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

CRIMINAL APPEAL NO.132 OF 1999

The State of Maharashtra,
(through : Yawal Police Station,
District Jalgaon)

... APPELLANT
(Original Complainant)

VERSUS

1. Anil Appa Bhalerao,
Age 18 years,
2. Anil Alias Guddya Dhondu Koli,
Age 25 years,
3. Arun Sukdev Koli,
Age 22 years
4. Vaijabai Appa Bhalerao
Age 45 years
5. Suresh Bapu Marathe,
Age 25 years,

All R/o Yawal,
District Jalgaon

... RESPONDENTS

.....
Shri S.D. Ghayal, A.P.P. for the appellant
Shri V.B. Jadhav, Advocate holding for
Shri A.V. Hon, Advocate for respondents No.1 to 5
.....

CORAM: T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.

DATED: 10th July, 2017.

J U D G M E N T (PER SUNIL K. KOTWAL, J.):

1. This appeal is directed by State of Maharashtra
against the judgment and order of Sessions Judge, Jalgaon in

Sessions Case No.3/1998, wherein the respondents were acquitted of the offences punishable under Sections 302 and 449 read with Section 34 of the Indian Penal Code (hereinafter referred as I.P.C.). Respondents No.1 to 5 are original accused No.1 to 5 respectively. Respondent No.2 died during pendency of the appeal.

2. Shorn of necessary details :-

The case of the appellant in brief is that, the deceased Miss Aarti Madhukar Sapkale, aged 17 years and accused No.1 to 5 are the residents of Yawal city, District Jalgaon. Respondent No.1 and 4 were was the neighbours of deceased. Respondents No.2, 3 and 5 were the friends of respondent No.1. Respondent No.2, 3 and 5 used to tease the deceased and when she protested, they abused and threatened her. On 1/10/1997, at about 4.15 p.m., when deceased was alone in her house, at that time, accused No.1,3 4 and 5 went inside the house of deceased and held her. Thereafter, respondent No.2 poured kerosene on the body of deceased and set her ablaze. Hearing shouts of the deceased, neighbour Raju Gajre (P.W.9) and his wife Ranjana rushed on the spot and they extinguished fire with the help of quilt lying in the house of deceased. At that time, uncle of the deceased namely Ravindra (P.W.2) had reached on the spot. On enquiry, the deceased disclosed them the occurred incident. Initially, deceased was shifted to Rural Hospital, Yawal where

doctor Talyarkhan Tadavi (P.W.7) recorded the history of kerosene burn and informed Yawal Police Station. Immediately the Head Constable Shri Ashok More (P.W.13) was deputed to Yawal Rural Hospital. Head Constable Ashok More (P.W.13), in presence of Dr. Talyarkhan Tadavi (P.W.7) recorded the statement of deceased, wherein she again disclosed the occurred incident to them. As deceased had sustained 80% burn injuries, she was referred to Civil Hospital, Jalgaon, where she succumbed to her injuries on next day at 6.00 a.m.

3. On the basis of statement given by deceased, crime was registered at Police Station Yawal. During the course of investigation, all the accused persons were arrested and spot panchanama was drawn on the spot of occurrence by A.P.I. Shri Rajendra Raising (P.W.11). He attached one plastic can of kerosene, one match box and ash of burnt clothes from the spot of occurrence. Statements of the relevant witnesses were recorded and the seized articles on the spot were referred to Chemical Analyser on 6/10/1997. Three photographs (Articles A to C) and their negatives were seized from the photographer Shri Barjighe under panchanama. After death of deceased, local police had drawn inquest panchanama and the dead body was referred for post mortem examination. Dr. Kulkarni (P.W.12) performed autopsy. After completion of investigation, charge sheet was submitted in the Court.

4. Charge (Exh.8) was framed against accused No.1 to 5 for commission of the offences punishable under Sections 302 and 449 read with Section 34 of the Indian Penal Code. Respondents pleaded not guilty and claimed trial. Defence of the respondents was that, deceased had love affairs with respondent No.2 and because family members of deceased opposed that relationship and arranged marriage of deceased with her parental aunt's son, the deceased committed suicide by setting herself ablaze. In the alternate, accused Nos.2, 3 and 5 had also taken defence of alibi and examined defence witnesses in support of their defence.

5. After considering the oral and documentary evidence placed on record, learned trial Court acquitted respondents No.1 to 5 of the offence punishable under Sections 302 and 449 read with Section 34 of the I.P.C. Therefore, this appeal arises.

