

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

CRIMINAL APPEAL NO.267 OF 2001

Aminabi w/o. Shaikh Chand,
age 26 years, Occupation Household,
R/o. Garkheda, Bharatnagar,
Aurangabad.

APPELLANT

[Ori. Accused]

VERSUS

State of Maharashtra

RESPONDENT

...

Mr.Vijay Sharma, Advocate for the Appellant
Mr.S.D.Ghayal, APP for respondent/sole.

...

**CORAM: S.S.SHINDE &
S.M.GAVHANE, JJ.**

Reserved on : 30.06.2017

Pronounced on: 07.07.2017

JUDGMENT: (Per S.S.Shinde, J.):

1. This Appeal is filed by the appellant-accused, challenging the judgment and order passed by the Sessions Judge, Aurangabad, on 21st June, 2001 in Sessions Case No.278 of 1999, thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code, and

sentenced to suffer imprisonment for life and to pay fine of Rs.500/-, in default to suffer R.I. for 15 days.

2. The prosecution case in nutshell is as under:

The deceased Nurjaha Begum, who is the informant in the present case, was residing at Bharatnagar, Garkheda, Aurangabad. She was residing there with her husband, namely Shaikh Chand, who was a truck driver, and three children, and second wife of her husband Aminabi. She married with Sk. Chand about ten years back before the incident, and they were residing at Bharatnagar, Garkheda since about one year prior to the incident. About three years back, her husband married with Aminabi without her knowledge. But she was not pulling on well with Aminabi. Therefore, Aminabi was residing at her parental place.

About 15 days prior to the incident, which took place on 4th June, 1999, father of Aminabi had reached to her house, and since that time Aminabi was residing there. Since the time she came to Aurangabad she was picking up quarrels with her, and her husband Sk. Chand. She wanted that her husband should give money to her, and not to Nurjahabegum.

On 4th June, 1999, her husband Sk. Chand left the house in the morning for duty, and Aminabi and her children were in the house. At about 2.00 p.m., she along with her minor son Ashpak were sleeping on the bedstead in the house, and Aminabi was sleeping on the floor, and when she was about to fall asleep, she felt kerosene dropping on her face. Therefore, she opened her eyes and saw that Aminabi was pouring kerosene from the aluminium Can on her person. When she tried to get up, Aminabi ignited a match

stick and threw it on her person, as a result of which her saree caught fire, and when she was burning she ran out of the house and herself poured water from the pot which was kept outside the house. There was nobody to put off the fire. Thereafter, she was taken to Ghati Hospital, Aurangabad, by one Sk. Gulab and two women from the neighbourhood and then she was admitted in the Hospital. Her son Ashpak also sustained burn injuries and was also treated in the Hospital. When she was admitted in the Hospital, her complaint was recorded and offence at Mukundwadi Police Station as Crime No.77/1999 under Section 307 of the IPC was registered.

The Police Head Constable Kachru Namdeo Chavan, who was attached to Mukundwadi Police Station, went to the Ghati Hospital, Aurangabad, and requested the Doctor to certify whether the patient Nurjaha was in a

position to give statement, and the Doctor certified that she was in a position to give statement. Thereafter, he recorded the complaint on 4th June, 1999, which is the FIR in the present case. He obtained her thumb impression on the said complaint. Thereafter, the Special Executive Magistrate, Mr.Magan Pawar, was also requested to record dying declaration of Nurjahan. The Special Executive Magistrate, Mr.Magan Pawar, recorded her dying declaration after obtaining certificate from the Medical Officer at 8.30 p.m. on 4th June, 1999.

