

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 79 OF 2009

Sau. Sangita Bhagwat Talekar,
Age - 36 years, Occu.-Household,
R/o. village Aher Chincholi,
Tq. & Dist. Beed

.. Appellant

Versus

The State of Maharashtra

.. Respondent

Mr. R.N. Dhorde, Sr. Advocate i/b. Mr. V.R. Dhorde, Advocate for
appellant

Mr. P.K. Lakhotiya, APP for respondent-State

CORAM : SUNIL P. DESHMUKH &
SANGITRAO S. PATIL, JJ.
DATE : 17-11-2017

JUDGMENT (PER - SUNIL P. DESHMUKH, J.) :

1. Assistant Sub-Inspector of Police Balaji Baburao Jadhav working at Police Chowki, Government hospital, Beed had on 20-06-2007 received around 3:45 p.m. a medical legal certificate from Doctor upon which he went to Burn ward in the hospital where the Doctor had been present who had endorsed that the patient had been in a position to give statement and thereupon, the patient by name Sunita Baliram Talekar aged about 27 years, a housewife

resident of Aher Chinchole in Taluka and District Beed had made a statement that,

She had been married for about 10 years and that, she had a son and daughter from the marriage. She had a brother-in-law and sister-in-law, who were residing separately and the two brothers i.e. her husband and his brother Bhagwat and sister-in-law Sangita are staying separately. On 20-06-2007, while she had been in the house, her sister-in-law Sangita Bhagwat Talekar, who had been troubling her and treating badly, had come to her house, saying that she would burn her alive, had poured kerosene from a can on her person and set her on fire by lighting a match-stick. In the fire, her entire body got burnt and she had fallen down. Thereafter, people from neighbouring village - Amol Talekar and others and her distant father-in-law Asaram Bhaurao Talekar and her husband had taken her to hospital at Beed in auto-rickshaw of Janardhan Kisanrao Karande and that she is being treated in the hospital and is in a position to make statement.

Her toe impression had been taken by the said Police Officer, who also had put his signature thereon.

2. Her further statement was recorded by Special Executive Magistrate around 4:50 p.m. on the very day at Exhibit-27 that,

Around 3:00 p.m. on 20-06-2007, her sister-in-law - Sangita Bhagwat Talekar, who had been badly treating her and troubling her, had been to her house, saying that she will burn her alive and had poured kerosene from the can on her person and set her ablaze by lighting match-stick and had ran away. Upon hearing her screams and shouts, father-in-law - Asaram Bhaurao Talekar and neighbouring people and people from village had poured water on her body and had extinguished the fire. However, she had by then completely burnt and she was taken by her husband and other persons to Government hospital at Beed in the rickshaw of Janardhan Kisanrao Karande. Sister-in-law -Sangita Talekar had been saying that she had gobbled up her estate and had burnt her.

3. The Special Executive Magistrate had also recorded further statement of Sunita around 10.00 p.m. on 21-06-2007, after getting endorsement from the Doctor that patient is conscious and well oriented and can give statement, in which it has been stated by Sunita that,

While she was alone at her house around 3.00 p.m. on 20-06-2007, her sister-in-law Sangita Bhagwat Talekar had come to her house, with whom there used to be quarrels and bickerings over petty / trifle things, had locked the door from inside and had poured kerosene on her person and set her ablaze by lighting a

match-stick and had ran away. After hearing her shouts, her father-in-law - Asaram Bhaurao Talekar and people from village and neighbouring areas had come, by which time she had fallen down. The people had doused fire by pouring water but she had been completely burnt. Thereafter, she was taken by her husband Baliram, Anil Talekar, Arjun Kolkar in the rickshaw of Janardhan Kisanrao Karande to Government hospital.

