

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

CRIMINAL APPEAL NO.624 OF 2006

1. Motiram s/o Manohar Phad,
Age : 23 years, Occu. Agri.
2. Sumanbai w/o Manohar Phad,
Age : 50 years, Occu. Agri.

Both r/o Saudana, Taluka
Ambajogai, District Beed

**APPELLANTS
(Orig. Accused
Nos.1 and 2)**

VERSUS

The State of Maharashtra

**RESPONDENT
(Prosecution)**

Mr. A.M. Gaikwad, Advocate for the appellants
Mr. S.N. Morampalle, A.P.P. for the State/Prosecution

**CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.**

DATE : 17th November, 2017

JUDGMENT (PER SANGITRAO S. PATIL, J.) :

The appellants have taken exception to the judgment and order dated 17th August, 2006, passed in Sessions Case No.97 of 2004 by the learned 1st Adhoc Additional Sessions Judge, Ambejogai, whereby they have been convicted and sentenced for the offences punishable under Sections 302 and 498-A read with

Section 34 of the Indian Penal Code ("IPC", for short).

2. Appellant No.1 is the husband, while appellant No.2 is the mother-in-law of the deceased namely Balika. The marriage of appellant No.1 and the deceased Balika was performed before about one year of the incident that took place on 12th May, 2004.

3. It is alleged that the deceased Balika did not conceive child even after one year of the marriage and therefore, the appellants started illtreating her. On 12th may, 2004 at about 6.00 p.m., the deceased Balika was taking out grains from a gunny bag for being grinded on the say of appellant No.2. Both the appellants closed the door of the house from inside, poured kerosene on her person and appellant No.1 set her on fire by means of a burning matchstick. The deceased Balika raised shouts and tried to run away. She sustained serious burn injuries. The appellants then tried to make a show of extinguishing fire from her person. One Surekha Namdeo Phad, Aasubai Laxman Phad and others rushed to the husband of the appellants. They extinguished the fire. The mother, cousin-brother-in-law and cousin-maternal uncle of the deceased Balika took her to the Civil Hospital at Ambejogai and admitted

her there for treatment.

4. The statement of the deceased Balika was recorded by ASI Lambture on 13th may, 2004 at about 12.30 noon. It was treated as the FIR. On the basis thereof, crime No.73 of 2004 came to be registered against the appellants for the offences punishable under Sections 307 and 498-A read with Section 34 of the IPC in Police Station (Rural), Parali.

5. The investigation followed. The spot panchanama was prepared on 14th May, 2004 at about 9.00 a.m. A kerosene lamp came to be seized from the spot of the incident. The Investigating Officer gave a letter to the Special Executive Magistrate to record the statement of the deceased Balika. Accordingly, the Special Executive Magistrate namely Savita Anurath Sagar recorded her statement on 14th May, 2004 at 10.30 a.m. The statements of the witnesses were recorded. Balika died on 17th May, 2004 at about 00.30 a.m. The offence punishable under Section 302 of the IPC came to be substituted for the offence punishable under Section 307 of the IPC. The inquest of the body of the deceased Balika was prepared. It was referred to the Medical Officer for post-mortem. The Medical Officers conducted

post-mortem on the body of the deceased Balika on 18th May, 2004 and found 87% of burns on her body. They opined that she died due to shock due to burns. After completion of the investigation, the appellants came to be chargesheeted for the above mentioned offences in the Court of the learned Judicial Magistrate First Class, Ambejogai.

6. The case being exclusively triable by the Court of Session, the learned Magistrate committed it to the Additional Sessions Court at Ambejogai for trial. The learned Trial Judge framed charges against the appellants for the above mentioned offences vide Exh-26 and explained the contents thereof to them in vernacular. The appellants pleaded not guilty and claimed to be tried. Their defence is that of total denial and false implication. According to them, the deceased Balika sustained burns accidentally.

