

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

CRIMINAL APPEAL NO. 455 OF 2002

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|-----------------------------------|---------------------------|
| 1. Shantilal Haribhau Karkele |] Appeal Abated |
| |] against Appellant No.1 |
| 2. Salubai Haribhau Karkele, |] as per order |
| Age : 45 Years, Occ. Agriculture, |] dated 4.12.2017 |
| and Household |] |
| |] |
| Appellant Nos. 1 and 2 |] ... <u>APPELLANTS</u> . |
| r/o Tribhuvanwadi, |] (Ori. Accused No. 1 & |
| Tal. Pathardi, Dist.Ahmednagar. |] and 2) |

Versus

The State of Maharashtra.

.. RESPONDENT.

.....

The appeal is abated against the Appellant No.1 as per Court order dated. 04.12.2017.

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Mr. A.B. Gatne, Advocate for the Appellant No.2

Mr. S.J. Salgare, Addl. Public Prosecutor for Respondent.

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

Date of reserving the Judgment : 08.12.2017

Date of pronouncing the Judgment : 21.12.2017

JUDGMENT (PER T.V. NALAWADE, J.) :-

1. Appeal is filed against the Judgment and order of learned Additional Sessions Judge, Ahmednagar delivered in Sessions Case No. 40 of 2001. The appellant No.2 of the present appeal is convicted for offences punishable under Sections 302, 498-A read with Section 34 of the Indian Penal Code and she is sentenced to imprisonment for life. Similar decision was given against the appellant No.1 who was the son of appellant No.2, but he died during the pendency of the appeal and the appeal is disposed of as abated. Both the sides are heard.

In short the facts leading to the institution of the present proceedings can be stated as follows :-

2. The deceased Manisha was the daughter of Aadinath Tandale who is resident of Khargatwadi, Tahsil Asthi, District Beed. Manisha was given in marriage to the appellant No.1 Shantilal Haribhau Karkele on 13th May, 1999. The appellant No.2 is mother of Shantilal and appellant No.2 is resident of Tribhuvanwadi Tq. Pathardi, District Ahmendnagar. Some more persons were made accused in the case.

The accused No.4 is the sister of husband of the deceased and accused No.3 is husband of the accused No.4. Accused No.3 and 4 are acquitted by the trial Court and the said decision is not challenged by the State. Deceased has not left behind any issue.

3. It is the case of the State that one year after the marriage, the accused persons started asking deceased to bring Rs. 25,000/- from her parents as vehicle was to be purchased for husband. Allegations are made that there was ill treatment from all the accused to deceased Manisha as their demand was not met with. It is contended that Manisha disclosed about ill-treatment and demand of money, during her visit to house of parent's. She had also disclosed that all accused used to give beating to her and they used to give abuses to her. The parents of the deceased had tried to convince the accused persons, but their conduct did not improve.

4. The incident in question took place on 03.01.2001 at about 11 a.m in the matrimonial house at Tribhuvanwadi. Manisha sustained burn injuries. Information was reached to the parents of the

deceased about the incident and Manisha was shifted to the Civil Hospital at about 1.00 p.m on 03.01.2001. Manisha made first disclosure and she informed that there was ill treatment to her for demand of Rs. 25,000/- made by the husband and as his demand was not met with there was quarrel, she disclosed that during the quarrel, mother- in-law, accused No.2, caught hold of her hands and accused No.1/ husband of the deceased, poured kerosene on her person and he set fire to her. She disclosed that after starting of fire, mother-in-law ran away, outside and shouted to call neighbors. She disclosed that her neighbours came to the house and extinguished the fire and they shifted her to the Civil Hospital. Her one more dying declaration was recorded. She succumbed to 93% burn injuries on 07.01.2001.

5. On the basis of dying declaration, crime No. 04/20011 came to be registered in Topkhana Police Station, Ahmednagar. Police prepared spot panchnama. After the death, inquest panchnama was prepared and dead body was referred for *post mortem* examination. The statements of the neighbours came to be recorded on 09.01.2001. Articles taken over during the investigation

were sent to the C.A office and charge-sheet was filed against all the four accused persons. The charge was framed for aforesaid offences. The accused pleaded not guilty. Prosecution has examined eight witnesses. All the accused took defence of total denial.