3. The Investigating Officer Sadanand Wayasepatil, who was attached to Chavani Police Station on 4th June, 1999, received message that burning incident had taken place at Bharatnagar, Garkheda, Aurangabad, and directed the PSI Thakare to visit the spot and make inquiry. He also received phone

message from PSI Thakare that the patient was serious and directed him to record her dying declaration. Before he reached Ghati Hospital, the Special Executive Magistrate had already recorded her dying declaration and in the meantime he was required to go to *bandobast* and on returning home at 11.00 p.m. he received message that burnt woman died in the Hospital. So the section which was recorded in the FIR was altered from Section 307 of the IPC to Section 302 of the IPC, and on 8th June, 1999, he himself took up the investigation. He received statement of the deceased and her dying declaration and postmortem report. The Medical Officer, who performed the postmortem on the dead body, reported that the deceased Nurjahan sustained 90-95% burn injuries, and that cause of death was shock due to burns. After receipt of papers, he went to the place of incident and made spot panchanama and attached plastic Can

containing kerosene, one half burnt nylon mattress, one match box and german pot. Muddemal articles were sent to Chemical Analyzer with covering letter. He received CA report on 22nd November, 1999. Before that he recorded statements of witnesses, and on 4th June, 1999, he arrested the accused and on completion of investigation, he submitted charge sheet against the accused for the offence punishable under Section 302 of the Indian Penal Code.

4. As the offence punishable under Section 302 of the IPC is exclusively triable by the Court of Session, the Judicial Magistrate First Class, Aurangabad, committed the case to the Court of Session for trial.

5. On consideration of the case papers and upon hearing the submissions of the learned Advocate for the accused, and the

learned APP for the State, there was ground for presuming that the accused committed offence which is exclusively triable by the Court of Session, and therefore, charge for the offence punishable under Section 302 of the IPC was framed against accused at Exh.3. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried.

6. It is her defence that Nurjahan herself set her on fire when she was alone in the house, and that she had not poured kerosene on person of Nurjahan, while she was sleeping on the bedstead and set her on fire as alleged by the prosecution, and denied to have committed an offence as alleged by the prosecution.

7. After full-fledged trial, the trial Court convicted the appellant for the offence punishable under Section 302 of the IPC.

Hence this Appeal filed by the appellant—accused.

8. Heard the learned counsel appearing for the appellant, and the learned APP appearing for the respondent—State. The learned counsel appearing for the appellant invites our attention to the dying declaration at Exh.18, and submits that the said dying declaration suffers from legal infirmities and is surrounded by the suspicious circumstance, and therefore, the reliance whatsoever can not be placed on the said dying declaration. It is submitted that the trial Court has rightly disbelieved the dying declaration which was recorded by the Special Executive Magistrate. He submits that the evidence of other witnesses in the nature of corroboration to the dying declaration is not trustworthy, and therefore, the appellant is entitled to get the benefit of doubt.

9. On the other hand, the learned APP appearing for the respondent—State invites our attention to the findings recorded by the trial Court, and also to the evidence of the prosecution witnesses, and submits that the findings recorded by the trial Court are in consonance with the evidence brought on record, and therefore, the appeal may be dismissed.

10. We have given careful consideration to the submissions of the learned counsel appearing for the appellant, and the learned APP appearing for the respondent—State. With their able assistance, carefully perused the entire evidence so as to find out whether the findings recorded by the trial Court are in consonance with the evidence brought on record or otherwise. It appears that the prosecution examined in all 9 witnesses in support of its case. The FIR filed by

Nurjahan herself is produced at Exh.18. The offence came to be registered on the basis of the FIR lodged by Nurjahan. The evidence of Dr.Nivrutti Wanole is recorded at Exh.12. The evidence of husband of deceased, namely Sk. Chand Sk. Usman, is recorded at Exh.13. The evidence of son of deceased namely Sk. Ayas is recorded at Exh.14. The evidence of PHC Kacharu Chavan is recorded at Exh.16. The FIR of Nurjahan is recorded at Exh.18. Copy of the letter under which request was made to the Special Executive Magistrate to record dying declaration of Nurjahan is produced at Exh.19. The letter sent to the Medical Officer to certify the condition of Nurjahan before recording her FIR is produced at Exh. 17. The evidence of Special Executive Magistrate, Mr.Magan Pawar, who recorded the dying declaration of Nurjahan, is recorded at Exh.20. PW-6 Sk.Farooq, brother-in-law of deceased is examined at Exh.23. The neighbour

of Nurjahan, namely Kamalabai Chandaliya is examined at Exh.24. The evidence of ASI Devidas Jadhav is recorded at Exh.25. Lastly, the evidence of Investigating Officer Sadananad Wayasepatil recorded at Exh.33. The C.A. report is produced at Exh.35, and the panchnama of spot under which the articles were seized is produced at Exh.27. The postmortem report is produced at Exh.8, and the provisional postmortem report is produced at Exh.9. All these documents have been admitted on behalf of the accused. The letter under which the seized articles were sent to C.A. is produced. This is all the evidence that has been led by the prosecution to prove its case.