6. Learned A.P.P. for the appellant argued at length, and submitted that, the appellant is relying on one written dying declaration and three oral dying declarations of the deceased. His contention is that, when these three dying declarations are free from doubt, conviction can be based only on the basis of truthful dying declaration, even in absence of direct evidence.

7. On the other hand, learned defence Advocate submitted that, from the cross-examination of prosecution witnesses, it emerges that, the terms in between respondents and family members of the deceased were cordial and the respondents had no reason to commit murder of the deceased. In other words, according to defence, no evidence regarding motive is available. Learned defence counsel assailed the dying declaration on the ground that the oral dying declarations are not reliable and even the written dying declaration is a prepared document. According to defence counsel, no clinching evidence is available on record to show that the written dying declaration, alleged to be recorded by Head Constable Ashok More (P.W.13) was recorded when the deceased was in the fit state of mind to give statement.

8. After scrutiny of evidence placed on record, it is clear that, no direct evidence is available in the form of eye witness who had seen the respondents while setting ablaze the deceased. Even no witness is available who had seen the respondents while running away from the spot or even nearby the spot at the relevant time of the occurrence i.e. at about 4.15 p.m. Therefore, the total prosecution case is based on only four dying declarations of the deceased. Three dying declarations are oral and only one is written, which is obtained by Head Constable More (P.W.13), in presence of Medical Officer, Rural Hospital,

Yawal Dr. Talyarkhan Tadavi (P.W.7). The first oral dying declaration is in presence of Ravindra Sapkale (P.W.2), who is uncle of the deceased, who reached on the spot immediately after the occurrence of the incident. Second oral dying declaration is in presence of Smt. Shashikalabai (P.W.3), who is mother of deceased and third oral dying declaration is in presence of Madhukar Sapkale (P.W.8), who is father of the deceased.

9. Before proceeding to examine the reliability of these four dying declarations, we must make it clear that, even only on the basis of dying declaration conviction can be based without corroboration by other evidence, provided that the dying declaration is free from every infirmity. The entire law regarding dying declaration is disclosed in **K. Ramchandra Reddy Vs. The Public Prosecutor (1976 Cri.L.J. 1548)**. In that case, the case of Khushal Rao is quoted in para 6 and that is regarding when the dying declaration can be basis for conviction. Bearing in mind the law stated in para 6 of the said case and considering the facts of this case, the following principles can be stated to be relevant for us :-

- (1) The Court will have to be on guard against the statement of the deceased being a result of either of tutoring, prompting or a product of his imagination,

- (2) The Court must be satisfied that the deceased was in a fit state of mind to make statement.
- (3) The deceased had clear opportunity to observe and identify his assailant and that he was making the statement without influence of rancour.
- (4) One of the important tests of the reliability of a dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind.

In the facts of the case of K. Ramchandra Reddy (supra), the Supreme Court has held that the omission by the Magistrate in not putting a direct question to the deceased regarding the mental condition of the injured when he was satisfied that the injured was suffering from severe pain and was not able to speak normally, so also the conduct of the deceased in not making disclosure regarding the occurrence on three previous occasions when he had opportunity to name his assailant, were sufficient factors to give benefit of doubt to the accused.

10. In the case at hand, as per prosecution case itself accused did not have inimical terms with the deceased or her family members. In fact, no evidence is placed on record by prosecution to prove the motive behind the alleged murder of the deceased. On the other hand, from the cross-examination of

Ravindra Sapkale (P.W.2), Shashikalabai (P.W.3) and Madhukar (P.W.8), it emerges that, prior to the occurrence, the family members of the deceased had cordial relations with the accused persons. However, even in absence of motive, prosecution can establish guilt of the accused provided that the above discussed four dying declarations are free from every infirmity.

11. Raju Gajare (P.W.9) is the first witness who reached on the spot after hearing shouts of the deceased. However, when Raju Gajare (P.W.9) entered the witness box, he deposed that, on the date of occurrence at about 4.00 p.m., he heard shouts from the house of Madhukar Sapkale "Save me, Save me" and, therefore, he went to that house and saw the deceased on fire. With the help of quilt, this witness extinguished the fire. But, according to this witness, deceased disclosed before him that she set herself on fire because she had love affair with Anil Koli (accused No.2). Therefore, this witness was declared hostile and he was confronted with his statement recorded by police. However, nothing could be elicited in his cross-examination which is helpful to the prosecution. On the other hand, this witness has brought on record probability of commission of suicide by deceased, due to her love affair with accused No.2, provided that the above statement of this hostile witness is corroborated by some other circumstances on record.