4. Statement made by Sunita on 20-06-2007 had been taken as FIR Exhibit-39. PW6 - Police Inspector Gajanan Devuba Kayande had visited spot of incident along with panch witnesses. The spot was shown by a girl bearing name Priyanka where they found a house of a single door on southern side and there had been partition of wooden planks separating the houses. The house had been described as having a shed and roof behind of tin sheets. They had noticed that portion of the partition had been opened and that door had also been broke opened. These persons noticed ash of clothes and a can of capacity of 5 liter containing 200 ml. kerosene.

5. He had recorded statement of witnesses *viz.* Balbhim Laxman Kale PW2 at Exhibit-19. In his evidence, PW 2 has referred to ruckus / altercation between Sunita and Sangita - sister-in-law *inster-se* on account of washing clothes while he had been proceeding

from his tailoring shop around 11.00 am on 20-06-2007 in the front portion of their house. He had intervened and stopped their quarrel. He had returned to his tailoring shop which has been at a distance of 150 ft. On the same day, he heard around 2.00 p.m. shouts and cries from the house of Sangita and Sunita and he had rushed there and noticed smoke coming out from house of Sunita and Sangita, residing in adjoining houses which are separated by a partition of wooden planks and strips. He had broken open wooden planks of the partition wall and had entered inside the house of Sunita finding Sunita in burnt condition. Her clothes had been entirely burnt, so was her skin. Along with him were Anil Talekar, Sunil Talekar and Shriram Talekar. Sunita was uttering as to what would happen to her children. This witness has, however, dis-owned a portion of his statement made to Police which was marked 'A' wherein it is stated to have been said that Sunita had been shouting that Sangita had poured kerosene on her person and put her on fire by a match-stick and ran away.

6. His cross-examination does show that Baliram (PW3) had been all along close to the house and doing carpentry work and that the incident in the morning had been ordinary and not severe. At the time of incident, along with Baliram other people had also gathered and that door of house of Sunita was found to be chained

from inside and thus they had to break open the partition and remove wooden plank. Around that time, he states that Sangita had been away from her house. There was no-one inside the house of Sunita and Sunita had been uttering 'save me, save me' and 'as to what would happen to her children'. In his cross-examination, he has dithered over accompanying Sangita to the court on the day of evidence, while he said so in examination-in-chief. In cross-examination he states that he had come along with six persons and Sangita was not with them.

7. Statement of PW3 - Baliram Talekar, husband of Sunita also refers to quarrel between Sunita and Sangita around 11.00 a.m. on 20-06-2007. The same had been stopped by him and PW2 Balbhim and, thereafter, he had started carpentry work near their house which it emerges, is right in front of their house. While he was at the work place around 2.00 p.m., he heard shouts 'save me, save me' from his wife and he rushed along with other persons from the village and the door was found to be closed from inside. He states that he, his uncle Balbhim Kale and other persons had removed the door from stripped partition, noticing Sunita had caught fire. They had poured water to extinguish fire and had arranged for rickshaw. They lifted wife to hospital through rickshaw. PW-3 - husband of Sunita too dis-owned statement having been

made to the police about Sunita having told him that Sangita had poured kerosene on her person and put her on fire by match-stick. In the cross-examination, he refers to that his wife had been of quarrelsome nature. Sangita had been working in a *mahila bachat gut* and his brother Bhagwat was an insurance agent. He refers to that his house had only one door.

8. Janardhan Kisanrao Karande, auto-rickshaw driver has been examined as PW4 at exhibit-21, who too disowned his statement made to the police on 21-06-2007 that Sunita was uttering that Sangita had poured kerosene on her person and burnt her and ran away.

9. PW5 is the Special Judicial Magistrate who had examined Sunita twice initially, on 20-06-2007 around 4.45 p.m. and on 21-06-2007 around 10.00 p.m. In his deposition, he states that on the two occasions, the Doctor before beginning of recording statement, had endorsed that Sunita had been in a condition to give statement, however, after recording of the statement had been over, on both the occasions no endorsement of the Doctors had been taken about the condition of Sunita. In his evidence, he states that on 20-06-2007, after the Doctor had endorsed, relatives of patient Sunita were removed from the ward and then statements were recorded. Her thumb impression could not be obtained, as

her hands were completely burnt and thus, left leg toe impression had been taken. On 21-06-2007, once again he had been called by police officer from police chowki and upon his request, Medical Officer had examined the patient and had endorsed that the patient is conscious and able to give statement. His evidence about statement by Sunita is slightly discrepant about her husband's presence around the time of incident and about recording dying declaration after discussion with the investigating officer.

