

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 401 OF 2001
WITH
CRIMINAL APPLICATION NO. 590 OF 2017

1. Pandurang s/o. Limbaji Sapkal,
Age 68 years, Occu. Agri.,
2. Sangram s/o. Pandurang Sapkal,
Age 36 years, Occu. Service,
3. Sushilabai Pandurang Sapkal,
Age 65 years, Occu. Agri. & Household,

All R/o. Deolali, Taluka and
District Osmanabad
At present in JAIL

**....Appellants.
(Ori. Accused 1 to 3)**

Versus

The State of Maharashtra

**....Respondent.
(Ori. Complainant)**

Mr. R.N. Dhorde, Senior Counsel i/b. Mr. V.R. Dhorde, Advocate for appellants.

Mr. S.J. Salgare, APP for respondent/State.

**CORAM : T.V. NALAWADE AND
S.M. GAVAHANE, JJ.**

RESERVED ON : 18/09/2017
PRONOUNCED ON : 11/10/2017

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Sessions Case No. 168/2000, which was pending in the Court of 2nd Additional Sessions Judge, Osmanabad. The Trial Court has

convicted all the appellants for the offences punishable under section 302 r/w. 34 of Indian Penal Code ('IPC' for short) and under section 342 r/w. 34 of IPC. Both the sides are heard.

2) The facts leading to the institution of the appeal can be stated as follows :-

Deceased Shashikala was daughter of Harishchandra Thavale, who is resident of village Surdi, Tahsil Osmanabad. She was given in marriage about 12 years prior to the date of incident to Dixit Pandurang Sapkal. Dixit is son of appellant Nos. 1 and 3 and brother of appellant No. 2. Appellants are residents of village Deolali and they were living in Joint Hindu Family with the appellants. After 3-4 years of the marriage, there was some dispute and so, the deceased had lived for some time in the house of her parents. Then there was settlement and deceased had returned to matrimonial house. After 4-5 years of the marriage, Dixit had started living separate from his parents and brothers, though he was living in the same building. One room was allotted to Dixit. Dixit and his wife used to earn livelihood by doing labour work. The deceased has left behind three issues.

3) There was dispute between Dixit and the appellants as appellants were not giving agricultural land of the share of Dixit in

his possession and they were not effecting partition. Due to that, the deceased and Dixit used to pick up quarrels with the parents.

4) The incident in question took place on 8.4.2000 in the matrimonial house of deceased. At about 7.00 p.m. the deceased returned to the house from the place of work. She cooked food and she started taking dinner. On that day, there was quarrel between appellant No. 3 Sushila, mother of Dixit and Dixit. Due to the quarrel, appellant No. 3 had become angry. Dixit went outside of the house to answer the nature's call. The appellant No. 3 then started giving abuses to the deceased and the deceased questioned her and said that she should not give abuses. After that accused Nos. 1 and 2 entered the room where deceased was living with Dixit. They closed the door by putting latch from inside and then appellant No. 3 poured kerosene on deceased and appellant No. 1 set fire to her. During incident, appellant No. 2 was holding deceased.

5) When clothes of the deceased caught fired, she started shouting. After hearing shouting of the deceased, Dixit rushed back. He used blanket to extinguish the fire, but the deceased sustained injuries all over the body. Dixit shifted the deceased to Civil Hospital, Osmanabad in a private jeep. The Civil Hospital by sending reference letter informed to the police station that such patient was admitted.

One police constable of Osmanabad Police Station visited the hospital and recorded the statement of Shashikala, deceased. In the first disclosure made to police, she blamed the parents and brother of Dixit for the incident by saying that they had set her on fire.

6) Police requested Executive Magistrate to record the dying declaration and so, the Executive Magistrate also recorded the dying declaration. In that dying declaration also, the deceased blamed appellants for burn injuries sustained by her.

7) Uncle of the deceased namely Machindra is a resident of Osmanabad. After learning about the incident, he went to Civil Hospital with his wife Chaya. Information was given about the incident to parents of Shashikala and they also went to Civil Hospital on the same night. To these persons also, Shashikala disclosed the incident and she blamed parents and brother of the husband for the burn injuries sustained by her.