6. Trial Court gave conviction to husband and his mother on the basis of dying declarations and also the evidence given by the relatives of the deceased about ill-treatment.

7. It is not disputed that death took place due to burn injuries. The *post mortem* report is at Exh. 65 and inquest panchnama is at Exh.33, which are admitted by the defence. The extent of burns on left upper limb was 9% and it was 9% on right upper limb also. The injuries were superficial to deep burns.

8. The first dying declaration is proved in the evidence of Ramchandra Ganpatrao Dimale (P.W.5), Executive Magistrate. He has deposed that he recorded dying declaration at 10 p.m on 03.1.2001. He has given evidence that he sought the opinion of Medical Officer

regarding fitness of the deceased and an opinion was given that she was fit to give statement. He has deposed that throughout recording of dying declaration, the Medical Officer was present by the side of patient and his endorsement was obtained accordingly on dying declaration. The record of dying declaration is proved at Exh. 46, in the evidence of P.W. No.5. He has deposed that before obtaining thumb impression of deceased on Exh.46, he had read over the contents of Exh.46 to the deceased and when she admitted the contents and correctness, he obtained her thumb impression. The contents of Exh. 46 are as follows :-

- (i) The marriage of the deceased had taken place prior to 1 and ½ years.
- (ii) The deceased was educated up to 10th standard.
- (iii) The incident took place at 11 a.m.
- (iv) The husband and mother-in-law were present in the house, at the time of incident.
- (v) The husband was working as a driver and he was asking the deceased to bring Rs. 25,000/- from her parents as he wanted to purchase a vehicle.

(vi) The parents of the deceased are poor, they are required to maintain two younger brothers of the deceased and so they could not afford to give the amount.

(vii) During the incident in question, husband asked deceased to go to the parents and bring Rs., 25,000/-.

(viii) The deceased said to the husband that she will not give money.

(ix) Mother-in-law, caught hold of hands of the deceased.

(x) The husband poured kerosene, from kerosene can of two liters capacity on the person of the deceased.

(xi) Only husband and mother-in-law were present in the house.

(xii) The husband set fire to Saree and blouse of the deceased, which caught fire.

(iii) The deceased shouted that she was inflame { पेटले पेटले }

(iv) The neighbours rushed to the house of the deceased and by using clothes, they extinguished the fire.

(xv) Information was given to the father-in-law.

(xvi) The mother-in-law and father-in-law, admitted her in Civil Hospital, Ahmednagar.

(xvii) Even if she survives, the husband will not allow her to cohabit

with him.

(xviii) For incident in question, her mother-in-law and husband are responsible.

(xix) The statement was read over to the deceased and it was admitted to be correct.

(xx) The deceased was not in a position to use hand and so had not put her signature.

9. Devram Namdev Gore (P.W. No.3) Police Head Constable, recorded second dying declaration of the deceased on 07.01.2001. This constable was attached to Pathardi Police Station. He has deposed that, he was asked to record dying declaration on that day and so he recorded second dying declaration of deceased Manisha on 07.01.2001. He has deposed that he asked Manisha as to whether she was in a position to give statement and when she answered in affirmative, he recorded the statement of deceased Manisha. He has further deposed that, he obtained the thumb impression of Manisha on the statement.

10. Manisha admittedly died on 07.01.2001, on which date second dying declaration was allegedly recorded. The evidence of Devram Gore (P.W.3), Police Head Constable, does not show that he had attempted to approach Medical Officer to obtain opinion regarding the fitness of Manisha to give statement. No reason whatsoever is given by this witness for not obtaining opinion of the Medical Officer on 07.01.2001. The evidence of this witness shows that, he was not in charge of the investigation. The evidence of Investigating officer Ghanashyam Palwade (P.W. No.8) shows that there was no written instruction to Devram Gore (P.W. No.3) to record one more dying declaration. No application was given for the same, by any relatives of the deceased. These circumstances need be kept in the mind as much improvement was made in the second dying declaration and more persons were implicated.

