

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

CRIMINAL APPEAL NO. 333 OF 2001

The State of Maharashtra
Through Police Station,
Chikalthana, Dist. Aurangabad. .. **Appellant.**

Versus

1. Shaikh Musa s/o Shaikh Vajir
Age : 19 years, occu. : agri.,
R/o Chikalthana, Dist. Aurangabad
2. Shaikh Vazir s/o Shaikh Anwar
(Abated since died).
3. Habibabegum w/o Shaikh Vazir
Age : 55 years, occu. : agri.,
R/o as above.
4. Shaikh Hussain s/o Shaikh Vazir
Age : 20 years, occu. : agri.,
R/o Chitegaon, Taluka and
District Aurangabad. .. **Respondents.**

Mr. S.J. Salgare, A.P.P. for the appellant/State.
Mrs. R.S. Kulkarni, Advocate for respondent Nos.1, 3 & 4
(Appointed by the Court).
Appeal is abated against respondent No.2 as per order of
this Court dated 24.07.2017.

**CORAM : T.V. NALAWADE &
SUNIL K. KOTWAL,JJ.**

DATED : 31-07-2017.

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

1. This appeal is filed by the State against the judgment and order of acquittal dated 17.04.2001 passed by Additional Sessions Judge, Aurangabad in Sessions Case No. 392/1999, acquitting the original accused Nos.1 to 4 of the offences punishable under Sections 302, 306 and 498-A read with Section 34 of the Indian Penal Code (For short "I.P.C.").

2. Respondent Nos.1 to 4 are the original accused persons. Respondent No. 2 Shaikh Vazir s/o Shaikh Anwar died during pendency of the appeal and appeal against him is abated.

3. Facts leading to institution of this appeal are that accused Nos.1 to 4 were prosecuted for the offences punishable under Sections 498-A, 302 and 306 read with Section 34 of I.P.C. Prosecution case, in brief, is that Zakira Begum w/o Shaikh Musa (hereinafter referred as "deceased") married to accused No.1 prior to one year from the date of incident. Accused No.2 is father and accused No.3 is mother as well as accused No.4 is brother of accused No.1.

4. After marriage, for about one month accused treated deceased properly and thereafter they started ill-treatment to her over the demand of cupboard and an amount of Rs. 15,000/- for renovating their house. Accused used to tell the deceased that she was black and they did not want to keep her and they want to divorce her. Deceased informed her parents about this ill-treatment whenever she visited her parental house. Deceased also informed her uncle Shaikh Mansoor Shaikh Gafoor about the ill-treatment given to her for demand of accused persons. The parents of the deceased could not fulfill the demand of accused persons, and therefore, the ill-treatment continued.

5. On 01.08.1999 at about 9.00 p.m. Shaikh Mansoor (PW-6) was informed that the deceased had sustained burn injuries and she had been hospitalized. Therefore, Shaikh Mansoor (PW-6) visited the hospital and inquired with the deceased, who was admitted in the hospital for treatment. She disclosed that on the date of incident accused had beaten her, abused her for not fulfilling the demand and thereafter accused

Nos.1, 2 and 4 caught hold her while accused No.3 pored kerosene on her body and set her ablaze. Shaikh Mansoor (PW-6) immediately informed the parents of deceased about the occurrence. The parents of deceased (PW-3 & PW-4) reached to M.G.M. Hospital, Aurangabad around midnight on 02.08.1999 at about 1.00 hour. When Shaikh Shamsuddin (PW-3) and Sabera Begum (PW-4) inquired with their daughter, she informed them about the above-said occurred incident. By that time, Police Station Chikalthana was informed by the Medical Officer, M.G.M. Hospital, Aurangabad about the injured deceased vide letter (Exh.9). On the next day morning Head Constable R.K. Meher (PW-1) visited M.G.M. Hospital at about 10.15 a.m. and gave letter (Exh.10) to Medical Officer to ascertain whether the deceased was conscious and oriented. The then Medical Officer permitted Head Constable Meher (PW-1) to record dying declaration of deceased as she was conscious. Therefore, he recorded first written dying declaration (Exh.11) of deceased on 02.08.1999 at about 10.15 a.m. Head Constable Meher (PW-1) also issued letter (Exh.12) to Special Executive Magistrate Shri Bomble (PW-2) requesting him to record dying

declaration of deceased. Accordingly, on 02.08.1999 at about 03.15 p.m. Special Executive Magistrate Shri Bomble (PW-2) visited M.G.M. Hospital and after ascertaining that the deceased was conscious and in a condition to give statement, recorded second written dying declaration (Exh.14) of the deceased in between 3.30 p.m. to 3.55 p.m. The first dying declaration (Exh.11) obtained by Head Constable Meher (PW-1) was treated as F.I.R. and accordingly Crime No. 81/99 under Sections 498-A and 307 read with Section 34 of I.P.C. was registered against accused at Police Station, Chikalthana.