In the present case, though the Special Executive Magistrate recorded dying declaration at Exh.19, the said has been discarded by the trial Court. We have carefully perused the said dying declaration,

and we find that the findings recorded by the trial Court while discarding the said dying declaration are correct. The said dying declaration suffers from procedural as well as legal infirmities, and the same has been rightly disbelieved by the trial Court.

11. The main piece of evidence, which is the basis of the order of conviction by the trial Court, is the dying declaration at Exh. 18. Upon careful perusal of the said dying declaration, it appears that, the said was treated as First Information Report. Upon perusal of the endorsement made by the Police Sub Inspector, Mukundwadi Police Station, Aurangabad, an offence vide Crime No.77/1999 came to be registered on 4th June, 1999, for the offence punishable under Section 307 of the IPC, and the time is mentioned as 21.30 hours. We have also carefully perused the letter written by the Police Officer of the

Mukundwadi Police Station to the Medical Officer, GHATI Hospital at Aurangabad. It is stated in the said letter that MLC bearing No.7433/NDW dtd. 04.06.1999 in respect of a burnt woman viz. Nurjahan wife of Sk. Chand, who is 90% burnt is admitted in the Hospital for treatment. A request is made to give opinion as to whether said lady is in a position to give statement or otherwise. Therefore, the Medical Officer made endorsement on the said letter that she was in a position to give statement. It appears that the said letter was marked at Exh.17. The said letter was carried by one Police Head Constable Kachru Namdeo Chavan to the Medical Officer, Ghati Hospital at Aurangabad. On the said letter, the Medical Officer has put his endorsement at 5.35 p.m. that the patient by name Nurjahan is conscious and oriented and she is able to give statement. However, on the dying

declaration at Exh.18 which was registered as FIR subsequently, there is no endorsement of the Medical Officer that Noorjahan was conscious and oriented to give dying declaration. It appears that the said dying declaration was recorded at 21.30 hours. There is no mention of starting time of recording of such dying declaration and when recording ended.

12. Dr.Nivrutti Dhonbarao Wanole was examined as [PW-1]. In his deposition he stated that on 4th June, 1999, he was working as Medical Officer in the Medical College Hospital at Aurangabad. On that day at 2.00 p.m. the patient by name Nurjahan was brought to the Hospital for medical treatment by one Sk. Gulab. She gave history that when she was sleeping on the bedstead, her husband's another wife Aminabi poured kerosene on her person and set her on fire with match stick. She had sustained 90% burn injuries. Along

with her, one child aged about 3 years was also brought for treatment. He had also sustained 2% burn injuries. However, he admitted in his cross examination that he did not obtain signature of the person who brought the patient, on M.L.C. register. He stated that the child was brought afterwards by Sairabegum and Sk. Gulam Rasul. He stated that he personally did not treat the patients. It is also relevant to mention that Dr.Nivrutti Wanole [PW-1] stated that Nurjahan gave history that when she was sleeping on the bedstead, her husband's wife Aminabee poured kerosene on her person and with match stick set her on fire. However, when he deposed after lapse of considerable period before the Court, the said statement made by him was without having any record or MLC register. It is admitted by him in the cross examination that he did not obtain signature of the person who brought the

patient, on MLC register. The suggestion was also given to him that patient was brought by Sk. Chand, and the medical history was given by Sk. Chand i.e. husband of Nurjahan and not by the patient, however, the said suggestion is denied, nevertheless in absence of entry in the MLC register, who brought the patient in the Hospital, the said suggestion also assumes importance, in view of the defence taken by the appellant that to save Sk.Chand himself, he has falsely implicated the appellant in the alleged offence. In the peculiar facts of this case, since Nurjahan sustained 95% burn injuries, Nurjahan ought to have been examined by the Medical Officer soon before the recording of the dying declaration, and his presence throughout recording of such dying declaration, was necessary.

