

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

CRIMINAL APPEAL NO.67 OF 2001

The State of Maharashtra
through P.S.O., Basmathnagar,
District Parbhani

... **APPELLANT**

VERSUS

- 1) Nivrutti s/o Santoba Bhalerao,
Age 35 years, Occu. Service,
- 2) Sambhaji s/o Manikrao Bhalerao,
Age 30 years, Occu. Agri.
- 3) Sow. Rahibai w/o Santoba Bhalerao,
Age 55 years, Occu. Household
- 4) Dhrupatabai w/o Nivrutti Bhalerao,
Age 30 years, Occu. Household
- 5) Santoba s/o Gyanba Bhalerao,
Age 60 years, Occu. Agri.

All R/o Darephal, Tq. Basmathnagar,
District Hingoli.

... **RESPONDENTS**

.....
Shri S.D. Ghayal, A.P.P. for appellant/ State
Shri R.N. Chavan, Advocate holding for
Shri Vijay Sharma, Advocate for respondents
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CORAM: T.V. NALAWADE AND
 SUNIL K. KOTWAL, JJ.

DATE : 31st July, 2017.

JUDGMENT (PER SUNIL K. KOTWAL, J.) :

1. This appeal is directed by the State against the judgment and order of acquittal of accused No.1 to 5, delivered by Additional Sessions Judge, Parbhani, in Sessions Trial No.180/1999. Respondents are original accused No.1 to 5 respectively.

2. Facts leading to institution of this appeal are that, accused were prosecuted for the offences punishable under Sections 302, 498-A read with Section 34 of the Indian Penal Code (I.P.C. for short). Prosecution case in brief is that, deceased Sojarbai was the wife of accused No.1. Accused No.4 is second wife while accused No.3 and 5 are parents of accused No.1. Accused No.2 is cousin of accused No.4. The deceased Sojarbai married to accused No.1 prior to 17 years, however, she did not conceive child. Therefore, before 7 to 8 years, accused No.1 performed second marriage with accused No.4.

3. It is alleged that, all accused persons ill-treated the

deceased Sojarbai and as she did not conceive child. Parents of the accused No.1 started residing in separate house before 7 to 8 years at village Daraphal, Taluka Basmathnagar, District Hingoli. At the relevant time of occurrence of the incident, at the eve of Nagpanchami festival of 1999, deceased had gone to her maternal home. On 26/8/1999, at about 4.30 p.m., she came back to the house of accused No.1 along with Vilas Chavan (P.W.3). However, when they reached to the house of accused No.1, they noticed that the house was locked. They waited up to 6.00 p.m. till arrival of accused No.1, 2 and 4. Thereafter quarrel started between deceased and accused No.1, 2 and 4. Ultimately, at about 9.00 p.m., accused No. 1, 2 and 4 took the deceased to the house of accused No.3 and 5 under the pretext of obtaining key of the house. Quarrel in between them continued even in front of house of accused No.3 and 5. After some time, accused No.3 and 5 asked the accused No.1 to set the deceased ablaze. Thereon, accused No.1 fetched plastic can containing kerosene from the house of accused No.5. Accused No.2 and 4 caught hold of deceased and accused No.1 poured kerosene on the body of deceased and set her ablaze. Deceased started shouting and, therefore, Vilas Chavan (P.W.3) who was witnessing the occurrence, fled away towards his village Adgaon. Hearing shouts of the deceased, nearby residents gathered on