12. No doubt Ravindra Sapkale (P.W.2) deposed before the Court that on the date of occurrence i.e. on 1/10/1997 at about 4.30 p.m. when he was sitting in the house of his father, he heard commotion that a girl was set on fire, so he ran towards his house and saw that Raju Gajare (P.W.9) and his wife Ranjana were extinguishing fire set on deceased. According to this witness, he asked the deceased as to who had set her on fire and she named accused No.1, 3, 4 and 5, who held her. Deceased also named accused No.2 Anil @ Guddya as the same culprit who set her on fire. However, from his cross-examination, it emerges that, at the time of occurrence, he was sitting 5 to 6 houses away from his own house where he used to reside along with deceased and her parents. Therefore, question arises, after hearing the commotion, why he rushed to his own house when he was not aware that there was some mishap in his house. The second doubtful conduct of this witness is that, he did not enquire with the deceased as to what happened, but he enquired in the words "who set you on fire". When Ravindra Sapkale (P.W.2) was not aware as to what exactly happened with the deceased, then how can he ask the deceased as to who set her on fire. From his cross-examination, it also emerges that, though he accompanied the deceased to Rural Hospital, Yawal and though he met to Head Constable More (P.W.13) who recorded dying declaration of the deceased, this witness did not inform Head Constable More about the disclosure statement of the deceased. Ravindra Sapkale

(P.W.2) also admits that he did not tell the incident even to the doctor or to anybody until police recorded his statement on the next day of the incident. Thus, obviously possibility cannot be ruled out that this witness is a prepared witness to support the theory of murder of the deceased.

13. According to Shashikalabai Madhukar Sapkale (P.W.3), on the date of occurrence, she was away from her house in Yawal Market and from the third person she came to know that her daughter was burnt and, therefore, she rushed to her house. From her evidence, it emerges that when she enquired with the deceased about the occurrence, deceased told that accused No.1 and 4 held her and accused No.2 poured kerosene and set her on fire. Later on, she has improved that, according to deceased, all accused had done this work. But this improvement was made when learned A.P.P. repeated her previous statement. The cat has come out of the bag, when this witness was subjected to cross-examination. In her cross-examination, Shashikalabai (P.W.3) admitted that when she reached to her house, by that time, Aarti was kept in the bullock cart and many persons were present near that cart including Raju Gajare and Ranjanabai. According to this witness, her brother-in-law Ravindra Sapkale (P.W.2) was not present there because she admitted that, on the date of incident she did not meet Ravindra Sapkale (P.W.2). On the other hand, according to Ravindra Sapkale (P.W.2), after the

occurrence, he accompanied the deceased up to Rural Hospital, Yawal. Thus, it is smelling somewhere. From the further cross-examination of Shashikalabai (P.W.3), it emerges that she had talked with deceased Aarti when she was in bullock cart and thereafter the bullock cart went ahead. According to this witness, her husband's sister namely Latabai was sitting in the bullock cart. From her cross-examination, it emerges that, on the date of incident, this witness was taken by police to Police Station. It is highly doubtful circumstance, that when she had gone to Police Station, Yawal, why she did not inform police about disclosure statement of deceased and why she did not lodge report to Police Station, Yawal against the accused persons.

14. If the testimony of Ravindra Sapkale (P.W.2) and Shashikalabai (P.W.3) is compared, then it emerges that, Shashikalabai (P.W.3) was trying to suppress that she had knowledge regarding the joint photograph of accused No.2 and deceased. On the other hand, Ravindra Sapkale (P.W.2) has admitted in his cross-examination that prior to the incident, there was discussion with the father and mother of the deceased regarding the joint photograph of the deceased with accused No.2. Thus, considering the overall conduct of Shashikalabai (P.W.3), I find that, even her oral testimony regarding dying declaration of deceased is totally doubtful as she tried to suppress material facts and truth from the Court. Thus, on the

testimony of such dubious witness conviction of the accused cannot be based. Learned trial Court has rightly discarded the evidence of this witness.

