

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

CRIMINAL APPEAL NO. 63 OF 2008

The State of Maharashtra,
Through Police Station Officer,
Dhule Taluka Police Station Officer,
Tq. and Dist. Dhule

**APPELLANT
(Prosecution)**

VERSUS

1. Shamkant @ Dhanraj Waman Patil,
Age : 35 years,
2. Waman Rajaram Patil,
Age : 65 years,
3. Sau. Kamalbai Waman Patil,
Age : 60 years,
4. Jeejabrao Waman Patil,
Age : 22 years,
All resident of Vinchur,
Tq. and Dist. Dhule

**RESPONDENTS
(Orig. Accused)**

Mr.P.G. Borade, A.P.P. for the appellant/State/Prosecution
Mr. B.R. Warma, Advocate for the respondents

**CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.**

**RESERVED ON : 21th SEPTEMBER, 2017
PRONOUNCED ON : 28th SEPTEMBER, 2017**

JUDGMENT (PER : SANGITRAO S. PATIL, J.):

The State/Prosecution has challenged the judgment and order dated 31.10.2006 passed in Sessions Case No.58 of 2005 by the learned 2nd Adhoc Sessions Judge, Dhule, whereby the respondents came to be acquitted of the offences punishable under Sections 498-A, 302, 342 and 406 read with section 34 of the Indian Penal Code, ("IPC" for short).

2. The deceased Sunita was the wife of respondent No.1. Their marriage was performed prior to about 5 years of the incident. Respondent No.2 is the father, respondent No.3 is the mother, while respondent No.4 is the brother of respondent No.1.

3. The case of the prosecution, in short, is that the deceased Sunita was being ill-treated by the respondents because she did not conceive child. Ultimately, on 10.04.2005 at about 10.00 a.m., when the deceased Sunita was in the house, the respondents closed the door thereof from inside. Respondent Nos. 1 and 4 tied the deceased Sunita with a rope, respondent No.4 poured kerosene on her person and respondent Nos.2 set

her on fire by lighting a match stick. The deceased Sunita raised shouts. The neighbours gathered near the house of the respondents. One Vishwas Namdeo Patil - Police Patil of village Vinchur, took the deceased Sunita to Civil Hospital at Dhule and admitted her there for treatment.

4. The statement of the deceased Sunita was recorded by ASI Wagh in the hospital, which was treated as the First Information Report ("FIR" for short). On the basis of that FIR Crime No. 131 of 2005 came to be registered against the respondents for the offences punishable under Sections 307, 498-A, 342 and 504 of the IPC against the respondents. On the same day, her statement was recorded by the Special Executive Magistrate - Sardar Ajam Mansuri. Investigation followed, the spot panchanama was prepared. A plastic can of kerosene, one match box with brunt sticks, pieces of blanket and burnt pieces of petticoat of the deceased Sunita came to be seized from the house of the respondents. The seized articles were sent to the Chemical Analyst for analysis and report. Sunita died in the hospital on 15.04.2005. Therefore, the offence under

Section 302 of the IPC came to be substituted for the under Section 307 of the IPC. Postmortem of the body of the deceased Sunita was conducted. The Medical Officers noticed that she had sustained 90% of burns. They opined that she died of "septicemia due to thermal burns". Statements of witnesses were recorded. After completion of the investigation, the respondents came to be prosecuted for the above mentioned offences.

5. The learned Trial Judge framed charge against the respondents for the said offences vide Exh.8 and explained the contents to them in vernacular. The respondents pleaded not guilty and claimed to be tried. Their defence is that of total denial and false implication. Respondent No.1 filed written statement when he was examined under Section 313 of the Code of Criminal Procedure, wherein he stated that on 10.05.2004 at about 8.00 a.m. Respondent Nos. 2, 4 and himself had gone to their agricultural land for doing agricultural work. They received a message at about 11.00 a.m. that Sunita got burnt. They immediately went back to their house. They came to know that Police Patil namely Vishwas Namdeo Patil had taken the deceased Sunita to

the Civil Hospital at Dhule. Then they went there to see her. They tried to ask her as to how she got burnt, but she was not in a position to speak. He then stated that at the time of the incident, respondent No.3 and the deceased Sunita only were in the house. He denied that he ever illtreated the deceased Sunita on any count.

6. The prosecution examined eight witnesses to prove the guilt of the respondents. The learned Trial Judge scrutinized the said evidence and came to hold that the prosecution failed to establish guilt of the respondents for the above-mentioned offences. The learned Trial Judge, therefore, acquitted the respondents.