10. PW1 is Bhagwat Murlidhar Kale (exhibit-17) giving deposition about the spot panchanama and seizure of articles from the spot.

11. PW7, Balaji Baburao Jadhav, Assistant Sub-Inspector of Police, Beed has been examined at exhibit-50, who has stated that before he had recorded statement of patient Sunita, he had taken endorsement of Doctor about patient being in a position of giving statement. Thereafter, he had recorded statement and again he got the opinion of the Doctor after recording of the statement about the condition of the patient who had stated that she was in a fit condition of giving the statement and thereafter he wrote to the Special Executive Magistrate for recording the dying declaration of the patient. In the Cross-examination it has been elicited that he was not in a position to state that whether the patient's father,

mother, brother and sister were present in the hospital.

12. In the evidence of PW8, Dr. Kulkarni at exhibit-59, it emerges that he had not made any endorsement below the recorded statements of patient. In the Cross-examination, he purports to explain about absence of endorsement below the statement since the Doctor had not been asked to endorse the same after recording the statements.

13. PW9, Dr. Mrs. Pranita Marutirao Lakhdive refers to that she had conducted post mortem along with Dr. Upendra Kulkarni and found 93% burn injuries on the patient who died of shock from the same. She states that the patient with so much of burn injuries may not be able to give statement.

14. Learned senior advocate Mr. R. N. Dhorde, appearing on behalf of appellant - accused submits that conviction under impugned order for offence punishable under section 302 of Indian Penal Code sentencing the appellant to imprisonment for life and to pay fine of Rs.5,000/- is absolutely untenable in fact and in law.

15. He submits, there is no evidence on record worth credence at all in respect of allegation against appellant having committed offence punishable under section 302 of Indian Penal

Code. He submits that the dying declarations are recorded while the patient-the dying person had suffered extreme burn injuries and had not been in a proper state of mind, conscious enough, to give proper statement requiring fit state of mind. As a matter of fact, evidence would show that all the statements have been recorded in the hospital after patient had been admitted who had suffered severe burn injuries. The statements were not voluntary and were recorded in extreme and severe burn conditions upon being asked. He submits that, none of the so called dying declarations which were three in number can be said to form evidence and strong basis for conviction as awarded under impugned judgment.

16. He submits that while Sunita appears to have been admitted at 3.45 p. m. on 20-06-2007 and thereafter, upon a medico legal certificate (MLC) of a doctor, Assistant Sub Inspector of Police had visited the patient and had purportedly take down the statements and before beginning, endorsement of doctor had been obtained about patient being in a position to give statements. Thereafter, the patient is stated to have recorded that Sangita, sister-in-law of the patient, had burnt her who had not been putting up well with her and had been staying in neighbouring portion of the house. Moreover, the patient was so entirely burnt that her thumb impression could not be taken and it is stated that her toe

impression had been taken. Special Executive Magistrate had soon thereafter around 4.50 p. m. taken down the statement of the victim wherein Sunita is said to have stated that she was set ablaze by Sangita and had ran away. On the next day, i.e. 21-06-2007 once again Special Executive Magistrate had recorded statement of Sunita around 10.00 p. m. wherein she is said to have stated that Sangita had come to her house and locked the door from inside and has set her ablaze.

17. Mr. Dhorde submits, in none of these three dying declarations there is an endorsement by the doctor that after completion of statement, patient was found to be conscious and oriented. He submits that apart from aforesaid deficiencies, the narration under the statements is to the effect that Sangita had been to Sunita, locked the door from inside, poured kerosene and set her on fire by ignited matchstick and had run away. Whereas, these statements do not find corroboration at all in the evidence.