15. Madhukar Sapkale (P.W.8) is the father of the deceased, who claims that, when he visited Rural Hospital, Yawal on 1/10/1997 and met the deceased, at that time the deceased named all the accused No.1 to 5 as her assailants. This witness has also identified the joint photograph of deceased and accused No.2 i.e. Article "C". However, from his cross-examination, it emerges that, at the time of occurrence, he was working in Yawal town at a far distance. So, he naturally could not meet the deceased immediately after the occurrence. He admits in his cross-examination that, he alone went to the hospital, but could not tell how many persons were present in the Ward in which the deceased was kept. According to his statement, nobody was inside the hospital where the deceased was kept. He admits that, when he talked with the deceased for a period of 15 minutes, at that time, even doctor and police were not present near the deceased. However, version of this witness is totally doubtful for the reason that, the incident occurred at about 4.00 p.m. and after about half an hour the deceased was taken to Rural Hospital, Yawal. From there, at about 5.30 p.m., the deceased was shifted to Hospital at Jalgaon as her condition was serious. In between this period, dying declaration of deceased was recorded

by Head Constable More. Considering this short time gap in between admission of the deceased in Rural Hospital and her discharge from the Rural Hospital at about 5.30 p.m., as specified in medical case record of Rural Hospital, Yawal (Exh.32). Absolutely no time was available with Madhukar (P.W.8) to have a discussion with the deceased about occurrence of the incident. So also, though he claims that without meeting the doctor he sought permission from the police to see the deceased, from the cross-examination of P.W.2 Ravindra Sapkale and P.W.3 Shashikalabai, it emerges that, in the hospital nobody was allowed to go near the deceased as it was exclusively Ladies Ward. Therefore, the version of Madhukar (P.W.8) is highly improbable that with the permission of police he went to the Ward where deceased was kept at Rural Hospital, Yawal and had meeting with the deceased where she disclosed the occurrence of incident to him in all details. From the cross-examination of this witness, it further emerges that, though on the date of incident along with his wife he had been to Police Station, Yawal, his statement was recorded by police on third day of the incident. Thus, obviously this witness appears to be a prepared witness. Considering the total improbable version of this witness, the learned trial Court rightly discarded his testimony.

16. The fourth dying declaration, recorded by Head Constable More (P.W.13) in presence of Dr. Tadavi (P.W.7) at

Rural Hospital, Yawal is the most important piece of the evidence relied by prosecution. According to A.P.P., this dying declaration was recorded when the deceased was in fit condition of mind to give statement and there was no possibility of tutoring the deceased as after occurrence, at the earliest she was shifted to Rural Hospital, Yawal. On the other hand, learned defence counsel assailed this dying declaration mainly on the ground that prosecution cannot establish that at the time of recording this dying declaration the deceased was in proper condition to give the statement.

17. At the outset, we must observe that, as after the occurrence of incident immediately neighbours and other nearby residents gathered on the spot and because within short time from the occurrence the deceased was shifted to Rural Hospital, Yawal at about 4.15 p.m., there was short time for tutoring the deceased. It must be noted that, even father of deceased did not reach to his house before shifting of the deceased to Rural Hospital, Yawal. Even, when the mother of the deceased reached on the spot by that time, deceased was kept outside the house in bullock cart and immediately she was shifted to the hospital. Thus, the parents had no time to tutor their daughter. So also, as observed above, the relations between accused and family of the deceased were cordial before the occurrence of the incident. Therefore, tutoring the deceased to implicate the accused in such

serious offence is out of question. However, we must examine whether dying declaration was recorded by Head Constable More when the deceased was in fit state of mind i.e. in condition to give statement.

18. Dr. Tadavi (P.W.7) deposed on oath that, on 1/10/1997 the injured was brought to the Rural Hospital, Yawal at about 4.15 p.m. where he used to work as Medical Officer. From the evidence of this witness, it emerges that the deceased sustained 82% burn injuries on her body. However, she was conscious and well oriented. From the examination-in-chief of Dr. Tadavi (P.W.7), it emerges that, at about 5.30 p.m. i.e. after recording of the dying declaration by Head Constable More, the deceased was shifted to Civil Hospital, Jalgaon as the condition of that patient was deteriorating. However, from the cross-examination of this witness, it emerges that, before arrival of police when he enquired with the deceased as to what had happened, that time she informed that she was injured due to keorsene. Thus, it becomes clear that, at the first opportunity, when the deceased met to independent Government servant, that time she did not disclose that she was set on fire by the accused persons.