7. The learned A.P.P. submits that there is sufficient evidence on record to show that the deceased Sunita was being subjected to cruelty by the respondents on the ground that she could not conceive any child. She was severely beaten by respondent No.1 in the year 2003. Therefore, a criminal case was instituted against him. Respondent No.1 entered into an amicable settlement and assured in writing to treat the deceased Sunita properly and therefore, she resumed cohabitation with him, in the

month of August, 2004. However, she was again subjected to cruelty. He submits that the father of the deceased Sunita, viz:- Subhash (PW2), has produced the written undertaking given by respondent No.1 on a stamped paper (Exh.37). The evidence of Subhash (PW2) coupled with the said written undertaking shows as to how the deceased Sunita was being ill-treated at her matrimonial house. He then submits that there are two written dying declarations (Exhs.44 and 48) recorded by ASI Wagh (PW4) and the Special Executive Magistrate- Sardar Ajam Mansuri (PW5) respectively, which are quite consistent in respect of the role played by the respondents, at the time of incident. These dying declarations have been recorded by these witnesses after getting it verified from the Medical Officer that the deceased Sunita was conscious and in a fit state of mind to give statement. These dying declarations were made voluntarily. They are truthful. They create a great confidence. The medical evidence also supports the case of the prosecution. The chemical analysis report shows traces of kerosene on the burnt piece of rope as well as the pieces of Saari and Petticoat of the deceased Sunita. According to him, the dying declarations of the deceased coupled with the

medical evidence clearly show that her death was homicidal and the respondents only were responsible therefor. He, further submits that the oral dying declarations of the deceased Sunita given before Subhash (PW2) and Bhatu (PW6) also show involvement of the respondents in the incident of burning the deceased Sunita. According to him, the learned Trial Judge did not appreciate the evidence properly and correctly. The learned Trial Judge wrongly acquitted the respondents.

8. on the other hand, the learned counsel for the respondents submits that the Police Patil Vishwas Namdeo Patil was the first person who visit the house of the respondents after the incident. He tried to extinguish fire that was on the person of the deceased Sunita and took her to the Civil Hospital at Dhule. He was the best witness to state as to who were inside the house at the time of the incident and what was stated by the deceased Sunita immediately after the incident. However, this witness is not examined by the prosecution. He then submits that when the deceased Sunita was admitted in the Civil Hospital, Dhule, Dr. Shinde (PW7) recorded in the case papers the history of the incident that was

narrated by her. According to him, it was the first dying declaration of the deceased Sunita. In that dying declaration she did not whisper about the presence of respondent Nos. 1, 2 and 4 at the time of the incident. According to him, after the father and uncle, i.e. Subhash (PW2) and Bhatu (PW6) respectively, met the deceased Sunita in the Civil Hospital, they tutored her and made her to involve all the respondents in the incident. According to him, the inconsistent dying declarations of the deceased Sunita, therefore, cannot be believed. He submits that there is no sufficient and cogent evidence on record to connect the respondents with incident in question. According to him, the view taken by the learned Trial Judge is quite a possible view, it cannot be interfered with lightly in the appeal against the judgment of acquittal. He prays that the appeal may be dismissed.

9. The prosecution is mainly depending on the dying declarations of the deceased Sunita. The learned counsel for the respondents cited an unreported judgment in the case of **State of Maharashtra Vs. Raghunath Ramchandra Sable, Criminal Appeal No.154 of 1996,**

decided by this Court on 29.06.2015, wherein there is a reference of para 24 of the judgment in the case of Tukaram Padhen and Ors. Vs. State of Maharashtra, All.M.R. (Cri) 2754, which reads as under:-

"24. When the Court is called upon to appreciate the evidence of written dying declaration, the Court has to be extremely cautious and examine with meticulous care the evidence regarding recording of the dying declaration. Merely because witnesses came forward and depose about the recording of the dying declaration, it should not impel the Court to immediately accept the dying declaration. It has to be remembered that the declarant is not available for cross examination and, therefore, the prosecution must prove, apart from the truthfulness of the contents, the factum of the recording of the dying declaration as well as the fact that the declarant was in a fit mental condition to give the statement. Once suspicious circumstances are found in the evidence, the Court should be extremely slow in placing implicit reliance on the dying declaration. It is to be remembered that the conviction can be recorded on the dying declaration alone if the court finds that the dying declaration to be wholly

reliable. It is, therefore, necessary for the Court to scrutinize the evidence and place reliance on the dying declaration only if the evidence in respect of the recording of the dying declaration is of "sterling" quality. If there are suspicious circumstances the Court should reject the dying declaration and look for other evidences if it is available. Mechanical acceptance of the dying declaration dehors a meticulous scrutiny of the evidence relating to the recording of the dying declaration must be deprecated. In the present case as we have pointed out in the light of circumstances stated by us, we do not find the dying declarations to be pieces of evidence which would inspire the confidence of the Court for implicit acceptance. The aforesaid dying declarations, therefore, will have to be left out of consideration."