11. Exh. 35 second dying declaration contains following things :-

(i) Sangita, sister-in-law of the deceased who is resident of village Chinchodi Shiral Tq. Pathardi, was instigating the husband of the deceased to ask the deceased to bring Rs. 25,000/- from parents of

the deceased for purchasing motor-cycle for husband.

(ii) Due to instigation of Sangita, the husband of the deceased and the mother in law of deceased were asking deceased to bring Rs. 25,000/-.

(iii) The husband of the sister-in-law, namely Satish (accused No.3) was also instigating the husband to demand Rs. 25,000/- and was saying that the husband should not allow the deceased to cohabit with him unless the demand was met with.

(iv) The deceased had disclosed about the demand and ill-treatment to her parents.

(v) As the demand was not met with, even sister-in-law used to beat to the deceased.

(vi) On 02.01.2001, the husband had brought meat even when it was Tuesday and they were not expected to eat non-veg on Tuesday. On 02.01.2001, the husband consumed liquor and he had taken non-veg meat in the dinner.

(vii) On 03.01.2001, at about 9.00 a.m, quarrel started between deceased and her husband as the husband had brought meat to home on Tuesday. The deceased had expressed that husband ought

to have brought meat on Thursday.

(viii) During the quarrel, husband said that he would finish the deceased by burning her.

(ix) The mother-in-law of the deceased was also asking her to bring Rs. 25,000- and had given abuses to her.

12. All the aforesaid things were not disclosed in the first dying declaration. There were no allegations against accused No.4 Sangita and her husband accused No.3. No reasons, for quarreling over bringing meat on Tuesday, was mentioned in the first dying declaration.

13. Exh. 35, second dying declaration contains more things, which were there in the first dying declaration. Those things are as under :-

(i) During the incident, mother-in-law held both the hands of the deceased.

(ii) The husband poured kerosene on abdomen of deceased from Can of kerosene, which was present in the house.

(iii) The husband set on fire to the deceased by using Matchstick.

(iv) When the deceased caught fire, the mother-in-law left her and ran out of the house and she started shouting, and for leaving the house mother-in-law had removed the latch of the door.

(v) The husband of the deceased and neighbourers extinguished the fire.

(vi) The mother-in-law and the father-in-law of the deceased took the deceased to Civil Hospital for medical treatment.

14. Aadinath (P.W. No.4), father of the deceased, has deposed that due to instigation of accused No.3 Satish, the husband and mother-in-law of the deceased gave ill-treatment to the deceased. He has deposed that they were asking to bring Rs. 25,000/- from the parents and as demand was not met with, mother-in-law, husband and even accused No.3 were assaulting the deceased. He has given evidence that father-in-law instigated other accused to give ill-treatment. He has given evidence that during the visits of the deceased to the house of her parents, she used to disclose about demand and ill-treatment.

15. Aadinath Tandale (P.W. No.4) has deposed that on 03.01.2001, after knowing about the incident, he went to the Civil Hospital and there the deceased made following disclosure to him. :-

- (i) At 9.00 a.m., mother-in-law, and husband asked to bring money of Rs. 25,000/- from the parents for purchasing motor-cycle.
- (ii) Deceased refused to bring money.
- (iii) Mother-in-law caught hold hands of the deceased. The husband poured kerosene on her person and set fire to her.
- (iv) After setting fire, husband went outside of the house and bolted the door from outside.
- (v) The deceased shouted for help.
- (vi) The neighbours extinguished the fire.
- (vii) In-laws admitted the deceased in the Hospital.

