

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

CRIMINAL APPEAL NO. 225 OF 2002

Balasaheb s/o Sahebrao Kolte,
Age 31 years, Occu. Labourer,
R/o Manikdaundi road,
Shivshakti Nagar, Pathardi,
Taluka Pathardi, Dist.Ahmednagar

..Appellant

Versus

The State of Maharashtra

..Respondent

-WITH-

CRIMINAL APPEAL NO. 228 OF 2002

Sumanbai w/o Sahebrao Kolte
Age 46 years, Occu. Household
& Labourer
R/o Manikdaundi road,
Shivshakti Nagar, Pathardi,
Taluka Pathardi, Dist.Ahmednagar

..Appellant

Versus

The State of Maharashtra

..Respondent

Mr D.R. Jaybhar, Advocate for appellants
Mr S.J. Salgare, A.P.P. for respondent-State

**CORAM : T.V. NALAWADE AND
A.M. DHAVALA, JJ**

DATE : 8th November 2017

ORAL JUDGMENT (Per A.M. Dhavale, J.)

1. In Sessions Case No.41/2001, the learned Additional Sessions Judge, Ahmednagar by judgment dated 30.3.2002 held accused no.1 Balasaheb guilty under Section 302 of Indian Penal Code and sentenced him to imprisonment for life and to pay fine of Rs.500/-, in default rigorous imprisonment for three months, but acquitted accused no.2 - Sumanbai of offence punishable under Section 302 of

Indian Penal Code. He held accused nos.1 and 2 guilty for the offence punishable under Section 498-A of Indian Penal Code and sentenced them to rigorous imprisonment for two years and to pay fine of Rs.500/-, in default rigorous imprisonment for two months each. The aggrieved accused no.1 Balasaheb has preferred Criminal Appeal No.225/2002 and accused no.2 Sumanbai has preferred Criminal Appeal No.228/2002.

2. Accused no.1 Balasaheb, husband of deceased Swati and accused no.2 - Sumanbai, mother-in-law have been prosecuted on the basis of dying declaration of Swati recorded by P.W.5 - Ramchandra Dimale, Special Judicial Magistrate on 18.1.2001 at 5.45 p.m. It was registered as F.I.R. at C.R. No.10/2001 under Sections 498-A, 302 read with Sec.34 of Indian Penal Code at Pathardi police station. The dying declaration shows that the Special Judicial Magistrate had taken opinion of Medical Officer on duty that the patient was conscious and fit to give statement. The dying declaration shows that Swati had sustained 65% burns and was admitted in the hospital by her husband. Her marriage was solemnised two years back (it must be three years). She had a son aged two years. Her husband was serving in a hotel, but since Deewali of year 2000, he was not doing any work, while she was working under a mason. She used to accost him why he was not doing any work and he used to abuse her. On 18.1.2000, when she asked him as to why he is not going on work, he poured kerosene from a stove on her person and attempted to set her on fire, but his first attempt failed and the match stick was extinguished by Swati, but he lit another match stick and set her on

fire. Her saree and blouse caught fire and clinged to her body. Her mother-in-law was standing there. She instigated accused no.1 - Balasaheb stating that 'let her die as she had given lot of trouble'. Swati raised shouts, Thereafter she came out of the house and poured water on herself. Her husband and mother-in-law did not help her to extinguish the fire. But, they admitted her in the hospital. Then the neighbours gathered there. Both husband and mother-in-law of Swati left the hospital without intimation. She was studied upto 7th Standard and she held her husband and mother-in-law responsible for the incident. After recording dying declaration, P.W.5 - Special Executive Magistrate Dimale obtained her thumb impression and again obtained certificate about her consciousness from the Medical Officer. This F.I.R. (Exh.40) recorded in Civil Hospital, Ahmednagar was sent to Pathardi and crime was registered at Police Station, Pathardi at 11.10 p.m.

3. The investigation revealed that deceased Swati was married to accused no.1 three and half years before the incident. After initial good treatment, she was subjected by the accused to dowry demand for construction of house and accused no.1 used to abuse and assault her. Whenever she was visiting her maternal house, she was disclosing these facts to her maternal relatives. During investigation, spot panchnama was drawn and statements of material witnesses were recorded. The deceased succumbed to the burn injuries on 2.2.2001, i.e. after fourteen days. Then, inquest and post mortem were conducted. Accused no.2 had brought orders of anticipatory bail. The accused were arrested and after completion of investigation,

charge-sheet was submitted in the Court of Judicial Magistrate, First Class, Pathardi.