10. Keeping in mind the above mentioned observations, we proceed to scrutinize the dying declarations of the deceased Sunita.

11. The first dying declaration (Exh.44) has been recorded by ASI Wagh (PW4) (Exh.43). He deposes that he recorded the dying declaration (Exh.44) of the deceased

Sunita as per her version, after getting it verified from the Dr.Shinde (PW7) (Exh.54) that she was conscious and able to give statement. He states that he obtained left thumb mark of the deceased Sunita on that dying declaration after reading over the contents thereof to her and after she accepted the said contents to be true. After recording that dying declaration also he obtained opinion of Dr. Shinde (PW7) that she was conscious and able to give statement. Dr. Shinde (PW7) (Exh.47) supports the evidence of ASI Wagh (PW4). From the endorsements made by Dr. Shinde (PW7), it will be clear that it was recorded between 1.45 p.m. and 2.10 p.m. on 10.04.2005. The said dying declaration was treated as the FIR. In that dying declaration she states that she was being ill-treated by the respondents on the ground that she could not conceive any child. She was bearing that illtreatment with the hope that she would conceive a child. She then states that on 10.04.2005 at about 10.00 a.m. when she was in the house, the respondents closed the door of the house from inside. Respondent Nos.1 and 4 tied her by means of a rope, respondent No.3 poured kerosene on her person and respondent No.2 set her ablaze by igniting a match stick. She raised shouts.

The neighbours gathered there. One Vishwas Namdeo Desale took her to the Civil Hospital at Dhule and admitted her there.

12. The second dying declaration (Exh.48) has been recorded by the Special Executive Magistrate – Sardar Ajam Mansuri (PW5), between 2.20 p.m. and 2.40 p.m. on 10.04.2005. He states that he got it confirmed from Dr. Shinde (PW7) that the deceased Sunita was conscious and able to give statement prior to and after recording her statement (Exh.48). Dr. Shinde (PW7) also supports this fact. Then he recorded the dying declaration (Exh.48) as per the say of the deceased Sunita, read over the contents of thereof to her, she admitted them to be correct and then he obtained her left thumb mark thereon. The said dying declaration is consistent with the dying declaration (Exh.44) in all material particulars.

13. Subhash (PW2) and Bhatu (PW6) state that after receiving the message about admission of the deceased Sunita in the Civil Hospital at Dhule, they rushed to see her in the said hospital. On being asked by them, the deceased Sunita narrated before them that respondent

Nos.1 and 4 tied her hands with a rope, respondent No.3 poured kerosene on her person and respondent No.2 set her on fire by igniting a match stick inside their house. Thus, these are oral dying declarations of the deceased Sunita, which are consistent with her dying declarations at Exhs. 44 and 48.

14. The learned counsel for the respondents pointed out to the evidence of Dr. Shinde (PW7), who being the Casualty Medical Officer in the Civil Hospital at Dhule on 10.04.2005, admitted the deceased Sunita in that hospital on being brought by Vishwas Patil. He states that he recorded history of the injuries as narrated by the deceased Sunita and obtained her thumb mark thereon. He produced the case papers (Exh.56), wherein this statement made by the deceased Sunita has been recorded. The said statement shows that her mother-in-law poured kerosene on her body and set her on fire on 10.04.2005 at 10.30 a.m. It has been reiterated by him in his cross-examination that the deceased Sunita had stated that she got burnt because her mother-in-law (i.e. respondent No.3) poured kerosene on her person and set her on fire by means of match stick on 10.04.2005 at

about 10.30 a.m. The learned counsel for the respondents submits that this is the dying declaration of the deceased Sunita recorded first in point of time. The dying declarations (Exhs.44 and 48) as well as the oral dying declarations disclosed through the evidence of Subhash (PW2) and Bhatu (PW6) are not consistent with this dying declaration which was recorded by Dr. Shinde (PW7). Therefore, according to the learned Counsel for the respondents, the learned Trial Judge has rightly discarded the dying declarations of the deceased Sunita.