8) On the basis of first disclosure made by Shashikala to police, the crime came to be registered for offences punishable under sections 307, 504, 34 etc. of IPC at C.R. No 39/2000 in Osmanabad Rural Police Station. During the course of investigation, police recorded statements of some relatives of deceased on

parent's side including the aforesaid persons. On 9.4.2000 panchanama of the spot where incident had taken place was prepared in presence of panch witnesses. Accused Nos. 1 and 3, the in-laws were present in Civil Hospital and they came to be arrested. Appellant No. 2 also came to be arrested. Shashikala died on 10.4.2000. Post mortem ('P.M.' for short) was conducted on the dead body and on the basis of statement of father of deceased, crime for offence punishable under section 302 r/w. 34 of IPC and other offences came to be registered. The clothes of deceased were taken over. The articles like earth sample mixed with kerosene and pieces of partly burn clothes of the deceased, which were lying on the spot of incident and which were lying in front of the room were taken over during the preparation of spot panchanama and they were sent to C.A. Office. Kerosene was detected in these articles. One can containing some kerosene was also found in the room and it was also taken over.

9) In the Trial Court, charge was framed against appellants for the aforesaid offences. All the accused pleaded not guilty. The prosecution has examined in all nine witnesses for proving the offences. The accused persons took the defence of total denial. No defence evidence was given. It was contended in the statement given under section 313 of Criminal Procedure Code ('Cr.P.C.' for

short) that they had no knowledge as to what had happened on that day between the deceased and her husband and their attention was drawn first time when she ran out of the room and her clothes had caught fire. They contended that they had shifted the deceased to Civil Hospital.

10) The Trial Court believed the two recorded dying declarations and also the oral dying declarations which were made to father of the deceased and to Chaya. The points raised by the learned Senior Counsel are being discussed at proper places hereinafter.

11) The defence has disputed everything including the case of prosecution that Shashikala died homicidal death. When the death takes place due to burn injuries, there are always three possibilities like sustaining burn injuries in accidental fire, sustaining injuries when deceased wanted to commit suicide and sustaining injuries when she was set on fire to finish her. Due to these circumstances, in a case like present one, only on the basis of medical evidence, finding cannot be given as to whether it was homicide. The medical evidence can be considered only to ascertain the condition of the patient if there is material like dying declarations of the deceased.

12) The inquest panchanama at Exh. 17 is admitted by the defence. This document shows that there were burn injuries on both hands, palms, fingers etc. There were burn injuries over face, neck, chest, abdomen, private parts, back, thighs etc. Except the soles of foot, almost on every part, there were burn injuries. The deceased was wearing nylon sari and it can be said that due to this circumstance the intensity of burns must have increased.

13) Dr. Jawale (PW 2) is examined to prove the P.M. report which is at Exh. 28. Surprisingly, the doctor has not mentioned in P.M. report the percentage of burn injuries noticed by him on every part or limb of the body, which is requirement of law. Due to that, the original record was called like bed head ticket and then on that basis, the evidence is given by doctor. Substantive evidence and this record (Exh. 29/1 to 29/4) show that the extent of burns over upper extremities, left and right was 9%. Initially in case papers, the extent of burn was mentioned as 68%, but subsequently, it was mentioned as 96%. This record and the evidence shows that both the hands, palms of the deceased had burn injuries. This circumstance needs to be kept in mind as thumb impressions are shown to be obtained on the two recorded dying declarations. The Trial Court has held that as the thumb impressions were obtained immediately within few hours of the incident, it was possible to

obtain thumb impressions.

14) The bed head ticket mentioned above shows that the deceased was admitted in Civil Hospital at 10.05 p.m. of 8.4.2000 and the death took place on 10.4.2000. In the bed head ticket, it is mentioned that there were burn injuries, but how the burn injuries were sustained was not informed to the hospital. The time of incident was informed as 7.30 p.m. of 8.4.2000. In the bed head ticket, there is no specific mention that for the purpose of giving opinion regarding fitness of patient at the time of recording of dying declaration, the patient was examined. However, there is entry to show that at about 11.00 p.m. on 8.4.2000, the patient was examined. The second examination was made at 9.00 a.m. of 9.4.2000.