7. The prosecution examined seven witnesses to establish guilt of the appellants for the above mentioned offences. The learned Trial Judge evaluated the evidence of the prosecution and found the appellants guilty for the above mentioned offences. He, therefore, convicted them for the said offences and sentenced each

of them to suffer imprisonment for life and to pay a fine of Rs.500/- in respect of the offence punishable under Section 302 of the IPC and imprisonment for three years and a fine of Rs.500/- in respect of the offence punishable under Section 498-A of the IPC.

8. The learned counsel for the appellants submits that the prosecution is mainly relying on the statement of the deceased Balika recorded by ASI Lambture (PW6) of Police Station, Ambejogai on 13th May, 2004 at about 12.30 noon, which was treated as the FIR and consequent upon the death of Balika, as a dying declaration (Exh-50). He submits that the deceased Balika was not in a condition to give such exhaustive statement. The mother and other relatives of the deceased Balika were present with her in the hospital. Though she was admitted in the hospital at about 8.00 p.m. on 12th May, 2004, she did not make any allegation against the appellants implicating them in the incident of burning till the time of recording her alleged dying declaration (Exh-50).

9. According to the learned counsel, the dying declaration (Exh-50) has been prepared by ASI Lambture (PW6) at the instance of the maternal relations of the

deceased Balika. He submits that the Medical Officer has not given endorsement on the said dying declaration that the deceased Balika was in a fit state of mind to give statement prior to its recording. He further submits that the delay in giving such statement has not been explained by the prosecution.

10. The learned counsel then points out to the dying declaration (Exh-37), recorded by the Special Executive Magistrate on 14th May, 2004 at about 10.30 a.m. In that dying declaration, she has specifically stated that on 12th May, 2004 at about 6.00 p.m., when she was taking out grains from a gunny bag for being grinded, she was holding a burning kerosene lamp which accidentally fell on her saree. Due to that, her saree was caught by fire. She raised shouts whereon the appellants rushed to her and extinguished fire by pouring water on her person. She further stated that she had no complaint to make against anybody. He submits that this dying declaration bears the endorsement of the same Medical Officer who has endorsed on the dying declaration (Exh-50) about fit state of mind of the deceased Balika to give statement. He submits that the said dying declaration has been

produced by the prosecution when the matter was at the stage of hearing bail application. The genuineness thereof has been admitted on behalf of the appellants and therefore, it has been admitted in the evidence.

11. The learned counsel further submits that the parents and other relatives of the deceased Balika were examined by the prosecution. They did not support the prosecution. Therefore, the dying declaration (Exh-50), which incriminates the appellants, cannot be relied on in the absence of any evidence corroborating the contents thereof. On the contrary, the evidence of the parents of the deceased Balika show that the appellants had no reason to set the deceased Balika on fire. The spot panchanama also shows that a kerosene lamp was found there which came to be seized. There was no kerosene container found in the house of the appellants when the spot panchanama (Exh-31) was prepared. He submits that a false seizure panchanama (Exh-66) has been prepared on 18th May, 2004 at about 5.45 p.m., showing that there was a kerosene container in the house of the appellants. He submits that when there are contradictory dying declarations, the dying declaration, which is in favour of the accused and which is supported

by the other evidence and attending circumstances, has to be accepted. He submits that the appellants have been wrongly convicted by the learned Trial Judge and prays that the impugned judgment and order may be set aside.

12. On the other hand, the learned A.P.P. supports the impugned judgment on the say that the dying declaration (Exh-50), which was recorded first in point of time, clearly incriminates the appellants and shows that they poured kerosene on her person and set her ablaze. There was no reason for the deceased Balika to state false against the appellants. According to him, the learned Trial Judge has rightly appreciated the facts of the case and rightly convicted and sentenced the appellants believing the dying declaration (Exh-50) as voluntary and truthful. He, therefore, prays that the appeal may be dismissed.

13. The learned counsel for the appellants cited the judgment in the case of **Raju Devade Vs. State of Maharashtra AIR 2016 SC 3209**, wherein it has been held that when there are multiple dying declarations, each dying declaration has to be considered independently on its own merits so as to appreciate its evidentiary value

and one cannot be rejected because of the contents of the other. In the cases where there are more than one dying declarations, it is the duty of the Court to consider each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs.