the spot and doused the fire. The deceased was immediately rushed to Civil Hospital, Parbhani. On M.L.C. Intimation (Exh.18) given by Medical Officer, Civil Hospital, Parbhani, Police Head Constable Pathan (P.W.1) from Police Station, Nanalpeth, Parbhani paid visit to the deceased on 26/8/1999 at midnight, and after verifying the fit condition of the deceased from the concerned Medical Officer, he recorded first dying declaration (Exh.19) on 27/8/1999 at 00.30 a.m. This dying declaration was treated as F.I.R. and Crime No.00/1999 came to be registered under Sections 307, 498-A read with Section 34 of the I.P.C. at Police Station, Nanalpeth, Parbhani. Second dying declaration (Exh.41) of the deceased was recorded by Naib Tahsildar Shri B.S. Makrand (P.W.6) on 27/8/1999 at 00.50 Hrs. On the same day, the parents and relatives of the deceased were informed and, therefore, her brother P.T. Renge (P.W. 2) rushed to Civil Hospital, Parbhani along with other relatives. In their presence, again deceased disclosed the entire occurrence. The F.I.R. (Exh.19) was transferred to Police Station, Hatta, within whose jurisdiction the incident had taken place. On receiving that report, Crime No.99/1999 came to be registered against the accused persons for the above mentioned offences. Deceased succumbed to her injuries on 27/8/1999 at about 6.00 a.m. Inquest panchanama was drawn by Head Constable Pathan when

the dead body was referred to Medical Officer, Civil Hospital, Parbhani for post mortem examination. Dr. B.R. Jadhav (P.W.5) performed autopsy examination and by submitting the post mortem report (Exh.34), opined that, cause of death of the deceased was cardio respiratory failure due to shock and secondary to 100% burns. During the course of investigation, P.S.I. P.P. Pardeshi (P.W.8) had drawn spot panchanama (Exh.46) of the spot of incident. He seized bangle pieces and burnt pieces of sari. Offence punishable under Section 302 came to be added in Crime No.99/1999. Accused were arrested on 28/8/1999 and their police custody was obtained till 31/8/1999. On 31/8/1999, in police custody, accused No.1 gave disclosure statement and in consequence whereof, plastic can of kerosene and match box came to be seized from his house. The banian, full pant and underwear which were on the person of accused No.1, came to be seized under panchanama dated 28/8/1999. These articles were referred to Chemical Analyser for chemical examination. After completion of the investigation, charge sheet was filed against all accused persons in the Court of Judicial Magistrate, First Class, Basmathnagar.

4. Offence punishable under Section 302 of the I.P.C. being exclusively triable by Court of Sessions, this case was

committed to Sessions Court, Parbhani. The then Additional Sessions Judge framed charge (Exh.4) against the accused persons for the offence punishable under Sections 302, 498-A read with Section 34 of the Indian Penal Code. Accused pleaded not guilty and claimed trial. The defence of the accused was of total denial and false implication.

5. Prosecution examined total 8 witnesses. After considering the direct and circumstantial evidence placed on record, the learned trial Court pleased to acquit the accused persons. Against that judgment and order of acquittal, this appeal is filed by the State.

6. Learned A.P.P. for the State submitted that, though prosecution has proved two written dying declarations and one oral dying declaration of the deceased, the learned trial Court erroneously acquitted the accused persons. According to A.P.P., the prosecution has examined Medical Officer (P.W.7) and proved that, at the time of recording of dying declaration, the deceased was in fit state of mind to give statement. According to A.P.P., Vilas Chavan (P.W.3), who is important eye witness, is erroneously disbelieved by the trial Court without assigning proper reasons.

7. Learned Advocate for the accused supported the judgment of acquittal on various grounds which will be considered in the further part of the judgment.

8. In the case at hand, by examining Head Constable Pathan (P.W.1), Naib Tahsildar B.S. Makrand (P.W.6), prosecution has proved two written dying declarations (Exh.19 and 41) of the deceased. To prove that at the time of recording of these both dying declarations the deceased was in fit state of mind to give statement, prosecution has placed reliance on testimony of Dr. Patel (P.W.7). In addition to this, prosecution has placed reliance on direct evidence of important eye witness Vilas Chavan (P.W.3) and other circumstantial evidence such as recovery of kerosene can and match box from the possession of accused No.1.

9. Initially, we propose to consider the evidence placed on record by prosecution in the form of three dying declarations.

- (1) Recorded by Head Constable Pathan (P.W.1) at Exh.19.
- (2) Recorded by Executive Magistrate Shri B.S. Makrand (P.W.6) at Exh.41.