18. He further submits, evidence does conclusively show that after haring shouts, cries and screams of Sunita, people around including her husband who had been working at a closer place had to break-open the wooden planks of partition wall or for that matter wooden door. This evidence has gone un-controverted and unchallenged. In the circumstances, it cannot at all be said,

Sunita having pointed out Sangita to have burnt her, that there is any credibility and/or substance in the statement so recorded. Indeed, to the house where Sunita was found in burnt condition, had single door and was found to have been chained from inside. People around had to rush there and open the house by breaking open it. Correctness of the allegations against Sangita as recorded is not only highly improbable but is impossible.

19. Learned counsel draws attention to that none of the witnesses had corroborated/endorsed the recorded statements of Sunita. The husband of deceased himself has referred to that Sunita had been of irascible and quarrelsome nature. Sangita's presence around the time of incident in the house has not been proved while she is indisputably a working woman and was not supposed to be in the house around the time of occurrence of the incident.

20. Learned senior advocate purports to point out that while the statements were recorded by Special Executive Magistrate on 20-06-2007, the medical case papers of the hospital show that around 5.00 p. m. the patient had been disoriented and that Fortwin had been administered to her.

21. Learned counsel, vehemently submits that the evidence

is far too short and deficient to bring home guilt conclusively against Sangita. Her name had been arraigned by a person who had not been in a fit state of mind and had been entertaining a grudge against her for a long time. Statement of the patient had been recorded in an unsafe condition while she cannot be said to be conscious or not disoriented.

22. Learned senior counsel purports to rely on a clutch of reported cases. He refers to a decision in the case of *Surinder Kumar vs. State of Haryana, (2011) 10 SCC 173* wherein, according to him, the Supreme Court has considered that dying declarations not having been recorded by following proper procedure would not be acceptable. He submits that in said case as well, the patient was found to be administered and under influence of fortwin and pethidine injections (sedative / painkillers) when a patient is not supposed to have normal alertness.

23. Mr. Dhorde further refers to a decision in the case of *State of Rajasthan vs. Shravan Ram and another, (2013) 12 SCC 255* to support his contention that unreliable, inconsistent and uncorroborated evidence like dying declarations cannot form basis for conviction. He submits that in the absence of any corroboration to so called statements recorded as dying declarations, it is absolutely unsafe to rely on the same to base conviction on the same.

24. He further refers to and relies on a case of *J. Ramulu vs. State of Andhra Pradesh, (2009) 16 SCC 432* to contend that in case a suspicion can be raised as regards correctness of dying declaration, the court before convicting accused on the basis thereof should look for some corroborative evidence. Suspicion is no substitute for proof. If evidence brings on record that such dying declaration does not reveal the entire truth, it would only be a piece of evidence and in such an event, the conviction would not be rest only on the same. He submits that dying declarations recorded in present case would not be said to be proper evidence for conviction of the appellant and once dying declarations are excluded, there is no other evidence available in respect of the allegations against the appellant. He, therefore, submits that impugned judgment and conviction and awarded sentence in present matter are not sustainable and deserve to be set aside and appeal deserves to be allowed.

25. Countering aforesaid submissions of learned senior advocate, learned Additional Public Prosecutor Mr. Lakhotia submits that conviction and sentence awarded against appellant for commission of offence punishable under section 302 of Indian Penal Code is based on cogent, convincing and reliable evidence. Impugned judgment and order contains sound reasons on which

the same is based. He submits that there does not appear to be any dispute about position that relations between Sunita and Sangita had been acrimonious and there used to be quarrels and bickerings between the two. The evidence does show that quarrel had taken place on 20-06-2007 around 11.00 a.m. and thereafter the incident had occurred. He submits, there is also evidence to show that Sunita had been screaming and shouting ("save me, save me") and thereupon the people had seen her burning and they had doused fire while she had been telling that she was set ablaze by Sangita – her sister-in-law and that she (Sunita) was also worried about future of her children.