15) The aforesaid circumstances and the record show that nothing was informed to the Civil Hospital as to how the deceased had sustained injuries. If the deceased was conscious, in ordinary course, doctor would have made inquiry with the deceased at 10.05 p.m. and on that basis, history would have been recorded in the bed head ticket. This did not happen. This circumstance needs to be kept in mind as such information could have been treated as first disclosure of the deceased and it could have been used as statement

under section 32 of Evidence Act.

16) After admission of deceased in the hospital at about 10.05 p.m. reference letter must have given to police by the hospital and after that police must have visited the hospital. This circumstance needs to be kept in mind as the first dying declaration is shown to be recorded at 11.30 p.m. of 8.4.2000. The time of starting of recording and the time of finishing recording is not mentioned on the first dying declaration, Exh. 31.

17) Police Head Constable Patil (PW 3) has given evidence on the first dying declaration, Exh. 31. He has deposed that first he made inquiry with Dr. Diwan (PW 8) from Civil Hospital and Dr. Diwan came with him to the burn ward and Dr. Diwan gave opinion that deceased was conscious and able to give statement. He has deposed that he made inquiry with the deceased about name etc. and then he asked about the incident and the incident narrated by her was recorded by him in Exh. 31. He has given evidence that the contents of the dying declaration were read over to the deceased and when she admitted it, he obtained her thumb impression on the statement. He has deposed that he obtained endorsement of Dr. Diwan about the physical condition of patient on Exh. 31. Dr. Diwan (PW 8) is examined to prove the endorsement. He has deposed that

in his presence, the statement was recorded by Police Head Constable Patil and aforesaid procedure was followed by Patil. He has given evidence that he had given opinion that the patient was conscious and able to give statement.

18) Dr. Diwan (PW 8) had admitted patient in the hospital and so, he was cross examined on bed head ticket. He has not given reason as to why history was not asked to the patient. He admits that both the upper limbs had sustained burn injuries and when he was questioned as to how thumb impression could have been obtained due to burn condition of upper limbs, he deposed that time of 12 hours is required for formation of bullae and till that time, thumb impression can be obtained. This opinion cannot be accepted as due to burn injuries, one cannot get proper finger print expression. The Trial Court has, however, accepted the opinion given by Dr. Diwan.

19) In the evidence of Dr. Diwan (PW 8), it is brought on the record on the basis of bed head ticket that on admission he had immediately given injectable sedatives. The names of sedatives are mentioned by him in substantive evidence and also in bed head ticket and he has admitted that the deceased might have been under sedatives at the time of giving of the statement. This possibility

cannot be ruled out due to aforesaid record and substantive evidence. He has not given reason as to why the time of starting of recording was not mentioned and the time 11.30 p.m. is only mentioned on Exh. 31. This circumstance about first dying declaration, Exh. 31, needs to be kept in mind while ascertaining as to whether all the so called disclosures were made on time given by witnesses and whether they are consistent with each other or not.

20) The prosecution has examined Pathan (PW 7), the Executive Magistrate, who recorded the second dying declaration. His evidence is similar to the evidence of Police Head Constable Patil (PW 3) and he had also obtained opinion of Dr. Diwan. There is endorsement about the fitness of patient, which is proved in the evidence of Dr. Diwan (PW 8). The second dying declaration was recorded between 11.45 p.m. and 12.00 night. The circumstances which are mentioned already with regard to history and condition of patient need to be considered at the time of appreciation of the dying declaration which is at Exh. 41 also.