4. In due course, the case was committed to the Court of Sessions. The learned Additional Sessions Judge, Ahmednagar framed charge at Exh.8. Both the accused pleaded not guilty. The prosecution examined nine witnesses. Defence of the accused is of denial of allegations of ill-treatment and commission of murder.

5. It is the case of the accused that deceased Swati sustained burns due to accidental flames from the stove. The learned Additional Sessions Judge, Ahmednagar accepted the prosecution case substantially and convicted the accused.

6. Learned Advocate Mr D.R. Jaybhar for the appellants argued that there was no dowry demand or ill-treatment by the accused to the deceased for three and half years. The deceased had given birth to a son. Accused were already having their own house. Therefore, there was no question of demanding dowry for construction of house. The accused themselves have taken the deceased to the hospital for treatment. The circumstances on record disclose that the dying declaration is not true. The alleged dying declaration was not read over to the deceased and she had not admitted it to be correct before her thumb impression was allegedly taken. Even, dying declaration does not contain any statement to that effect. The cause shown for committing murder is inherently improbable and insufficient. The deceased was studied upto 7th Standard. Her father stated that she

had written letters to him, but the same were not produced. The hands of the deceased were totally burnt. Hence, it is not known how her thumb impression was obtained on dying declaration.

7. Learned Counsel for the appellant relied on following rulings :

(i) State of Rajasthan v. Ashfaq Ahmed AIR 2009 SC 2307

It is a case where the patient was critical and, therefore, his injuries could not be examined. The dying declaration recorded by Investigating Officer was discarded. This ruling is not applicable to the facts of the present case.

(ii) Pankaj v. State of Rajasthan, AIR 2016 SC 4150

In this case, the deceased was brought unconscious to the hospital. There was no certificate of duty doctor that she regained consciousness in front of S.D.M. Hence, dying declaration was held to be not reliable. This ruling is also not applicable to the facts of present case.

(iii) State of Maharashtra v. Hemant Chauriwal AIR 2016 SC 287

In this case, the deceased bride had sustained 88% burns and her dying declaration was recorded by Naib Tahsildar in Civil Hospital, Yavatmal, on the day of incident. She died of septicemia after two days. The dying declaration was registered as F.I.R. on the next day and there was no evidence in whose possession the crucial evidence was during the intermediate period. In paragraph 8, it is observed :

"8. It is a settled law that dying declaration can be the sole basis of conviction and it does not require any corroboration. But it is equally true that dying declaration goes against the cardinal principle of law that 'evidence must be direct'. Thus, dying declaration must be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. In the present case, dying declaration was recorded by the Naib Tahsildar after she was informed vide a Memo by the police authorities. However, it is on record that the said police official who delivered the Memo was never produced or examined before the Court. The Naib Tahsildar deposed before the Court that fitness certificate as to mental capacity of the deceased was taken from the doctor. However, the certificate nowhere states that the deceased was in a fit and stable mental condition at the time of making the statement. The dying declaration was recorded on 20.06.2004 i.e. the same day of incident but the same was recorded at 5.45 p.m. and it is undisputed that the incident occurred in the morning at 8.00 a.m. The Naib Tahsildar specifically deposed that she ordered the blood relation of the deceased to be removed from the ward. The dying declaration was signed by the Naib Tahsildar P.W.1, the doctor PW5 and thumb impression of the deceased was taken at about 5.55 p.m. The dying declaration then formed the basis of the FIR on 21.06.2004 at Ghatanji Police Station, however, there is no explanation as to in whose custody the said crucial piece of evidence was placed for one full day. The prosecution did not give any evidence to explain the said delay."

(iv) **State of Gujarat v. Jayrajbhai Varu AIR 2016 SC 3218**

The law regarding appreciation of dying declaration is laid down in paragraphs 10 and 11 as follows :

"10. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

11. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned."