26. He further refers to that it has come on record that deceased Sunita and Sangita had been residing in adjoining houses. In the circumstances, the evidence does carry substance for accusations as are appearing in dying declarations against Sangita and cannot be said to be vacuous. He submits that the Trial Court has appreciated the evidence on record properly and the arguments on behalf of the appellant – accused are not strong enough to overturn the judgment given on sound reasons.

27. Learned Additional Public Prosecutor purports to refer to and rely on a decision of this court in the case of *State vs. Shamkant @ Dhanraj Waman Patil and others*, 2017 DGLS (Bom.) 687 wherein, according

to him, it has been considered that the dying declaration as recorded by the Medical Officer was reliable and had gone unchallenged and had not been given at the instance of any one. The facts in the case cited do show that respondent no. 3 therein had alone been present at the time of incident along with deceased at the occurrence of the event at its place. In the case relied on by respondent – State, the prosecution evidence had been showing beyond reasonable doubt that respondent no. 3 had poured kerosene on the victim in said case and had set her ablaze.

28. The case relied on by learned Additional Public Prosecutor would not have any nexus with the facts of present case since the facts in the case cited are wide apart from facts involved in present case. In present matter, it does not appear that there can be any dispute about that Sunita died on 23-06-2007 of burn injuries suffered on 20-06-2007. It further appears that although Medical Officer had endorsed at the starting of recording of statement of the deceased on three occasions, on none of the three occasions at the end of statements he had endorsed about the condition of the patient. In the normal course, it is expected that Medical Officer making endorsement at the beginning of recording of statement about the condition of the patient also records about the condition of patient on completion of his/her

statement and is also expected to be present through the process of recording of statement. This normal practice does not appear to have been followed while recording any of the three statements which are considered to be dying declarations.

29. In the present case although Medical Officer states that he had opined that patient was conscious after completion of the statements yet, he had not so endorsed since he was not asked for the same. Doctor's evidence is rather discrepant and unreliable, for, although he in his deposition refers to that he had recorded history of admission of the patient yet, medical case papers which are stated to have been produced do not depict any such recording.

30. Thus, overall, it appears that the procedure which ordinarily ought to have been followed while recording statement had not been resorted to in present case. In the face of such situation, veracity and correctness of the statements occurring in the recorded statements without corroboration would not be safe to be considered, accepted and acted upon. Although there have been omissions in the evidence of Balbhim and Baliram yet the evidence makes it pointedly clear that the house wherein Sunita had been found in burnt condition had only one door and that had been locked/chained from inside. In such case, statements recorded as dying declarations are of dubious veracity, for, while people upon

hearing shouts of Sunita had to broke-open into the house either from the partition wall of wooden planks or by breaking open the door. It is sufficient indication of the position that it does not appear that Sangita could have access to be in the house of Sunita while the incident had occurred. It is absolutely not the case of prosecution that house of Sunita had access other than a single door and further that the only access to the house had ever been open when the incident had occurred. In the circumstances, accused Sangita's presence at the occurrence of incident cannot be said to have been convincingly established.

31. Evidence of the witnesses in respect of spot of occurrence is silent sofar as access to the house of Sunita is concerned, albeit, some photographs had been taken and marked as articles. The Trial Court's consideration that the witnesses had not stated about the house having only single access before the police is an indication of omission in present scenario is rendered conjectural. The cumulative effect of the quality of the evidence would not lead conclusively to base conviction on the same.

32. We are, therefore, of the opinion that the conviction under impugned judgment is unsustainable. As such, appeal is allowed. Impugned judgment and order of conviction and sentence are set aside. The appellant is acquitted of the offence with which

she was charged. She is set at liberty if not required in any other offence. Her bail bond stands cancelled.

33. Appeal is accordingly disposed of.

SANGITRAO S. PATIL
JUDGE

SUNIL P. DESHMUKH
JUDGE

arp/