6. During the course of investigation, A.S.I. Andhale (PW-7) visited the spot, had drawn spot panchnama (Exh.22) in presence of panchas, attached burnt pieces of clothes of the deceased and recorded statements of witnesses. On 05.08.1999 at about 7.45 p.m. deceased succumbed to the burn injuries. Accordingly, inquest panchnama (Exh.18) was drawn. Dr. S.P. Tapse (PW-8) performed autopsy examination of the dead body of deceased and issued postmortem notes (Exh.19). He opined that the cause of death of deceased was “shock due to burns”.

After completion of the investigation, charge-sheet was submitted before Judicial Magistrate, First Class, Aurangabad against the accused persons.

7. Offences punishable under Sections 302 and 306 of I.P.C. being exclusively triable by the Court of Sessions, this case was committed to Sessions Court, Aurangabad.

8. Charge (Exh.3) was framed against accused persons for the offences punishable under Sections 498-A, 302 and 306 read with Section 34 of I.P.C. Charge was read over to accused. Accused pleaded not guilty and claimed trial.

9. Prosecution examined total 10 witnesses. Defence of the accused is of total denial.

10. After considering the evidence placed on record by prosecution, the learned Sessions Judge, Aurangabad pleased to acquit accused Nos.1 to 4 of the offences punishable under Sections 498-A and 302, alternately under Section 306 read

with Section 34 of I.P.C. Therefore, this appeal arises.

11. Learned A.P.P. for the State placed reliance on three oral dying declarations before the parents and uncle of the deceased as well as two written dying declarations obtained by Head Constable Meher (PW-1) and Executive Magistrate Shri Bomble (PW-2). According to A.P.P., the learned trial Court wrongly disbelieved the dying declarations on the ground of possibility of tutoring.

12. In reply, learned Counsel Smt. Rashmi Kulkarni, Advocate for the respondents supported the judgment of acquittal on the ground that the prosecution cannot rule out the possibility of tutoring by parental relatives of the deceased before recording written dying declarations. She also pointed out that the prosecution cannot establish that at the time of recording the two dying declarations (Exhs. 11 and 14) the deceased was in a fit state of mind to give the statement.

13. No doubt, contention of learned A.P.P. is absolutely correct that on the basis of dying declaration, conviction of the

accused can be based, provided that it is free from all infirmities. There shall not be any possibility of tutoring, mis-identity of the assailants or unstable mental condition of the deceased.

14. In the case at hand, as per prosecution case itself the first dying declaration (Exh.11) was recorded by Head Constable Meher (PW-1) on 02.08.1999 at about 10.15 a.m. and before recording that dying declaration, Shaikh Mansoor (PW-6), Shamsuddin (PW-3) and Sabera Begum (PW4) met to the deceased in M.G.M. Hospital. These three witnesses categorically deposed regarding their meeting with deceased in M.G.M. Hospital prior to recording of dying declaration by Head Constable Meher (PW-1). Therefore, prosecution witnesses themselves have provided possibility of tutoring of deceased by her parental relatives. On this count itself both written dying declarations relied upon by the prosecution cannot be considered as free from all infirmities.

15. Head Constable Meher (PW-1) deposed before the

Court all details regarding his visit to M.G.M. Hospital, Aurangabad on 02.08.1999 at about 10.15 a.m. and regarding recording of dying declaration (Exh.11) after obtaining necessary permission from the Medical Officer on letter (Exh.10). However, from his evidence it becomes clear that before recording dying declaration he did not ask preliminary questions to the deceased to satisfy himself that she was in a fit state of mind to give the statement. From his cross-examination it also emerges that he obtained the certificate of fitness of deceased to give statement from Casualty Medical Officer (C.M.O.) whose office is at the distance of 50 to 60 ft. from the Ward where the deceased was admitted. He does not say that at the time of recording dying declaration of deceased, C.M.O. was present near the deceased to observe the condition of deceased. Even this important witness nowhere deposed that before recording of dying declaration the C.M.O. personally examined the deceased and thereafter issued certificate regarding fitness of deceased to give statement. Therefore, we have no hesitation to hold that Head Constable Meher (PW-1) did not take necessary precaution to confirm that at the time of

recording dying declaration of the deceased, she was in a fit state of mind to give the statement. So also, Dr. M.R. Bagde (PW-10), who was present in the Casualty Ward in M.G.M. Hospital on 02.08.1999, has admitted in his cross-examination that there was excessive loss of fluid due to burns to the deceased and because of excessive loss of fluid, the mental condition of the deceased was disturbed. This clear admission of Dr. Bagde (PW-10) together with the above discussed testimony of Head Constable Meher (PW-1) is sufficient to hold that the prosecution failed to prove that at the time of recording of dying declaration (Exh.11) of deceased by Head Constable Meher (PW-1) the deceased was in a fit state of mind to give the statement. Therefore, considering the possibility of tutoring as well as unfit mental state of deceased to give statement, the dying declaration (Exh.11) recorded by Head Constable Meher (PW-1) deserves to be discarded.