21) Harishchandra (PW 1), father of the deceased is resident of other village and so, it needs to be ascertained as to whether any relative from parent's side was present near the deceased when the dying declarations were recorded. In the cross examination,

Harishchandra (PW 1) has admitted that his real brother Machindra is resident of Osmanabad. He has admitted that when he reached Civil Hospital on that night, Machindra and his wife were present near the deceased. Evidence on record, particularly of Chaya (PW 4) shows that one requires hardly 10 minutes to cross the distance between the house of Machindra and the Civil Hospital.

22) In the evidence of Harishchandra (PW 1), one more circumstance can be found. His evidence shows that one Chandrakant Thavale of village Surdi, the village of the first informant gave information to him about the incident and in his vehicle, he went to the hospital. It is suggested to him that this man was sent by accused persons to give the news, but he has avoided to admit that. He has tried to say that Machindra had sent him. Machindra is not examined and Chaya (PW 4) has not given such evidence. This circumstance creates a probability that accused had given news about the incident to the parents of deceased immediately. Evidence of Chaya (PW 4) also shows that a message was given to them by Venkat Sapkal, nephew of accused No. 1 at about 10.30 p.m. on 8.4.2000. This conduct of the accused persons was not consistent with the guilt.

23) The evidence of father Harishchandra (PW 1) and the

spot panchanama show that in the vicinity of the house of accused, there were houses of many persons including Laxman Gaikwad and the house of Laxman Gaikwad is at the distance of 10 ft. from the spot of incident. In spite of this circumstance, no neighbour of the accused is examined by prosecution. No explanation is given for non examination of the neighbours. If the husband of the deceased could rush back from the place where he had gone to answer nature's call after hearing the shouting of the deceased, the neighbours would have also rushed to the spot. Further, nothing is said about children of the deceased. Considering the circumstance that the marriage had taken place more than 10 years back, it can be said that one or two issues must have crossed the age of 8 or 9 years and that issue could have given some information regarding incident. In the dying declaration itself, it is mentioned that the children were present in the house and in ordinary course also, the children must have been there. The non examination of the children of the deceased as witnesses has created serious doubt about the case of prosecution.

24) The evidence of Harishchandra (PW 1), father of deceased and Chaya (PW 4) shows that there was dispute between the deceased and her husband on one side and the accused persons on the other. Evidence is given that Dixit was demanding partition from the accused and they were not giving separate possession of

the land to Dixit. Even when there is such case of the State, no record is produced to show that the accused persons have ancestral property in which Dixit had some share. The evidence of Harishchandra (PW 1) shows that one property was purchased by accused No. 1, father of Dixit and one property is probably standing in the name of another brother of Dixit. Even if it is believed that Dixit was asking for partition and due to that the relations were strained, Dixit would have been good witness for prosecution on the incident. Dixit is not examined by the prosecution. Further, the motive can be used by both the State and also by the accused. If the accused were not ready to give separate possession of any property to the family of deceased, there was ground for her to implicate the accused due to vindictiveness. This probability needs to be kept in mind while giving weight to the dying declarations.

25) The contents of the first dying declaration show that the deceased had disclosed that there was quarrel between her husband and mother in law at about 7.00 p.m. on that day. It shows that children were at home. The deceased disclosed that due to this quarrel with the husband, accused No. 3 had become angry and she started giving abuses to the deceased. It was disclosed in this dying declaration that the deceased questioned accused No. 3, mother in law about the abuses and she said that accused No. 3 should not

give abuses. The disclosure shows that after that accused Nos. 1 and 2 entered her room, they closed the doors from inside by putting on latch. She disclosed that accused No. 2, brother in law held her in the incident, accused No. 3 poured kerosene on her person after fetching it and after that accused No. 3 set her on fire by using matchstick. She disclosed that she shouted loudly and after that husband came running towards her. She disclosed that by using blanket, the husband extinguished the fire. She disclosed that the incident took place at about 9.00 p.m. and it is her husband who had shifted her to Osmanabad Civil Hospital in a private jeep for treatment. The first disclosure does not show that as to when husband had left the room to answer the nature's call, though there is mention that after hearing shouting the husband came running towards her. In ordinary course, she must have given statement to her husband first about the incident and husband would have informed about that in the hospital to doctor if the deceased was not able to inform about it. It is already mentioned that in case papers no history of burn injuries is given. Thus, in first dying declaration, it was disclosed that accused No. 1 set fire to the deceased and other two accused had played active role in the way mentioned in the declaration.