8. Per contra, learned A.P.P. Mr S.J. Salgare submitted that the dying declaration is recorded by Special Judicial Magistrate who is independent person. He has followed the procedure, he has obtained

the necessary opinion of the Medical Officer about fitness of the patient. He has properly deposed what was told to him by deceased Swati. There is nothing suspicious in the dying declaration. Hence, the conviction of accused no.1 based on dying declaration should not be disturbed. He fairly conceded that the dying declaration is silent on the ill-treatment in past. Hence, there is no reliable material to convict accused nos.1 and 2 under Section 498-A read with Sec.34 of Indian Penal Code.

9. The prosecution has examined following witnesses and produced following documents :

- (i) Police witnesses : P.W.4 Head Constable Shivaji Sathe, attached to Civil Hospital, who issued request letter Exh.29 for recording dying declaration.
- (ii) Dying Declaration (Exh.34) recorded by P.W.5 - Special Executive Magistrate Ramchandra Dimale and P.W. 6 Dr. Nagne Oral dying declaration before P.W.1 Bhanudas and and P.W.2 Ishwar.
- (iii) Medical Evidence :
(Inquest panchnama and post mortem notes) (Exhs.18 & 19)
- (iv) The evidence of past conduct :
P.W.1 Bhanudas father of the deceased
P.W.2 Ishwar, brother of the deceased

P.W.7 Head Constable Biraji Waghmode, who registered the F.I.R. at C.R.No.10/2001 at Police Station, Pathardi.

P.W.8 P.S.I. Ghanshyam Palwade who conducted initial investigation. He drew spot panchnama (Exh.26) in presence of P.W.3 Kishore who has also supported the prosecution. P.W.8 P.S.I. Palwade seized stove, match box, burnt pieces of clothes from the spot and recorded statements of witnesses. He arrested accused no.1 Balasaheb and further investigation was handed over by him to P.W.9 P.I. Randive. He had formally arrested accused no.2 who had obtained orders of anticipatory bail. After death of Swati, he converted the crime under Section 307 of Indian Penal Code to Section 302 of Indian Penal Code. He collected material documents and submitted charge-sheet.

10. The accused have admitted inquest panchnama (Exh.18) and post mortem notes (Exh.19). Those show that deceased Swati had sustained 65% burns on 18.1.2001 in the morning at her matrimonial house and died on 2.2.2001 i.e. after fourteen days due to burns. Here the crucial question is whether deceased Swati sustained burns by accident or she committed suicide or this was a case of suicidal death. This can be determined only on the basis of ocular evidence. The medical evidence cannot throw light on this. Hence, we proceed to consider the ocular evidence.

11. As per the evidence of P.W.1 - Bhanudas and P.W.2 Ishwar, deceased Swati daughter of P.W.1 Bhanudas and sister of P.W.2 Ishwar residents of Daule Wadgaon married to accused no.1 who is

resident of Pathardi about 3 ½ years before the incident. Thereafter she started co-habiting with him and gave birth to a male child. At the time of marriage, there was no complaint of any dowry demand. During the period of co-habitation also, no complaint was made to the police about any dowry demand or ill-treatment. P.W.1 Bhanudas and P.W.2 Ishwar deposed that accused persons were asking Swati to bring money from her parents for constructing house and accused used to abuse and assault Swati. Whenever Swati was visiting her maternal house or whenever P.W.1 Bhanudas, her father used to come to her matrimonial house, she used to tell him about the incident. P.W.2 Ishwar is brother of Swati who has also deposed about similar behaviour of the accused. However, we find that their evidence is not at all trustworthy and reliable at this point. P.W.1 Bhanudas stated that the ill-treatment started after the first Deewali, whereas P.W.2 Ishwar stated that the ill-treatment started after last Deewali. P.W.1 Bhanudas has admitted that accused are having their own residential house and there was no question of re-construction of house. P.W.1 Bhanudas admitted that his financial condition was poor and the accused were aware of it. He admitted that these statements are made by him for the first time in the Court. The allegations regarding dowry demand are as vague as it could be. No time and date are stated. Similarly, about the allegation of abusing and assault. P.W.1 had stated that Swati was studied upto 7th Standard and she had written letters to her family members, but those letters were not seized and produced in the Court to show allegations against her in-laws. Pertinently, P.W.1 Bhanudas and P.W.2 Ishwar have not stated anywhere that Swati was required to leave her matrimonial

house due to ill-treatment and reside at her maternal house. There is no allegation that there were efforts of mediation and efforts to persuade the accused not to ill-treat Swati. The most material fact is that in the alleged dying declaration, there is not even whisper about dowry demand and assault on account of not meeting the dowry demand. Hence, the evidence of P.W.1 Bhanudas and P.W.2 Ishwar with regard to ill-treatment to Swati will have to be discarded.