16. Second dying declaration is recorded by Special Executive Magistrate Shri Bomble (PW-2), who claims that on 02.08.1999 he visited M.G.M. Hospital, Aurangabad and

recorded dying declaration (Exh.14) of the deceased in between 3.30 p.m. to 3.55 p.m. However, the testimony of Shri Bomble (PW-2) is of no help to the prosecution to prove second dying declaration (Exh. 14) for the simple reason that in his entire evidence he did not state as to exactly what statement was given by deceased regarding the cause of burn injuries sustained by her.

17. The Division Bench of this Court in the cases of;

- (1) **Deorao Sonbaji Bhalerao Vs State of Maharashtra (2008 ALL MR (Cri) 1921)**
- (2) **Jivan Tulsiram Dhavali Vs State of Maharashtra (2008 ALL MR (Cri) 2018)**
- (3) **Laxmibai Maruti Satpute Vs State of Maharashtra (2010 ALL MR (Cri) 182)**
- (4) **Faizal Mohammed s/o Abdulla Banaim Vs State of Maharashtra (2010 ALL MR 2241)**

held that it was incumbent on the Scribe to prove the contents of dying declaration. In other words, it was incumbent for the Scribe to state in his substantive evidence as to what was narrated to him by the injured in respect of the injuries sustained by the injured. In absence of such evidence, the

Division Bench has held that the dying declaration does not stand proved. The ratio of above-said judgment is squarely applicable to the facts of the present case. On this count alone the second dying declaration (Exh.14) recorded by Special Executive Magistrate Bomble (PW-2) has to be discarded.

18. No doubt, Shaikh Shamsuddin (PW-3), Sabera Begum (PW-4) and Shaikh Mansoor (PW-6) have categorically deposed before the Court that when they inquired with the deceased in M.G.M. Hospital, that time she disclosed before them all the above-said occurred incident that she was put on fire by her mother-in-law and that time she was held by remaining accused persons. However, these oral dying declarations in presence of close relatives of the deceased cannot be relied upon unless corroborated by other circumstantial evidence. However, conduct of these parental relatives is abnormal. Despite knowing occurrence, they did not inform police or anybody as to what accused had done with deceased.

19. In the case at hand, it is the case of the prosecution that at the time of occurrence mother-in-law of the deceased i.e. accused No.3 poured kerosene on the body of deceased and set her ablaze. Dr. M.R. Bagde (PW-10), who was present in M.G.M. Hospital when deceased was admitted in the said hospital by her husband, has admitted in his cross-examination that while examining the deceased he did not find kerosene smell. Even Dr. Tapase (PW-8), who performed autopsy examination of the dead body of deceased, has admitted that no kerosene residues were found on the body of deceased. Even postmortem notes (Exh.19) does not show that there was kerosene smell with the body of deceased. Thus, the admissions on record belied the prosecution theory that accused No.3 poured kerosene on the body of deceased and set her ablaze. On the other hand, case paper of deceased shows that at the time of admission and even thereafter for two times the deceased gave history of injuries to her as burst of stove. Thus, the possibility of accidental burns has been brought on record.

20. In the circumstances, the evidence placed on record

by the prosecution certainly falls short to establish the guilt of the accused under Section 302 and 498-A, in the alternate under Section 306 read with Section 34 of I.P.C. The learned trial Court has assigned proper reasons while coming to the conclusion of acquittal of accused. The view taken by the learned trial Court is possible view, and therefore, judgment of acquittal cannot be interfered in the present appeal. Accordingly, we pass the following order.

ORDER

1. Criminal Appeal No. 333/2001 stands dismissed.
2. The acquittal of the respondents in Sessions Case No. 392/1999 is confirmed.
3. Under Section 437-A of the Code of Criminal Procedure, accused No.1 Shaikh Musa s/o Shaikh Vazir, accused No.3 Habiba Begum w/o Shaikh Vazir and accused No.4 Shaikh Hussain s/o Shaikh Vazir shall furnish before the trial Court the bail bonds with surety for the amount of Rs. 5,000/- (Rupees Five Thousands) 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.

4. Fees of learned Counsel Smt. Rashmi Kulkarni, Advocate appointed as amicus curie, is quantified at Rs. 4,000/-.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

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