- (3) Oral dying declaration made before Prabhakar Renge (P.W.2), who is brother of the deceased.

10. Head Constable Pathan (P.W.1) deposes that, after receipt of M.L.C. intimation (Exh.18) on 26/8/1999, he proceeded to Government Hospital, Parbhani and initially, approached the duty medical officer and informed him about his intention to record statement of the deceased. From the testimony of Pathan (P.W.1), it emerges that, the concerned medical officer examined the deceased and opined that she was in fit condition to give statement and accordingly, this witness recorded dying declaration (Exh.19) on 27/8/1999 at 00.30 Hrs. This witness has reproduced the statement of deceased before him. According to this witness, after completing the recording of dying declaration, he obtained thumb impression of deceased on the said dying declaration and countersigned it and thereafter again medical officer examined the deceased and endorsed at the bottom of the statement that the deceased was conscious. It also emerges that, the dying declaration was scribed by the writer and Pathan (P.W.1). It reveals that, learned trial Court mainly placed reliance on "**Paparambaka Rosamma & ors. Vs. State of Andhra Pradesh**", reported in **(1999 Cri.L.J. 4321)**, wherein the larger Bench of Apex Court ruled that, in absence of

medical certification that the injured was in fit state of mind at the time of making declaration, it would be risky to accept the subjective satisfaction of a Magistrate to opine that the injured was in a fit state of mind at the time of making declaration.

11. However, it must be mentioned that, Constitutional Bench of Apex Court, in **Laxman V.s State of Maharashtra** reported in **(AIR 2002 SC 2973)**, over ruled Paparambaka Vs. State (cited supra) and ruled that, the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. Before recording the declaration, the officer concerned must find that the declarant was in fit condition to make the statement in question. Therefore, the finding of the learned trial Court that in absence of proper certification by concerned medical officer on the dying declaration (Exh.19) it is invalid, is not the correct position of law. However, after going through the reasoning given by learned trial Court while rejecting the three dying declarations, it becomes clear that, apart from certification of Medical Officer Dr. Patel (P.W.7), the learned trial Court has also considered that this medical officer was not the person who was providing treatment to the deceased and who was not aware what was the line of treatment and what medicines were administered to this patient. This witness was

not aware whether any sedative was given to the patient. Considering these all aspects, learned trial Court rightly held that, in absence of evidence of Dr. Janapurkar, who treated the deceased, only on the basis of testimony of Dr. Patel (P.W.7), conclusion cannot be drawn that the deceased was in fit statement of mind to give dying declaration. Trial Court also considered that, prosecution has suppressed the case papers of the hospital wherein history of the injury is noted and even note is recorded regarding examination of the patient at the time of recording dying declaration. Therefore, considering the possibility of giving sedative to the deceased at the time of her treatment, the trial Court rightly held that the evidence of Dr. Patel (P.W.7) falls short to establish that deceased was conscious or in condition to give statement.

12. Trial Court has also noted in para 32 of the judgment that the dying declaration was not recorded by Head Constable Pathan (P.W.1) in the very words of the deceased. After going through the dying declaration (Exh.19), it emerges that, it has been recorded almost in the form of First Information Report. Even though Pathan (P.W.1) claims that he recorded the statement of deceased on the basis of questions put up to the deceased, those questions are not mentioned in the dying

declaration. Therefore, possibility cannot be ruled out that the dying declaration was obtained by putting certain leading questions to the deceased. Even the scribe of the dying declaration is not examined by prosecution and nothing is on record which shows that dying declaration was read over to the deceased and after informing its contents to be correct by deceased, her thumb impression was obtained over it. Thus, the finding of the trial Court is correct that it was the duty of the prosecution to specifically bring on record that deceased heard the statement recorded by Head Constable and she admitted it to be true and correct. Reference can be made of the case **Mohan Lal Vs. Ram Narayan** reported in **(AIR 1993 SC 2457)**, wherein the prosecution had not examined the scribe of the dying declaration without assigning any reason. The accused consequently had not got opportunity to cross-examine the scribe. Considering these circumstances, it was held that the dying declaration was not reliable.