12. With regard to dying declaration, P.W.4 Head Constable, Shivaji Sathe was working at Civil Hospital, Ahmednagar. He stated that on 18.1.2001, at about 11.00 a.m., accused no.1 Balasaheb brought his wife Swati who had sustained burn injuries. Then Medical Officer P.W.6 Dr. Nagne gave him intimation to the Police Station, Tofkhana. Hence, as per directions of his superiors, P.W.4 Shivaji Sathe wrote letter (Exh.29) to P.W.5 Special Judicial Magistrate, Dimale. Thereafter, P.W.5 Dimale deposed that he received the letter at about 5 p.m. and he reached the hospital at 5.35 p.m. He made enquiry with P.W.6 Dr. Nagne, who after examination of the patient gave certificate that she was conscious and in a position to give statement. He drove out all the relatives of Swati. He then personally put some questions to verify her condition and after satisfaction that she was fit to give statement, he started to record dying declaration. As per his evidence, Swati told him that her husband poured kerosene on her person and set her on fire by matching stick. The first match stick could not be lit but the accused set her on fire by lighting second match stick. She stated that her mother-in-law was present there, but she did nothing and stated that ' let her die, she has given us lot of -

trouble'. P.W.5 - Special Executive Magistrate Dimale deposed that Swati told him that her husband poured kerosene on her person and set her on fire. The neighbours gathered there. Her mother-in-law and husband taken her to the hospital, but they left the hospital without any intimation. Then he has obtained her thumb impression and put his signature and again obtained the signature of Medical Officer about consciousness of the patient (dying declaration is at Exh.34).

13. It is true that dying declaration can be sole basis for conviction without any corroboration. It is equally true that dying declaration recorded by Special Judicial Magistrate stands on higher footing and more credible as he is independent person. In this case, dying declaration is also supported by medical evidence, as the doctor has given certificate about her fitness before and after recording the dying declaration. The certificate about fitness is not exactly as required. There should have certificate of physical as well as mental fitness, but the certificate shows that she was conscious and in a position to give the statement. However, considering the fact that deceased Swati had survived for fourteen days and she had sustained only 65% burns, we accept the oral testimony of P.W.5 Special Judicial Magistrate and P.W.6 Dr. Nagne that she was physically and mentally fit to make a statement.

14. However, we find that the evidence on record shows that accused nos.1 and 2 themselves had brought Swati to the hospital at Ahmednagar for treatment. A message about the incident of burning

of Swati was given to her father promptly. The dying declaration has been recorded at 5.45 p.m. The evidence of P.W.1 Bhanudas shows that he learnt about the incident at 1.00 p.m. and within two hours he had reached the hospital. Thus, Swati's maternal relatives had been to her before recording of her dying declaration. Evidence of P.W.5 Special Executive Magistrate Dimale shows that he had removed all her relatives from the ward at the time of recording her dying declaration. This creates a possibility of tutoring Swati by her maternal relatives.

15. The dying declaration shows that Swati accosted her husband as to why he was not going for work. He got annoyed and, therefore, he poured kerosene from stove on her person and then set her on fire by lighting two match sticks. In the first place we find that the story regarding dowry demand and previous ill-treatment required to be discarded. Merely because Swati accosted her husband as to why he was not going for work, her husband would not take the extreme step of pouring kerosene and setting her on fire. This appears to be inherently improbable.

16. Secondly, accused no.1 Balasaheb would have uttered his intention. He would have required some time to take kerosene by removing the lid and for pouring the same on the person of Swati. Thereafter he would have required some time for lighting the match stick. Meanwhile, Swati could have definitely ran out of the house. There is nothing to show that there was any obstacle to leave the place on apprehending danger to her life. If Swati's dying declaration

is to be believed, she did not try to run away which is quite abnormal. On the contrary, Swati had a reason to commit suicide as her husband was not serving.