19. From the statement of Dr. Tadavi (P.W.7), it emerges that, when he informed Police Station, Yawal and on enquiry this

Medical Officer informed police that the deceased was in condition to give statement. It is to be noted that, before recording dying declaration of the deceased by police, Dr. Tadavi did not examine the deceased or he did not ask any preliminary questions to the deceased to ascertain whether she was in fit condition of mind to give the statement. Head Constable More (P.W.13) nowhere deposed that before recording the dying declaration he asked some introductory questions to ascertain whether the deceased was in proper condition to give the statement. Dr. Tadavi merely deposed that the patient was conscious when her statement was recorded. However, from the cross-examination of Dr. Tadavi (P.W.7), it emerges that, he could not record the blood pressure of the deceased because, due to burns, wrapping belt for measurement of the blood pressure was not possible. He also admits that, at that time, the pulse rate of deceased was 120 per minute and in normal condition, the pulse rate is 70 per minute. From his further cross-examination, it emerges that, such high pulse rate of 120 per minute is accompanied by temperature and may be of indication of entry into delayed shock. This Medical Officer has made it clear that, due to delayed shock, mental disorder is developed and even hallucination and delirium are resulted due to delayed shock. According to such expert witness, such patient may imagine that her near or dear had attacked her or after her life. Whenever there is mental disorder, suggestions given to that patient are

easily picked up by her. Thus, the extreme high pulse rate of the deceased creates a possibility that at the time of recording dying declaration, the deceased might be under delayed shock, and due to hallucination and delirium or due to mental disorder, she imagined that she was attacked by the accused persons, who were her neighbours.

20. Even Dr. Kulkarni, who performed autopsy examination, deposed before the Court that the cause of death of the deceased was shock due to toxemia following 80% burns. He admits that, in burn cases, pulse rate rises if person is under shock, and if pulse rate crosses 120 to 140, the person becomes unconscious. He also admits that, if carbon monoxide is present, and it is inhaled by patient, chances of his becoming unconscious are more, and in cases of burning, carbon monoxide and carbon-dioxide are present. This Medical Officer opined that, if a person does not become unconscious due to inhaling of carbon monoxide and carbon-dioxide, it may result in hallucination and delirium. In some cases, it is possible that person may feel that his near or dear are attacking him and doing harm to him. Dr. Tadavi (P.W.7) has also made it clear that, in case of kerosene burns, it produces carbon-dioxide and carbon monoxide and the percentage of carbon monoxide is high. From his cross-examination, it becomes clear that, in case of inhalation of large scale carbon monoxide, the internal organs of the body become

congested and it affects central nerves system, resulting into deterioration of patient. From the examination-in-chief of Dr. Tadavi, it becomes clear that, at about 5.30 p.m., the deceased was shifted to Civil Hospital, Jalgaon as her condition was deteriorating. Thus, in view of such condition of the deceased at the relevant time of recording dying declaration, probability cannot be ruled that under delayed shock deceased had given imaginary statement due to mental disorder or under hallucination. Even Dr. Tadavi has brought on record this probability because he has admitted in his cross-examination that before beginning of recording of statement by police when Police asked the deceased as to what happened, that time the deceased replied that she was residing with her parents at above said address. This indicates the possibility of mental disturbed condition of deceased at the time of recording her dying declaration.

21. Thus, from the cross-examination of these two expert witnesses, it emerges that, possibility of recording of dying declaration of deceased by police when she was not in fit state of mind, is most probable. Even Head Constable Ashok More (P.W.13) nowhere deposed that before recording statement of the deceased he ascertained and satisfied that deceased was in state of mind to give the statement. Only the version of this witness that deceased could talk is not sufficient to hold that she was in

fit state of mind. Therefore, taking into consideration all these probabilities, on the basis of evidence placed on record, the learned trial Court has rightly held that the prosecution failed to prove that, at the time of recording these four dying declarations of deceased, she was in fit condition to give statement. Thus, this last dying declaration of the deceased is not free from infirmities to base the conviction of the accused.

22. Accordingly, from the careful analysis of the evidence on record, we are fully satisfied that before the occurrence of the incident, the relations in between accused and the family members of the deceased were cordial and accused had no motive to kill the deceased by setting her on fire after pouring kerosene inside her own house. No witness has seen the accused persons even nearby the spot of occurrence at the relevant time of the incident. In view of seizure of joint photograph of deceased and accused (Article "C"), and prior discussion in respect of this photograph by the family members of deceased and hasty settlement of her marriage, as admitted by P.W.2 Ravindra Sapkale, probability of suicidal death of deceased due to her love affair with accused No.2 cannot be ruled out. This circumstance supports the version of Raju Gajare (P.W.9) that the deceased told him that she set herself ablaze because, against her love with accused No.2, her parents had arranged her marriage with some third person. As observed above, all the

dying declarations relied by prosecution are not free from doubt to base the conviction. Thus, accused persons deserve benefit of doubt.

23. After going through the judgment passed by the trial Court we are fully satisfied that the judgment of acquittal is based on sound reasons, and impossible view is not taken by the trial Court. In the result, this appeal deserves to be dismissed. Accordingly, we pass the following order :

ORDER

The Criminal Appeal is dismissed.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/