We have carefully perused the

contents of the dying declaration, which was treated as FIR [Exh.18]. Nurjahan stated that she married to Sk. Chand Sk.Usman who was working as truck driver about 10 years prior to filing the FIR. It is further seen that her husband, without her knowledge married to accused Aminabi, and he has one son from the accused. It is further seen that she was not pulling on well with Aminabi, and when she was residing with her husband, Aminabi was residing at her parental place. It is seen from her complaint that about 15 days prior to the incident, accused Aminabi's father reached her to their house at Aurangabad, and Aminabi was residing with them at Aurangabad. As she came to Aurangabad, she again started picking up quarrels with her, and she wanted her husband to give money to her and not to Nurjahan. As per the FIR, it is seen that the incident took place on 4th June, 1999, at about 2.00 p.m. Her husband Sk.Chand went to

his duty, and at about 2.00 p.m. when she was sleeping on the bedstead along with her minor son Ashpak, Aminabi was also sleeping on the floor and when Nurjahan was about to fall asleep, she felt kerosene dropping on her face, and when Nurjahan opened her eyes she saw accused Aminabi pouring kerosene on her person from german tin, and when she was trying to get up, Aminabi ignited match stick and threw burning match stick on her person, and as a result of which her saree caught fired and her body started burning. Then she ran out of the house and herself poured water on her person from the pot which was kept outside the house and tried to extinguish the fire.

13. Upon careful perusal of the dying declaration at Exh.18 from the original record, four thumb impressions are appearing on the said dying declaration. The trial Court has mentioned that there are three

thumb impressions. But, it appears that the said observation is not correct, and there are four thumb impressions, which are clearly visible. Admittedly, there is no endorsement made by the Medical Officer while recording the said dying declaration that Nurjahan was in a fit mental condition and well oriented to give such dying declaration. The time of recording of the said dying declaration is not mentioned. The said dying declaration [Exh.18] is treated as FIR, and the time is mentioned as 21.30 hours. Even if we consider the endorsement at Exh.17 given by the Medical Officer, the said endorsement was given at 5.35 p.m. It is not clear from the said document that as a matter of fact, whether the Medical Officer actually examined Noorjahan and then put his endorsement that, she was in a fit mental condition to give such dying declaration. Upon careful perusal of the postmortem report, time of death is

shown as 21.50 hours, it means the dying declaration [Exh.18], which was treated as FIR, was registered/recorded at 21.30 hours i.e. 9.30 p.m., and thereafter within 20 minutes Nurjahan died. In the peculiar facts of the present case, it will have to be held that the dying declaration is surrounded by suspicious circumstance inasmuch as there are four thumb impressions appearing on the said Dying Declaration. There is no endorsement of the Medical Officer about her mental and physical fitness to give such dying declaration, and further there is no mention of starting and ending time of recording of such dying declaration. Dr.Nivrutti Wanole [PW-1] has stated that Nurjahan sustained 90% burn injuries, however, the postmortem examination report shows 95% burn injuries.

14. The trial Court proceeded to accept the evidence of other prosecution witnesses

for the purpose of corroboration to the contents of the dying declaration at Exh.18, and concluded that the appellant is guilty for the offence punishable under Section 302 of the IPC. In the dying declaration at Exh. 18, Nurjahan stated that Ashpak, son of Nurjahan aged 3 years, was sleeping with her. However, the prosecution examined Sk.Ayas Sk.Chand as PW-3, another son of Sk.Chand, who stated that at the time of incident he was present in the house and saw that Aminabi poured kerosene and set ablaze Nurjahan. In the entire dying declaration, Nurjahan has not mentioned the name of Sk.Ayas Sk.Chand. In para 14, the trial Court observed that 'prosecution also heavily relied on the evidence of Sk. Ayas [Ashpak] son of deceased Nurjahan examined at Exh.14, who is 9 years old. It appears that the trial Court got confused in treating Sk. Ayas Sk.Chand and Ashpak are one and the same child, whereas

only the name of Ashpak is mentioned in the dying declaration by Nurjahan. It has come on record that Nurjahan had three children. There is suggestion given to Sk.Ayas Sk.Chand that at the relevant time he had gone to school, however, he denied the said suggestion. However, the answer given by Sk. Ayas Sk. Chand [PW-3], clearly indicated that at the relevant time he was school going boy, and Ashpak whose name is mentioned in the dying declaration by Nurjahan is another son. It has come on record in the dying declaration that at the relevant time the age of Ashpak was three years. If we treat Ashpak as eye witness, aged 3 years at the relevant time, by any stretch of imagination his statement could not have been recorded as eye witness.