13. Trial Court also noted certain improvements made by Head Constable Pathan (P.W.1) in his examination-in-chief, which is not included in the dying declaration (Exh.19). It was also pointed out that, Pathan (P.W.1) has tried to insert his own version through the mouth of deceased. It is to be noted that,

from the evidence of Dr. Jadhav (P.W.5), who performed autopsy examination of the deceased, he deposes that both hands of the deceased were found completely burnt including fingers and thumbs and it was not possible to obtain thumb impression of a person who sustained third degree burn injuries as found on the body of deceased. Despite this condition of deceased, Head Constable Pathan (P.W.1) says that, he obtained thumb impression of the deceased on her dying declaration. This statement of Head Constable Pathan (P.W.1) appears to be totally unreliable. Thus, considering overall conduct of Head Constable Pathan (P.W.1) and above discussed circumstances, we have no hesitation to hold that learned trial Court rightly disbelieved the testimony of Head Constable Pathan (P.W.1) and consequently, disbelieve the dying declaration (Exh.19).

14. To prove the second dying declaration of the deceased (Exh.41) recorded by Executive Magistrate Shri B.S. Makrand (P.W.6), this witness stepped in witness box and deposed that, after verifying the fit condition of deceased through concerned Medical Officer, he recorded statement of the deceased as per her narration. This dying declaration was also rightly discarded by learned trial Court on account of doubtful thumb impression of deceased on the dying

declaration when her both hands were totally burnt and not in a condition to give the impression. So also, as observed above, in absence of evidence of Dr. Janapurkar, who gave medical treatment to the deceased, possibility of giving sedative to the deceased cannot be ruled out. Therefore, the view taken by the learned trial Court while rejecting the second dying declaration of the deceased cannot be termed as impossible view.

15. Shri Prabhakar Renge (P.W.2) stepped in witness box and deposed that, on 27/8/1999 at about 2.00 a.m., along with other relatives, he went to the Government Hospital, Parbhani and enquired with the deceased. From his testimony, it emerges that, in his presence also the deceased disclosed all the details of occurrence i.e. setting her ablaze after pouring kerosene. However, after going through cross-examination of this witness, it emerges that, initially he tried to suppress his relations with one Samindrabai, who resides at village Darephal. Later on, he was compelled to admit his relationship with her. This indicates that, he is not a truthful witness. So also, it cannot be ignored that, Prabhakar (P.W.2) has admitted in his cross-examination that the condition of deceased went on becoming more critical. This

witness claims that, he enquired with the deceased at 2.00 o'clock in the hospital. However, he nowhere says that he obtained prior permission of the Medical Officer for questioning the deceased. Even this witness does not speak that before questioning the deceased he was satisfied that the deceased was in condition to give the correct disclosure. In the circumstances, on the basis of testimony of such interested witness, who did not try to contact the police even after knowledge regarding the alleged illegal acts of the accused, cannot be relied upon. Learned trial Court has minutely considered overall conduct of this witness and rightly rejected the testimony of Prabhakar Renge (P.W.2).

16. Now the direct evidence of Vilas (P.W.3), if considered and scrutinized carefully, it emerges that, though he claims that he was present on the spot of incident at the time of occurrence, and though he claims that in his presence the accused persons set ablaze the deceased, the overall conduct of this witness is absolutely abnormal. From the cross-examination of Vilas (P.W.3), it emerges that, after watching the occurrence of the incident, he bolted away from the spot and went to his village Adgaon, which is at a distance of 5 to 6 Kms. from Darephal. Vilas (P.W.3) has admitted in