14. In the case of ***Shudhakar Vs. State of M.P. AIR 2012 SC 3265***, it is observed that in the cases involving multiple dying declarations, for determining which of the various dying declarations should be believed by the Court, the test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters.

15. In ***Puran Chand Vs. State of Haryana 2010 AIR SCW 3677***, it is observed that the Courts have to be extremely careful when they deal with a dying

declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused persons. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. It is further observed that it cannot be that a dying declaration which supports the prosecution alone can be accepted, while the other innocuous dying declarations have to be rejected. Such trend will be extremely dangerous.

16. Keeping in mind the above referred principles, governing the dying declarations, we proceed to consider the dying declarations of the deceased Balika.

17. The dying declaration (Exh-50) was recorded by ASI Lambture (PW6) (Exh-49) on 13th May, 2004 between 12.30 and 1.00 noon in the Civil Hospital at Ambejogai. He states that he got it verified from the Medical

officer that the deceased Balika was in a fit state of mind to give statement and then recorded dying declaration (Exh-50) as per her say. In this dying declaration, the deceased Balika alleged that the appellants were illtreating her because she had not conceived any child even after one year of the marriage. She stated that she had informed about that illtreatment to her parents and her parents tried to convince the appellants to treat her properly. She then alleged that on 12th May, 2004 at about 6.00 p.m., when she was taking out grains from a bag, both the accused (appellants) closed the door of the house from inside and poured kerosene on her person. Appellant No. 2 asked appellant No.1 to set her on fire and accordingly, appellant No.1 lit a matchstick and set her ablaze. She raised shouts whereon the appellants made a show of extinguishing fire from her person so as to mislead the neighbours. Surekha Namdeo Phad, Aasubai Laxman Phad and others came there and extinguished fire from her person. She was admitted in the Civil Hospital at Ambejogai by her mother, cousin brother-in-law, cousin maternal uncle, the son of her cousin maternal uncle and one Narayan. Thus, the deceased Balika attributed guilt to the appellants for setting her on fire.

18. ASI Lambture (PW6) admits that there is no endorsement given by the Medical Officer on the dying declaration (Exh-50) prior to recording it that the deceased Balika was in a fit condition to give statement. The Medical Officer concerned has not been examined by the prosecution to show that the deceased Balika was in a fit condition to give statement when the dying declaration (Exh-50) was recorded. Though initially ASI Lambture (PW6) states that at the time of recording the dying declaration (Exh-50), the deceased Balika, the Medical Officer on duty and himself only were present, he states in his cross-examination that the dying declaration (Exh-50) was actually recorded by his writer under his supervision. Thus, one more person was present at the time of recording dying declaration (Exh-50). The person, who scribed or recorded the dying declaration (Exh-50) has not been examined by the prosecution. As seen from the contents of the dying declaration (Exh-50), the mother of the deceased Balika was with her when she was admitted in the Civil Hospital at Ambejogai on 12th May, 2017 at about 8.00 p.m. There is absolutely no explanation given by the prosecution as to why the deceased Balika did not disclose involvement

of the appellants in the incident of setting her on fire until the dying declaration (Exh-50) was recorded.

19. Rukminbai (PW2) (Exh-41) is the mother of the deceased Balika. She specifically states that she was present in the hospital with the deceased Balika from 12th May, 2004 until she died. She then states that the deceased Balika stated her in the hospital that the incident of fire took place accidentally due to fall of burning lamp on her person. She denies that the appellants used to illtreat the deceased Balika. If the appellants had set the deceased Balika on fire, she certainly would have disclosed that fact to her mother Rukminbai (PW2). However, whatever was stated by the deceased Balika to Rukminbai (PW2) is contrary to what has been mentioned in the dying declaration (Exh-50).