16. Haribhau Tandale (P.W.7), cousin brother of Aadinath Tandale (P.W.4), who is also uncle of the deceased, has given evidence, which is similar to the evidence of Aadinath (P.W.4) about ill-treatment and dying declaration. Haribhau Tandale (P.W.7) has deposed that deceased disclosed to him that her neighbours had opened the door

and had taken her out of the house. In the evidence of Haribhau Tandale (P.W. No.7), it is brought on record that as per disclosure of the deceased, neighbours had opened the door and they had also extinguished the fire.

17. In the evidence of investigating officer Ghanashyam Palwade (P.W. No.8), it is brought on record that on 04.01.2001, he recorded the statement of neighbours, like Digamber, Dilip, and Namdev. When statements of the neighbours were recorded on 04.01.2001 , the statements of close relatives of the deceased were recorded on 09.01.2001. In the recorded dying declaration also it is disclosed that neighbours had extinguished the fire. These neighbours are not examined by the prosecution as witnesses and no reasons are given for the same.

18. Spot panchnama (Exh.31) is proved in the evidence of Mohan Shripati Karkhele (P.W. No.1), panch witness. The evidence of the panch witness, Investigating Officer (P.W. No.8) and the document at Exh.31 show that spot was shown by Haribhau (P.W.7). The

panchnama was prepared on 04.01.2001 between 17.30 and 18.00 hours. Exh.31 shows that house was facing towards Nagar-Thisgaon road. The Entrance door of the house was towards western side and door was made by using wooden planks. Entrance door was found in broken condition and its wooden planks were lying inside of the house. The house of the deceased was having length of 30 feet and width of 8 feet. Exh. 31 further shows that, house was having floor of tiles and house was constructed in stones and cement. The house had ceiling of planks and pieces of wood. At Northern window corner of the house, there was cooking place and Earthen stove (chool) was facing towards east side. To the western side of the house, there were four windows. They were open. In front of the cooking place, there was kerosene drum and pieces of partly burnt saree were lying there. One Match box was also lying there. There was smell of kerosene in the house. Near southern side wall of the house, pieces of Parker (petticoat) in partly burnt condition were lying. Exh. 31 spot panchanama shows that on eastern side of the house, there was small room of tin shed and there was entrance door opening into that room from main construction and this door was also made from

wooden planks. The door was not visible from outside as this door was opening towards the room created on eastern side. Thus, only one door situated on western side, towards the road was available for entry in the house and this door was found in broken condition. Across the road, there were many houses.

19. The aforesaid circumstances mentioned in spot panchanama (Exh.31) and the evidence of the investigating officer have created probability that the neighbours were required to break open entrance door and neighbours had reached the spot immediately after the incident. If the neighbours had opened the door and they extinguished the fire, it was necessary for the prosecution to examine these witnesses. These witnesses would have made it clear as to why the door was required to be broken, as to whether the appellant No.2 was present inside the house or outside the house and what was the first disclosure made by the deceased. Due to non examination of the neighbours in the present matter, adverse inference needs to be drawn against the prosecution and benefit of these circumstances is required to be given at least to appellant No.2.

20. The evidence shows that, the relatives of the parent's side of the deceased have tried to say that disclosure was made to them when they reached the Civil Hospital, at 1.00 p.m on 03.01.2001 itself. If the disclosure was of aforesaid nature, in ordinary course, the parents would have given report to Police, on the basis of those disclosure but that did not happen. If there was really demand of money from the accused persons and, there was ill-treatment to the deceased, in that case also, father would have approached to the Police after seeing condition of his daughter on 03.01.2001 itself. The father and the other relatives gave statements to the Police on 09.01.2001 and no explanation is given by these witnesses, on the circumstance of delay caused for giving statements to the Police.

21. The evidence on record and particularly on the distance given by the Investigating Officer between the village of the accused and the Civil Hospital shows that the deceased was reached to the Civil Hospital well before 1.00 p.m, on 03.01.2001. If the deceased was admitted well before 1.00 p.m on 03.01.2001, in ordinary course dying declaration would have been recorded immediately at about

1.00 p.m. That did not happen and her dying declaration was recorded at 10.15 p.m on 03.01.2001. No explanation is given by the prosecution on this circumstance also.