17. The dying declaration does not disclose why accused no.2 Sumanbai would abet the commission of suicide. It is silent regarding the previous instances of quarrels. The statement that the mother-in-law Sumanbai stated "*Jalu de, maru de, Hine Khup tras dila ahe*" (let her burn and die, she has given lot of trouble to us) is not acceptable in the light of the facts on record. In order to base conviction solely on the basis of dying declaration, the law is settled that such dying declaration should be found to be truthful, trustworthy, reliable and convincing which should inspire confidence in the mind of a Judge. In this regard, we rely on **State of Gujarat Vs. Jayrajbhai Varu, AIR 2016 SC 3218**. We find that though there was substantial compliance of the procedure in recording the dying declaration, it does not appear to be truthful. There was no justifiable reason for accused nos.1 and 2 to cause death of Swati. Besides, accused nos.1 and 2 in that case would not have brought her to the hospital immediately. The dying declaration shows that at the time of incident, several neighbours had gathered, but prosecution has not examined a single neighbour. P.W.6 Dr. Nagne has stated that the history was given as injuries due to burns. There is no specific history that burns were caused by particular person.

18. We find that in case of such deaths, the prosecution invariably does not produce the medical evidence with regard to the treatment given to the patient during her life. The post mortem report is no

doubt important, but the case papers or medical papers disclosing the history recorded by the doctor and the symptoms noted in the clinical examination are also important. Besides, vital parameters found in the examination and noted in case papers, the medicines and sedatives given to the patient during the treatment are very material documents and the prosecution is bound to produce and prove such documents.

19. The prosecution cannot blindly rely on the dying declaration. The Investigating Officer should find out material corroborating or contradicting the statement made in the dying declaration and should fairly put up such evidence before the Court for determining the genuineness and truthfulness of the dying declaration. In the present case, it is alleged that both the hands of Swati were fully burnt. Then, it is not explained how her thumb impressions were obtained on dying declaration. Besides, it is necessary to know that after recording the dying declaration, it is essential that the dying declaration should be read over to the deponent and should be asked whether it is correctly recorded or not and after the deponent admits the correctness, then only her signature or thumb impression should be taken. It is axiomatic that if the witness is in position to make signature, the signature should be preferably obtained and if not in a position to sign, then that fact should be recorded and thumb impression should be obtained.

20. There is always possibility that a thumb impression can be obtained even in unconsciousness of a person and sometimes even of

a dead person. Therefore, dying declaration bearing signature of the patient is much more reliable than dying declaration bearing thumb impression. Besides, if the thumb impression cannot be obtained, the opinion of the doctor to that effect should be taken and thereafter the toe impression also be obtained on the dying declaration.

21. It is a matter of fact that large number of brides die in suspicious circumstances within short period after their marriages and there must be large number of cases of brides being subjected to ill-treatment, harassment or even killed in their matrimonial houses. The Investigating Officer is supposed to show utmost sensitivity while conducting investigation in such cases. The investigation should be extremely prompt, scientific and complete in all respect. All precautions should be taken so that no loop holes are left in the prosecution story. In case of recording of dying declaration, it will be always better if the Video recording can be done so as to rule out any doubts about truthfulness or genuineness of the dying declaration. We direct that all police officers having power to investigate such serious cases be instructed through their superiors to follow these directions in paragraphs 19, 20, 21.

22. In the present case, in the facts and circumstances discussed hereinabove, we find that the dying declaration is not trustworthy and reliable beyond reasonable doubt. Hence, the conviction of accused no.1 Balasaheb under Section 302 read with Sec.34 of Indian Penal Code is not sustainable. The learned trial Judge has not taken into account the above discrepancies in the prosecution evidence and, therefore, conviction of accused no.1 deserves to be set aside and

accused no.1 Balasaheb deserves to be acquitted. Hence, we pass the following order :

- ORDER -

(I) Both the appeals are allowed.

(II) The order of trial Court convicting the appellant Balasaheb s/o Sahebrao Kolte as mentioned in Criminal Appeal No.225 of 2002 and convicting appellant Sumanbai w/o Sahebrao Kolte as mentioned in Criminal Appeal No.228 of 2002 are hereby set aside.

(III) Both the appellants stand acquitted of all the offences for which they are tried and they are sentenced by the trial Court.

(A.M. DHAVAL, J.)

(T.V. NALAWADE, J.)

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