20. The father of the deceased Balika i.e. Madhukar (PW1) (Exh-40) also does not support the case of the prosecution. He also states that the deceased Balika died due to fall of a kerosene lamp on her person. He specifically states that the deceased Balika was cohabiting with appellant No.1 happily. As such, there is no corroboration to the contents of dying declaration (Exh-50) from the parents of the deceased Balika about

the alleged illtreatment given by the appellants to her on the ground that she did not conceive any child. The alleged ground behind the so called ill-treatment does not appear to be natural and probable, because the marriage of the deceased Balika had taken place hardly about one year prior to the incident.

21. As stated in the dying declaration (Exh-50), one Surekha Namdeo Phad, Aasubai Laxman Phad and others extinguished fire from the person of the deceased Balika. The evidence of these witnesses certainly would have been helpful to the prosecution to establish the reaction of the deceased Balika immediately after the incident. Had the appellants set her on fire, she certainly would have disclosed that fact before these witnesses. The prosecution has withheld their evidence without assigning any reason. Therefore, it will have to be inferred that had they been examined, their evidence would not have supported the case of the prosecution.

22. API Savale (PW7) (Exh-54) admits that he had given a letter to the Special Executive Magistrate with a request to record statement of the deceased Balika on 14th May, 2004. The dying declaration (Exh-37) has been

recorded by the Special Executive Magistrate on 14th May, 2004 at about 10.30 a.m. The same Medical Officer, who has endorsed on the dying declaration (Exh-50), has given endorsement on the dying declaration (Exh-37) that the deceased Balika was conscious and oriented to time, place and person. As such, she was in a fit condition to give statement. In that statement, she specifically stated that she sustained burns accidentally as the kerosene lamp fell on her person due to which her saree was burnt and she sustained injuries. She further stated that the appellants rushed to her and extinguished fire from her person.

23. This dying declaration finds corroboration from the evidence of the parents of the deceased Balika. Moreover, one Surekha (PW5) (Exh-45), who had come to her maternal home, which was in front of the house of the appellants, states that when the incident took place, she was sitting in the courtyard of the house. She saw the appellants extinguishing the fire from the person of the deceased Balika. Thus, the evidence on record corroborates the contents of the dying declaration (Exh-37), which was recorded by the Special Executive Magistrate.

24. This dying declaration (Exh-37) was produced by the prosecution when the bail application of the appellants was being heard. The genuineness of the contents thereof has been admitted by the appellants and therefore, it came to be admitted in evidence. Since the said document also forms part of the papers of investigation and since it was recorded by the Special Executive Magistrate at the instance of the Investigating Officer, it was rightly admitted in evidence. The dying declaration (Exh-37) supports the case of the appellants that the deceased Balika sustained burns accidentally.

25. As stated above, there is no corroboration to the contents of the dying declaration (Exh-50), which tends to incriminate the appellants. On the contrary, the dying declaration (Exh-37) finds corroboration from the evidence of the parents of the deceased Balika herself. Consequently, in view of the above cited judgments, the dying declaration (Exh-37), which is in favour of the appellants, will have to be accepted and the dying declaration (Exh-50) will have to be discarded.

22. The learned Trial Judge did not appreciate the facts of the case correctly and properly and wrongly relied on the dying declaration (Exh-50), which was not corroborated by attendant circumstances. The learned Trial Judge wrongly convicted and sentenced the appellants for the above mentioned offences. The impugned judgment and order being not legal, proper and correct, are not sustainable. They are liable to be quashed and set aside. Hence, the following order:-

O R D E R

- (i) The Criminal Appeal is allowed.
- (ii) The impugned judgment and order dated 17th August, 2006 passed by the learned 1st Adhoc Additional Sessions Judge, Ambejogai in Sessions Case No. 97 of 2004, convicting and sentencing the appellants for the offences punishable under Sections 302 and 498-A of the Indian Penal Code are quashed and set aside.
- (iii) The appellants are acquitted of the above-said offences.

(iv) The bail bonds of the appellants are cancelled.
They are set at liberty.

(v) Fine amount deposited by the appellants be
refunded to them.

(vi) The appeal is accordingly disposed of.

[SANGITRAO S. PATIL]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

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