22. The deceased was alive till 07.01.2001, for about four days from the date of incident. She was receiving the treatment in Civil Hospital. In view of these circumstances, it was necessary for prosecution to produce bed- head- ticket-case papers. Prosecution has not produced such papers. Though ordinarily doctors from Government Hospital do not administer sedatives before recording dying declaration, in the present case the deceased was in the Hospital for about 9 hours before recording the dying declaration. It is not probable that for nine hours no treatment at all was given to the deceased when the extent of burns was 93%. The record of the case of patient would have definitely helped in ascertaining the condition of the patient and treatment given to her. Adverse inference can be drawn due to this circumstance also. Though there is evidence of Dr. Balaji Jadhav (P.W.6) to the effect that he had examined the patient before recording of dying declaration by Executive Magistrate

and he had found patent to be in fit condition, due to aforesaid circumstance, it was necessary for prosecution to produce the case papers. Possibility that sedatives were already given, cannot be ruled out, in the present matter. Further father and other relatives of the deceased had reached the hospital and there is clear probability that there was tutoring before recording of first dying declaration.

23. The contents of the second dying declaration recorded by Police Head Constable show that an attempt was made to implicate other relatives of the husband by creating record of second dying declaration. Even married sister of the husband, who was living at other station was implicated and also her husband for the offence punishable under Sections 498-A of the Indian Penal Code. It can be said that relatives of the deceased gave statements to the Police late as they wanted to implicate relatives of the husband by creating record of dying declaration. It was necessary to give explanation why they did not approach the police on 03.01.2001 if they had grievance against all the accused. Thus probability that the relatives of the deceased tutored the deceased and they took steps that to see that,

not only husband and mother-in-law but all the relatives of the husband side are implicated, cannot be ruled out.

24. The contents of the dying declaration that mother-in-law was holding deceased when the husband was pouring kerosene and setting her on fire also are improbable in nature. The evidence of Haribhau (P.W.7) uncle of the deceased shows that when he reached the hospital on 03.01.2001, he noticed that mother-in-law (present appellant) was present by the side of the deceased. Even in dying declaration, there is mention that mother-in-law shifted the deceased to the Civil Hospital. This conduct of the present appellant was not consistent with the guilt but was consistent with her innocence. Further if the mother-in-law was holding hands of the deceased when husband was pouring kerosene on the person of deceased, some kerosene must have come on the clothes of the present appellant. When on 03.01.2001, present appellant was available, her clothes were not taken out by the police. Thus police did not collect the other evidence which could have been used as a circumstance.

25. The evidence of the relatives of the deceased shows that financial condition of her father was poor. The evidence shows that her father is required to take care of four more daughters. In the dying declaration, there is mention that deceased had two younger brothers. There is no evidence that husband has made demand directly. Further the amount, if at all demanded, was for husband for purchasing of motor-cycle and it must have been demand of husband, who is not alive. There are no particulars as to when the demand was made. The evidence on record shows that the accused were not preventing the deceased to visit the house of parents on the occasion of the festivals. She was regularly visiting the house of the parents. Evidence does not show that she was driven out of matrimonial house as demand was not met with. Thus the evidence of so called demand and ill-treatment is also not convincing in nature.

26. It is already observed that in the second dying declaration, the reason for quarrel mentioned is different. If the quarrel had started on the ground of bringing of meat by the husband on Tuesday, it can be said that due to quarrel, some incident took place. If

quarrel had taken place due to bringing of meat on Tuesday by the husband, there was no reason for the husband to finish the deceased. The possibility that quarrel created an anger in the mind of the deceased and she set herself on fire cannot ruled out. The circumstances like the entrance door was in broken condition, supports such probability.

27. The learned counsel for the appellant placed reliance on some reported cases. In the case of **Manohar Dadarao Landge Vs. State of Maharashtra (1999 (Supp.1) Bom.C.R. 215 Bombay High Court)** in view of the facts therein, the Court held that the dying declaration was not reliable.