26) In the second dying declaration, the deceased disclosed

that after 6.00 pm. the quarrel had started between accused No. 3 and her husband and when accused No. 3 started giving abuses, she said that accused No. 3 should not give abuses to husband. She disclosed that accused No. 3 then became angry and she started giving abuses to the deceased. Thus, in the second dying declaration indirectly, it was disclosed that it was continuous incident and there was no gap between giving abuses to the husband of the deceased first by accused No. 3 and then by giving abuses to deceased by accused No. 3. In the second dying declaration, it was disclosed that husband then left the room to answer the nature's call and then accused Nos. 1 and 2 took her inside of her room and accused No. 3 also entered her room. This story is little bit different as in the first dying declaration she had disclosed that she was already present in her room and there all the three accused entered. In the second dying declaration also, she disclosed that accused then closed the doors of the room from inside by putting on the latch and then accused No. 3 poured kerosene which was present in the house (in the room) and then accused No. 3 herself set the deceased on fire by using the matchstick. Thus, in the second dying declaration she disclosed that it was accused No. 3 who set her on fire and not accused No. 1. She disclosed that her husband rushed towards her when she started shouting and husband extinguished the fire. However, in this declaration, she disclosed that her husband and also

accused Nos. 1 and 3, the parents of the husband, had shifted her to Government Hospital, Osmanabad. This disclosure also shows that incident took place inside of the room where deceased was living with her family.

27) If the two recorded dying declarations are compared with each other, it can be said that there is inconsistency so far as the allegations made as against accused Nos. 1 and 3 are concerned. There are also aforesaid other inconsistencies which cannot be ignored. No injury was found other than burn injury and it is also not her case that she had sustained injuries due to use of criminal force. If the accused wanted to set her on fire, she would have definitely resisted and would have started shouting immediately after guessing about the intention of the accused. That did not happen. Thus, the story given in the second dying declarations does not appear to be probable in nature.

28) The evidence of Harishchandra (PW 1) father of deceased and the spot panchanama show that the parents of Dixit were living in separate room and accused No. 2 was also living in separate room. Specific admission is given that they had separated in mess. On the eastern side of these rooms, there is the public road. The incident took place at about 9.00 p.m. The neighbours

could have said about atleast the presence of the accused in the house at the relevant time, but neighbours are not examined. The observations are already made in respect of non examination of Dixit and issues of Dixit. It is admitted that accused No. 2 was in service in Osmanabad. Due to these circumstances, it was more necessary to examine somebody to prove that on that night accused No. 2 was present in the house. The aforesaid two dying declarations show that the role given to accused No. 2 is not that specific and it is vague.

29) If both the dying declarations are to be believed, they need to be compared with the spot panchanama. In the evidence of Investigating Officer, it is brought on the record that due to keeping of cot, the open space which had remained in the room was hardly 5 ft. in the width. This circumstance shows that there was no sufficient space for three accused persons and the deceased for happening of the incident in the manner described in the dying declaration. If kerosene was used and the incident took place in the manner described, in ordinary course, some accused would have sustained burn injuries. Accused Nos. 1 and 3 came to be arrested in the hospital itself as they had shifted the deceased to the hospital. Their clothes were not taken over to ascertain as to whether they had used kerosene in the incident. Thus, there is no circumstantial check to the disclosure made against the appellants.

30) The spot panchanama and other circumstances are sufficient to infer that fire started inside of the room where the deceased was living. The contents of C.A. report are sufficient to infer that kerosene was used in the incident. Some pieces of partly burn Sari of nylon were found in Ota portion, in front of room. The circumstances show that the fire was probably extinguished inside of the room and then the deceased was shifted from that room to outside.