In order to find out whether really Nurjahan stated the contents of the said dying declaration, it is relevant to make

reference to the cross examination of Sk. Ayas Sk. Chand. In his cross examination he stated that, it is true that his mother and father did not like Aminabee coming to their house for residence and there used to be quarrel amongst them. On that day in the morning his mother had quarrel with his father; she was telling him to send Aminabee to Kadrabad.

If the contents of the dying declaration at Exh.18 are carefully perused, it is mentioned that on 4th June, 1999, in the morning at 5 a.m. i.e. the date of incident, husband of Nurjahan namely Sk.Chand went to attend his duty, since he was working as driver, and only Nurjahan, children and Aminabi were in the house. If the above-mentioned portion of the cross examination of Sk. Ayas Sk. Chand [PW-3] is taken into consideration, he stated that on the date of incident i.e. on 4th June, 1999, in the

morning his mother had quarreled with his father; in that case the statement appearing in the dying declaration that father of PW-3 Sk.Chand and husband of Nurjahan went to attend the duty at 5.00 a.m. does not appear to be in conformity with the evidence of the PW-3. Therefore, as already observed, the dying declaration at Exh.18, which was treated as FIR, was surrounded by the suspicious circumstance, and therefore, the trial Court ought to have been more careful while scrutinizing the contents of the said dying declaration and other evidence brought on record by the prosecution.

15. Coming to the evidence of Sk.Chand Sk.Osman, who was examined as PW-2. Even according to the prosecution case he was not present, and according to him, Nurjahan orally told him about the said incident that Aminabi poured kerosene on her person and set her on fire. If we are not prepared to

believe the dying declaration at Exh.18 itself, the alleged oral dying declaration with Sk.Chand [PW-2] alone cannot form basis to sustain conviction of the appellant. It is also relevant to mention that during cross examination of Sk. Chand [PW-2], he admitted that Nurjahan had filed criminal case under Section 498-A of the IPC against him, his mother and sister. In that case, there was compromise. Nurjahan had also filed application for maintenance. The said compromise was recorded in the year 1997. He also stated that Aminabee never stayed with him, when Noor Jahan was residing with him. Only for last 8 days prior to the incident, Noor Jahan and Aminabee resided together with him. He also stated that he did not like Aminabee coming to his house to reside. There are certain suggestions given to him by the defence that, due to his liking to Aminabee in last 8 days preceding the date of

incident, and sexual intercourse with her during said period, Noorjahan picked up quarrel with him. There was also suggestion given to him that he sent Aminabee to the Bazar and while Noor Jahan was alone in the house, Nurjahan herself set her on fire, however, he denied said suggestion. He denied the suggestion that apprehending his involvement in the crime, he gave name of Aminabee before the Police, Doctor and the Executive Magistrate. However, the fact remains that to probabilise the defence taken by the appellant, the said suggestion was given by the defence.

Upon careful perusal of the entire evidence brought on record, the prosecution has not convincingly proved the presence of the appellant in the house at the relevant time. The evidence of Kamlabai Chandaliya [PW-7] was fatal to the prosecution case

inasmuch as she was residing in the same locality just two houses away from the house of Nurjahan at the relevant time. She stated in her deposition that the incident took place at about 2.00 p.m. She was at her house. People started shouting that woman had been burnt, then she came out of the house. She was at her house. As nobody was taking her to the Hospital, she took her to the Ghati Hospital in a rickshaw. She stated that she had no talk with that burnt woman on the way to the Hospital. She did not ask her as to how she burnt.