28. In the case of **Paparambaka Rosamma And Others Vs. State of A.P (1999) 7 Supreme Court Cases 695)** the Apex Court has held that certificate given by the doctor about consciousness was not sufficient and the certificate regarding fitness of mind ought to have been there.

29. On this point the learned A.P.P placed reliance on the case of **Laxman Vs. State of Maharashtra (AIR (SC) 2973)**. In this case, the larger bench of the Apex Court has laid down that only due to circumstances like absence of certificate of doctor about consciousness and fitness of patient, the evidence of the dying declaration cannot be discarded. There cannot be dispute over this proposition.

30. In the case of **Uka Ram Vs. State of Rajasthan ((2001) 5 Supreme Court Cases 254)** the Apex Court has laid down that for placing reliance on evidence of dying declaration the Court should be satisfied about its trustworthiness and voluntary nature and fitness of mind of the deceased. There cannot be dispute over this proposition.

31. In the case of **Surinder Kumar Vs. State of Harayana (2011) 10 Supreme Court Cases 172)** in view of the facts therein the Apex Court held that no reliance can be placed on dying declaration which was shrouded by suspicious circumstances. The

whole body was burnt and it was the case that thumb impression was obtained. The body was bandaged. The Court therefore, held that dying declaration was shrouded by suspicious circumstances. In the said case, the Apex Court considered the necessity of examination of witnesses. In view of the facts of the said case, the Apex Court held that it was necessary to have evidence of the person who had accompanied the deceased to hospital and it was necessary to make enquiry with children of deceased who were aged about six and four years respectively and were allegedly present at the time of incident.

32. In the present case, both the upper limbs of the deceased had burn injuries. But it was necessary for the defence to bring on record that it was not possible to have thumb impression of the deceased. Thus, only due to the circumstance that upper limbs were in burnt conditions, the evidence of dying declaration cannot be discarded. However, there is circumstance like the neighbours, whose names are taken by the Investigating Officer as persons who gave statements before Police, are not examined. They were material witnesses and in the present case, in view of the surrounding circumstances, their

examination was necessary. Non examination of these witnesses is circumstance due to which adverse inference needs to be drawn against the prosecution.

33. Learned A.P.P. Submitted that, in view of the ratio of the case of **Laxman Vs. State of Maharashtra** (supra) and in view of observations made by the Apex Court in the case **Ashabai and Another Vs. State of Maharashtra (AIR 2013 Supreme Court 341)**.

First dying declaration is sufficient for basing conviction law does not insist upon corroboration of dying declaration before it can be accepted. It is true that the insistence of corroboration to a dying declaration is only a rule of prudence. It depends upon facts and circumstances of each and every case. It is open to the Court to decide as to whether corroboration to dying declaration is necessary or not. In the present case, this Court holds that there was necessity to have independent corroboration like the evidence of neighbours and only after that, conviction could have been based on the first dying declaration. Thus, there is record of dying declaration which can be used under Section 32 of the Indian Evidence Act, but there is

no necessary corroboration.

34. Due to surrounding circumstance and absence of independent corroboration, this Court holds that it is not safe to convict the present appellant. The trial Court has not considered aforesaid circumstances and due to that the trial Court has committed error in convicting the mother-in-law. This Court holds that interference is warranted in the impugned Judgment/order. In the result, the appeal of the Appellant No.2. Salubai Haribhau Karkele is hereby allowed, with the following order :-

ORDER

1. Appeal of Appellant No.2 Salubai Haribhau Karkele is allowed.
2. The Judgment and order of trial Court in Sessions Case No. 40 of 2001 passed by the Addl. Sessions Judge, Ahmednagar dated 09.07.2002 convicting the appellant for the offences punishable under Sections 302 and 498-A of the Indian Penal Code is hereby set-aside. The appellant stands acquitted of both the offences. Her bail bonds stand cancelled.

3. The fine amount, if any deposited by the appellant, be returned to her.

(A.M. DHAVALA, J.)

(T.V. NALAWADE, J.)

YSK/