act when the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact. The explanation under the said Section states that a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of

business, documents purporting to be written by that person have been habitually submitted to him.

17. In the present case, the witnesses who are identifying the handwriting of the deceased Reena are her sister and brother. They certainly had opportunity to see her writing. In the circumstances, the note-book which has been recovered from the house of appellant no.1, wherein the other notes also have been taken by the deceased Reena besides excerpts (Exh.25), would make it clear that the excerpts (Exh.25) are in the handwriting of the deceased Reena. It is not always necessary that the disputed handwriting should be referred to the handwriting expert for opinion. The contents of excerpts (Exh.25) fully corroborated the dying declaration (Exh.56) of the deceased Reena about the illtreatment meted out to her by appellant nos.1 and 2.

18. Kalpana (PW 1), Sadhana (PW 2) and Ashok (PW 3) state that the deceased Reena stated before

them about the illtreatment meted out to her by the appellants on 28.02.2006. The evidence of these witnesses on that point is consistent inter-se. It corroborates the dying declaration (Exh.56).

19. Appellant no.1 has examined himself at Exh.90. In his defence, he states that on 28.02.2006 between 2.00 p.m. and 2.30 p.m., when he went back to his house after performing his duty as Police Naik, the deceased Reena was not present at home. He asked appellant no.2 as to where the deceased Reena had gone, whereon she replied that the deceased Reena had gone to reach his son. Then he went out of his house in search of the deceased Reena. However, she was not found. He came back to his house. After sometime, the deceased Reena came back to the house. He asked as to where she had gone, whereon she got angry on him. When he told her that appellant no.2 had informed him that she (deceased Reena) had gone out of house to reach her son at about 12.00 noon, she became angry against appellant no.2. She alleged that appellant

no.2 had poisoned his ears. Then he went in front side hall and sat there. After sometime, he heard shouts of Reena from inside his house. He reached there and found Reena with flames in the kitchen room. He tried to extinguish the fire. At that time, he also sustained burns. Appellant no.2 and accused nos. 3 and 5 also tried to extinguish the fire. Thereafter, they immediately took her to the Government Hospital. He states that the sisters, brother and mother of the deceased Reena prompted her to state against the other accused persons and himself. He alleged that Dnyaneshwar Mete had tutored the deceased Reena to give statement against them.

20. From the evidence of appellant no.1 also, one gets corroboration to the dying declaration (Exh.56) to the extent of genesis of the incident. Considering the past behavior of the appellants with the deceased Reena, it cannot be accepted that the deceased Reena got angry upon them and they just kept quiet. The reaction of the appellants certainly must

be of a higher degree in response to the anger expressed by the deceased Reena. In the circumstances, the contents of the dying declaration (Exh.56) about the events those took place prior to her setting herself ablaze, cannot be said to be tainted with falsity. Thus, the dying declaration (Exh.56) is not only voluntary but truthful as well.

21. The learned Counsel for the appellants submits that P.S.I. Divekar (PW 10) admits that in the M.L.C. report (Exh.66) dated 28.02.2006, it was specifically mentioned that when the deceased Reena was admitted in the Government Hospital, she stated before the casualty Medical Officer that on that day at about 4.30 p.m., she sustained burns due to flaring up of the stove while preparing tea. He, therefore, submits that the deceased Reena sustained burns accidentally.

22. The learned A.P.P. pointed out to the C.A. report in respect of the clothes seized from the spot

of the incident, which were on the person of the deceased Reena at the time of the incident. The C.A. Report (Exh.65) shows that kerosene residues were detected on the partially burnt bluish coloured piece of cloth (Exh.3), partially burnt bluish coloured saree (Exh.4) and partially burnt greenish coloured blouse (Exh.5) of the deceased Reena. The learned A.P.P. submits that had the deceased Reena sustained burns by flaring up of the stove, kerosene residues could not have detected on her clothes. It is only because of pouring of kerosene on her person that there were kerosene residues on her clothes.

23. I find substance in the contention of the learned A.P.P. The C.A. Report does not indicate that the deceased Reena sustained burns due to flaring up of stove. Even appellant no.1 does not state in his evidence that the deceased Reena was preparing tea and because of flaring up of stove, she got burnt.

24. The dying declarations Exhs.41 and 44 recorded on 02.03.2006 and 07.03.2006, respectively,

by Rupa Chitrak (PW 7) speak of setting the deceased Reena on fire by the accused persons. The oral dying declarations alleged to have been given before the above-named sisters and brother of the deceased Reena also indicate that the accused persons poured kerosene on the person of the deceased Reena and set her ablaze. The learned trial Judge, however, has thoroughly discussed the evidentiary value of these dying declarations and disbelieved them. It is obvious that the sisters and the brother of the deceased Reena tried to develop the case that the accused persons committed murder by pouring kerosene on the person of the deceased Reena and setting her ablaze. The facts and circumstances discussed above and the voluntary as well as the truthful dying declaration (Exh.56) given by the deceased Reena first in point of time in the sound state of mind, nullify the theory developed by the sisters and brother of the deceased Reena. The trial Court has rightly disbelieved the said dying declarations on

that point. I fully subscribe to the views expressed by the learned trial Judge on that point.

25. Though there are three dying declarations indicating accidental, suicidal and homicidal death of the deceased Reena, since the dying declaration (Exh.56) showing suicidal death of the deceased Reena, being voluntary and truthful will have to be accepted and accordingly accepted. Only because the other two dying declarations are inconsistent with the dying declaration (Exh.56), the dying declaration (Exh.56), which was made by the deceased Reena voluntarily and being truthful, cannot be disbelieved.

26. The dying declaration (Exh.56) coupled with the contents of the excerpts (Exh.25) of the deceased Reena sufficiently prove that the appellants subjected the deceased Reena to cruelty. They created such circumstances, which left no option before the deceased Reena but to commit suicide by setting

herself ablaze. The consequences of the misdeeds of the appellants proved to be very serious. The appellants have deprived the children of the deceased Reena of her love and affection forever. In the circumstances, I do not find any reason to show leniency to the appellants in the matter of punishment. The learned trial Judge has already shown sufficient leniency to them. They do not deserve any more leniency.

27. The prosecution established beyond reasonable doubt that the appellants committed the offences punishable under Sections 306, 498-A and 323 read with Section 34 of the I.P.C. The conviction and sentence recorded by the learned trial Judge against the appellants do not call for any interference. The appeal is devoid of any substance. It is liable to be dismissed.

28. In the result, the following order :-

O R D E R

- (i) The appeal is dismissed.
- (ii) The appellants shall be entitled to get set off under Section 428 of the Code of Criminal Procedure for the period during which they were in jail in connection with this case.
- (iii) The appellants shall surrender to their bail bonds before the trial Court on or before 29.08.2017 for suffering the sentence of imprisonment.
- (iv) In case the appellants fail to surrender as stated above, the trial Court shall issue coercive process to secure their presence.

[SANGITRAO S. PATIL, J.]