31) All aforesaid circumstances create a probability that it was a suicide and the deceased had set fire to herself by using kerosene. Only after examination of the husband, the things would have become clear. Due to non examination of the husband, the possibility of suicide is not ruled out.

32) The evidence of Harishchandra (PW 1) father of deceased and Chayat (PW 4) is on dying declarations and their versions are as per the first dying declaration. The circumstances which are discussed in respect of the recorded dying declarations need to be kept in mind for appreciating the evidence of these two witnesses also. If the four dying declarations are considered together, it can be said that there are inconsistencies between the

two oral dying declaration and first dying declaration on one side and the second dying declaration on the other. The inconsistencies are already discussed. This Court has already made observations with regard to sedatives used and the admission given by doctor on use of sedatives. There is possibility that the patient was not alert and the persons who had already reached like Chaya and her husband had tutored her.

33) It is true that the dying declarations can be acted upon without corroboration. When there are multiple dying declarations and death takes place due to burn injuries, in such cases, it is the duty of the Court to scrutinize the dying declarations and see as to whether the surrounding circumstances corroborate or contradict the disclosures. It is also the duty of the Court to ascertain as to whether there was the possibility of tutoring or dying declarations are outcome of the imagination. When the dying declaration itself is suspicious, the Court needs to look for corroboration. In the present matter, due to the circumstances like use of sedatives, the use of thumb impression when both the hands had received burn injuries and the presence of uncle and aunt of the deceased before recording of the dying declaration, serious suspicion is created about both the recorded dying declarations. There are discrepancies with regard to details of occurrence as already observed.

34) The dying declaration is substantive piece of evidence. In cases like present one, it is up to the Court to decide what weight can be given to the dying declaration. Though there is no rule that dying declaration cannot be acted without corroboration, this proposition depends upon the facts and circumstances of each and every case. To the aforesaid dying declarations, the corroboration was necessary, but by withholding the witnesses, the prosecution has created more suspicion about the correctness and truth of the dying declarations made by the deceased. Thus, the dying declarations are not inspiring the full confidence. Even if the possibility of tutoring is overlooked, the possibility of disclosure due to vindictiveness has remained there due to aforesaid circumstances. This Court has no hesitation to hold that benefit of doubt needs to be given to accused persons due to aforesaid circumstances. This Court is placing reliance on the observations made by the Apex Court in the case reported as **(2001) 5 Supreme Court Cases 254 [Uka Ram Vs. State of Rajasthan]**.

35) The learned Senior Counsel for appellants placed reliance on following reported cases :-

(i) (2008) 5 Supreme Court Cases 468 [Amol Singh Vs. State of Madhya Pradesh],

(ii) AIR 2005 SUPREME COURT 1277 [State of Punjab Vs. Praveen Kumar],

(iii) (2011) 10 Supreme Court Cases 173 [Surinder Kumar Vs. State of Haryana].

These cases are on the inconsistencies between the stories given in dying declarations and surrounding facts and circumstances. They are also on the circumstances like multiple dying declarations. It is observed that even the manner of sprinkling kerosene and setting fire if found inconsistent with other circumstances then the Court can look to the dying declarations with suspicion. The effect of use of sedatives on dying declaration is also discussed in aforesaid cases and effect of non examination of the witnesses who were available is also discussed. The facts and circumstances of each and every case are always different. The relevant facts of the present matter are already quoted by this Court. In view of the aforesaid discussion, this Court has no hesitation to hold that the Trial Court has committed serious error in placing reliance on the aforesaid recorded and oral dying declarations.

36) In the result, the appeal is allowed. The judgment and order of the Trial Court convicting and sentencing the appellants for the offences punishable under sections 302 r/w. 34, and 342 r/w. 34 of IPC is hereby set aside. All the appellants stand acquitted of the

offences for which they were charged and tried. The fine amount, if any is deposited, is to be returned to the appellants. The bail bonds of the appellants are to continue for the period of three months from today to give an opportunity to the State to challenge the decision of this Court. Criminal Application, if any, is disposed of.

[S.M. GAVAHANE, J.]

[T.V. NALAWADE, J.]

ssc/