15. It may be noted that the dying declaration of the deceased Sunita recorded by Dr. Shinde (PW7) has surfaced in his cross-examination. It has come in his cross-examination that at the time of giving history, (as recorded in the case papers Exh.56), the deceased Sunita was conscious. There is nothing on record to show that the said dying declaration was given by the deceased Sunita at the instance of anybody else. As such, it was made voluntarily without being influenced by any other persons, and when she was conscious. The said dying declaration has remained unchallenged. From the written statement Exh.64 of respondent no.1, it is

clear that at the time of the incident respondent No.3 and the deceased Sunita only were inside the house where the incident took place. This statement fully corroborates the dying declaration of the deceased recorded by Dr. Shinde (PW7). Respondent No.3 alone being present at the time of incident, she alone was in a position to explain the circumstances in which the deceased Sunita, got burnt, which were within her special knowledge. In view of Section 106 of the Indian Evidence Act, she was under an obligation to explain those circumstances which were within her special knowledge. Respondent No. 3 totally failed to explain as to how the deceased Sunita sustained burns. If that be so, her dying declaration recorded by Dr. Shinde (PW7) will have to be accepted as truthful. The said dying declaration creates a great confidence. We do not find any reason to discard it.

16. From the evidence of Subhash (PW2) it seems that he received a message about admission of the deceased Sunita in the Hospital at 12.30 p.m. After receiving the message he went to the Civil Hospital at Dhule along with his relatives. Bhatu (PW6) is the

cousin of Subhash (PW2). He states that after receiving that message he reached the Civil Hospital at Dhule at 1.00 p.m. on 10.04.2005. In all probabilities, Subhash (PW2) also must have reached there at the same time. The dying declaration (Exh.44) was recorded between 1.45 p.m. and 2.10 p.m. Prior to that both of these witnesses met the deceased Sunita. There is every possibility of their tutoring her to involve respondent Nos. 1, 2 and 4 also in the incident in question and accordingly, it seems that she gave dying declarations Exh.44 and Exh.48, which are not consistent with her dying declaration that was recorded by Dr. Shinde (PW7). There is no evidence on record to establish presence of respondent Nos. 1, 2 and 4 at the time of the incident. In the circumstances, we are not inclined to rely on the dying declarations Exh.44 and Exh.48 as also her oral dying declarations coming through the evidence of Subhash (PW2) and Bhatu (PW6).

17. Dr. Pathak (PW1) (Exh.29) and one Dr. H.C. Patil conducted postmortem of the body of the deceased Sunita on 15.04.2005 between 9.15 a.m and 10.15 a.m. They found septicemia due to deeper thermal burns on her

body. They found that she had sustained burns to the extent of 90% on various parts of her body. The said burns were anti-mortem. They opined the said burns were sufficient in the ordinary course of nature to cause death. According to them, the death of Sunita was caused due to "septicemia due to thermal burns". Dr. Pathak (PW1) states in his cross-examination that septicemia may be caused by accidental, homicidal or suicidal burns. However, this version would be of no help to the respondents, since they have not come with the case that Sunita sustained accidentally or that she committed suicide. The dying declaration of the deceased Sunita recorded by Dr. Shinde (PW7) coupled with the evidence of Dr. Pathak (PW1) clearly shows that the death of the Sunita was homicidal.

18. The incident took place inside the matrimonial house of the deceased Sunita. Consequently, there was no question of there being any eye witness. In all probabilities, the Police Patil of the village namely Vishwas Patil also must have gone to the spot of the incident much after the deceased Sunita got burnt. He simply took the deceased Sunita to the Civil Hospital at

Dhule and admitted her there. In our view, non examination of the said person as a witness would not have any adverse effect on the case of the prosecution.

19. The prosecution established beyond reasonable doubt that respondent No. 3 poured kerosene on the person of the deceased Sunita and set her ablaze. The deceased Sunita sustained 90% of burns on various parts of her body causing her septicemia, to which she succumbed on 15.04.2005. The act of respondent No. 3 of pouring kerosene on the person of the deceased Sunita and setting her on fire clearly establishes her intention to cause death of Sunita. The prosecution has proved beyond reasonable doubt that respondent No.3 committed murder of the deceased Sunita, made punishable under Section 302 of the IPC.

20. As far as the offences under Section 498-A, 342, 506 of the IPC are concerned, there is nothing against the respondents in the dying declaration of the deceased Sunita, recorded by Dr. Shinde (PW7). The evidence of Subhash (PW2) and Bhatu (PW6) in respect of the alleged illtreatment meted out to the deceased Sunita by the respondents is hearsay and is not

admissible to establish the offence under Section 498-A of the IPC. Under such circumstances, we hold that the prosecution failed to prove guilt of the respondents for the offences under sections 498-A, 342 and 406 of the IPC.