his cross-examination that, even after occurrence of the incident, he was present at village Darephal till 9.00 to 9.30 p.m. In natural course, after witnessing such horrified occurrence, P.W.3 would have immediately left the village Darephal so that none of the accused could trace out him to finish the sole eye witness. From his cross-examination, it also emerges that, even after going to Adgaon, he did not narrate the incident to anybody at Adgaon. In natural course, at least in his own house he would have definitely narrated the incident to his family members. From his cross-examination, it also emerges that, Police Station Hatta is hardly at a distance of 5 to 6 Kms. from village Adgaon. However, this witness did not inform the Police Station regarding commission of murder by accused in presence of this witness. Climax is that, Vilas (P.W.3) has flatly admitted that he did not feel it necessary to go to his house at Adgaon to inform the incident or to go to Police Station to give the information about the incident. Another important unnatural conduct to be noted is that, though this witness claims that after watching the incident he ran away from the spot due to fear and apprehension of life. The cat has come out of the bag when this witness was subjected to further searching cross-examination. Vilas (P.W.3) has admitted in cross-

examination that he had gone to Darephal i.e. at the village accused to attend funeral of deceased. Had this witness really witnessed the occurrence, definitely on account of apprehension of life at the hands of accused, he would have not dared to attend the funeral of the deceased at least at village Darephal. Another important aspect is that, from the cross-examination of this witness, it emerges that, though in his presence the entire incident occurred, neither he tried to intervene nor he tried to get the help of any neighbour or villager. This absolutely unnatural conduct of this witness certainly creates doubt regarding testimony of this witness that he is one of the eye witness of the occurrence. Considering the overall circumstances, learned trial Court also rightly disbelieved the testimony of Vilas (P.W.3). No neighbour who extinguished the fire is examined by prosecution. Thus, independent witnesses are suppressed by prosecution, who could have unfolded true story.

17. Regarding the circumstantial evidence placed on record by prosecution in the form of recovery of kerosene can (Article 9) and match box (Article 10) as per information given by accused No.1 in police custody, it is suffice to say that, recovery of such common articles from the house of accused

is not at all abnormal circumstance. From the cross-examination of investigating officer P.S.I. Pardeshi (P.W.8), it emerges that, it was transpired in his investigation that deceased and the accused No.1 were taken in jeep to the Civil Hospital, Parbhani after the incident. The investigating officer also admitted that, accused No.1 was admitted in the Civil Hospital and when he was arrested, the investigating officer found that the right hand of the accused was burnt in the same incident. However, prosecution has conveniently suppressed the injuries on the body of accused No.1 sustained by him at the time of occurrence. Thus, possibility cannot be ruled out that at the time of occurrence, accused No.1 might have tried to extinguish the fire and that time sustained burns. So also, possibility cannot be ruled that while taking the injured to Civil Hospital, Parbhani, the clothes of the accused would have received some stains of kerosene. Therefore, only on the basis of detection of kerosene residues from the clothes of the accused No.1, inference cannot be drawn that he committed the murder of deceased. No other circumstantial evidence is placed on record by prosecution to connect the accused persons with the alleged crime.

18. Thus, after careful scrutiny of the evidence of

prosecution witnesses on record, we are fully satisfied that, no clinching evidence has been placed on record to prove that death of the deceased was homicidal death and with requisite intention of knowledge, accused caused the homicidal death of the deceased. So also, when dying declarations of deceased are disbelieved, there remains no iota of evidence to establish the charge even under Section 498-A of the I.P.C.

19. Thus, the view taken by trial Court while acquitting the accused of the offences punishable under Sections 302, 498-A read with Section 34 of the Indian Penal Code is probable view and the acquittal recorded by trial Court need not be interfered. It follows that, this appeal fails and deserves to be dismissed. Hence we pass the following order :

ORDER

(i) Criminal Appeal is dismissed.

(ii) Under Section 437-A of the Code of Criminal Procedure, respondents/ accused shall execute before the trial Court bail bonds with sureties for the amount of Rs.10,000/- (Rupees ten

thousand) each to appear before the Supreme Court as and when notices are issued to them in respect of any proceedings filed against this judgment and the said bail bonds shall remain in force for a period of six months from today.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/