No doubt can be raised about happening of such incident, and the fact that Nurjahan sustained 95% burn injuries. However, the real question is who was responsible for the aforesaid incident. The appellant has taken two fold defence; *firstly* Nurjahan herself poured kerosene and set

herself ablaze; and *secondly*, in order to save himself Sk.Chand, he falsely implicated the appellant Aminabi. In the said background, it was fatal for the prosecution to convincingly prove the presence of Aminabi in the house at the relevant time, and *secondly*, the evidence of Kamlabai [PW-7] would have been turning point in the prosecution case inasmuch as she would have thrown light on the aspect; who is real author of the said incident? It appears that though she stated in her evidence that she took Nurjahan to the Ghati Hospital in a rickshaw, however, she stated that she had no talk with Nurjahan on the way to the Hospital, and Nurjahan did not tell her who poured kerosene and set her ablaze. She specifically denied suggestion that while she was taking Nurjahan in auto rickshaw to the Hospital, she asked Nurjahan as to how she burnt, and that Nurjahan told that her co-

wife burnt her. She specifically stated that Nurjahan did not talk in the auto rickshaw. Kamlabai [PW-7] should have been first person to whom Nurjahan ought to have narrated the incident. Kamlabai [PW-7] also denied suggestion that she saw Aminabee coming out from the house at the relevant time. Therefore, the evidence of Kamlabai [PW-7] assumes importance, since she was an independent witness.

Upon careful perusal of the evidence of Kacharu Chavan [PW-4], he was working as Police Head Constable at the relevant time. In his deposition he stated that the Doctor made endorsement on the letter itself certifying that Nurjahan was in a position to make statement, and the name of the said Medical Officer is Pramod Salve. It is not clear from the evidence of Kacharu Chavan [PW-4] that as a matter of fact that, whether

Doctor Pramod Salve really examined Nurjahan before giving endorsement. Admittedly, the said Medical Officer Pramod Salve is not examined by the prosecution. He [PW-4] also admitted in his cross examination that three thumb impressions are seen on the statement of Nurjahan at Exh.18. As first two thumb impressions were not properly impressed, third thumb impression was taken. However, he admitted that he did not mention on the statement that as earlier thumb impressions were not properly impressed, third thumb impression was taken. Therefore, the evidence of Kachru Chavan [PW-4], who recorded the statement at Exh.18, clearly shows that he obtained three thumb impressions of Nurjahan. Though he obtained endorsement of the Medical Officer at 5.35 p.m. it is not clear whether that Medical Officer really examined Nurjahan. Even in his evidence Kachru Chavan [PW-4] has not stated that he satisfied

himself by putting certain questions to Nurjahan that she was in a fit mental and physical condition and was oriented to give such dying declaration. It creates doubt in the mind that, whether Nurjahan was really in a fit mental and physical condition to give such dying declaration. The defence taken by the appellant cannot be said to be improbable.

16. In the light of the discussion in the foregoing paragraphs, we are of the considered view that, the trial Court while recording the findings of conviction of the appellant has not correctly appreciated that, the dying declaration at Exh.18 was surrounded by the suspicious circumstance, and there is no endorsement by the Medical Officer about mental and physical fitness of the Nurjahan to give such dying declaration.

17. In the light of the discussion in

the forgoing paragraphs, we are of the view that, the evidence brought on record by the prosecution, to uphold the conviction of the appellant, is not cogent, convincing and sufficient. In the case of *Mehiboobsab Abbasabi Nadaf V. State of Karnataka*¹, the Supreme Court held that conviction can indisputably be based on a dying declaration. But before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. The Division Bench of the Bombay High Court in the case of *Manik Vanaji Gawali V. State of Maharashtra*² has taken a view that even if a certificate by an expert about fitness of state of health is placed on record, such certificate by itself will not prove the fact represented therein, rather it will have to be proved by the medical witness by stepping into witness box. In that view of the matter, the benefit

1 [2007] 13 SCC 112

2 2013 Cri.L.J. 972

of doubt will have to be given to the appellant accused.

18. For the reasons afore-stated, we allow the Appeal, and quash and set aside the impugned judgment and order of conviction and sentence dated 21st June, 2001 passed by the Sessions Judge, Aurangabad in Sessions Case No.278/1999, and acquit the appellant from all charges. Fine amount deposited, if any, by the appellant shall be refunded to her. Bail bond, if any, shall stands cancelled.

[S . M . GAVHANE]
JUDGE

[S . S . SHINDE]
JUDGE

DDC