21. As far as respondent Nos.1, 2 and 4 are concerned, there is no positive and dependable evidence on record to connect them with the homicidal death of the deceased Sunita. They have been rightly acquitted by the learned Trial Judge. Their acquittal needs no interference.

22. The learned counsel for the respondents relied on the observations in para 12 of the judgment in the case of **Muralidhar alias Gidda and another Vs. State of Karnataka, 2014 [4] Mh.L.J.(Cri.)353**, in support of his contention that the acquittal of the accused cannot be lightly converted into conviction. The material portion of the observations from the para 12 of the said judgment is as under:

"It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the

appellate Court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the powers of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial Court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate Court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate Court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate Court on re-appreciation and reevaluation of the evidence is inclined to

take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial Court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate Court in the judgment of the trial Court."

23. As stated above, there is no dispute that respondent No.3 was the only person, besides the deceased Sunita, present in the house at the time of the incident. The dying declaration of the deceased Sunita recorded by Dr. Shinde (PW7) has not at all been challenged by respondent No.3. On the contrary, it is got confirmed in the cross-examination of Dr.Shinde (PW7). The said dying declaration is voluntary and truthful. It creates a great confidence. Respondent No.3 has not shown any other reason for sustaining burns by the deceased Sunita. With this strong evidence on record, the learned Trial Judge committed grave error in acquitting even respondent No.3 of the offence punishable under Section 302 of the IPC. The conclusion drawn by the learned Trial Judge that respondent no.3 cannot be held guilty for committing murder of Sunita is palpably wrong and against the evidence on record. The

judgment of acquittal is illegal and perverse so far as respondent No.3 is concerned. In the circumstances, respondent No.3 would not be entitled to get any benefit of the observations referred to above made in the case of **Murlidhar @ Gidda** (supra). The wrongful acquittal of respondent No.3 will have to be set aside in exercise of the appellate powers of this Court.

24. The judgment in the case of **Tukaram Padhen and Ors.** (supra), does not highlight any legal proposition which would be helpful to respondent No.3 to establish her innocence. The said judgment is based on the facts, which are quite distinguishable from the facts of the present case. Thus, it would not be of any assistance to respondent No.3.

25. The prosecution established beyond reasonable doubt that respondent No.3 committed murder of the deceased Sunita made punishable under Section 302 of the IPC. She is liable to be punished for the said offence. The learned Counsel for respondent no.3 submits that looking to the age of respondent No.3, which is more than 67 years, leniency may be shown to her in inflicting punishment. In our view, looking at the facts

of the case, it cannot be said that this is a rarest of rare case in which the ultimate punishment of death is called for. Respondent No.3 is, therefore, liable to be punished with imprisonment for life. Besides that she is liable to be punished with fine also. In our view, she should pay a fine of Rs.25,000/-. If the fine amount is recovered, it should be paid to the father of the deceased Sunita namely Subhash Dalpat Patil as compensation. The impugned judgment and order will have to be quashed and set aside partly and appeal will have to be allowed partly. We, therefore, pass the following order:-

O R D E R

- (i) The Criminal Appeal is partly allowed.
- (ii) The impugned judgment and order acquitting respondent No.3 - Kamalbai, are quashed and set aside.
- (iii) Respondent No.3 namely - Sau. Kamalbai Waman Patil is convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and

to pay a fine of Rs.25,000/- (Twenty Five Thousand), in default, to suffer rigorous imprisonment for one year.

- (iv) Set-off be given to respondent No.3 in respect of the period during which she was in jail in connection with this case.
- (v) If the fine amount is recovered, it be paid to Subhash Dalpat Patil, resident of Kalmadu, Taluka Chalisgaon, District Jalgaon as compensation.
- (vi) The appeal against respondent Nos.1, 2 and 4 is dismissed. Their acquittal is confirmed.
- (vii) The bail bonds of respondent Nos.1, 2 and 4 are cancelled. They are set at liberty.
- (viii) Respondent No.3 shall surrender to her bail bonds by appearing before the Trial Judge within one week from today, for suffering the sentence of imprisonment.
- (ix) In case respondent No.3 fails to appear before the Trial Court within one week from today,

the Trial Court shall issue coercive process
to secure her presence.

(x) The appeal is disposed off accordingly.

[**SANGITRAO S. PATIL**]
JUDGE

[**SUNIL P. DESHMUKH**]
JUDGE

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