

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

CRIMINAL APPEAL NO. 572 OF 2002

The State of Maharashtra Through PSI, MIDC Police Station, for the complainant Harku Geeta Pawar, R/o. Midsangvi, Tql. Pathardi, Dist. Ahmednagar.	.. Appellant [original complainant]
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Versus

1. Shivaji Bansi Karpe Age. 33 years	.. Respondents [original accused Nos.4 & 5]
2. Mahadeo Bansi Karpe Age. 35 years	

Both R/o. Majale Chincholi,
Tal. & Dist. Ahmednagar.

Mr.P.G. Borade, A.P.P. for appellant/State.
Mr.N.C. Garud, Advocate for the respondents.

**CORAM : T.V.NALAWADE &
S.M.GAVHANE, JJ.**

DATED : 19.09.2017

JUDGMENT [PER : S.M. GAVHANE, J.] :-

. The appellant/State has filed this appeal to the extent of acquittal of respondent Nos.1 and 2, who are respectively original accused Nos.4 and 5, for the offences punishable under sections 498-A, 302, 504 read

with section 34 of the Indian Penal Code [for short "the IPC"], as per the judgment and order dated 15.06.2002 in Sessions Case No.124 of 2001, passed by the Additional Sessions Judge, Ahmednagar.

2. The case of the prosecution is that the deceased Alka was daughter of the complainant – informant Harku Geeta Pawar [PW-2] who is resident of village Midsangvi, Tal. Pathardi, Dist. Ahmednagar. She was married to accused No.2-Trimbak Karpe in 1991 about 11 years prior to the incident. Accused No.1 is father-in-law of the deceased, while accused Nos.3,4 and 5 are respectively sister and brothers of husband-accused No.2.

3. After the marriage, the deceased started residing with the accused at village Majale Chincholi, Tq. & Dist. Ahmednagar. Initially for 1½ years she was treated properly by the accused. It is alleged that thereafter all the people from the in-laws' house of the deceased started harassing the deceased on account of

lifting cow-dung; that the new horse which was purchased was costly and on saying her to bring Rs.25,000/- for construction from her parents. The deceased used to say that the financial condition of her parents is poor and that they are not having money. Thereafter, the accused used to beat, starve her and used to cause mental and physical cruelty to her and abuse her. The deceased used to tell the same to the complainant. However, he used to send the deceased to the house of the accused. It is alleged that two months prior to the incident the deceased had come to the house of her parent for two days and she told complainant that the accused had driven her out of the house, as she did not bring Rs.25,000/- for constructing the house. Thereupon, he convinced her and she was sent to her in-laws' house.

4. On 20.09.2000 at about 12=00 noon the complainant had a message that the deceased sustained injuries due to flickering of stove and that she has been admitted in Booth Hospital, Ahmednagar for treatment.

Thereafter, the complainant, his brother Vithoba and his wife Satyabhama [PW-3] went to Booth Hospital in the evening at about 06=00 p.m. to 07=00 p.m. At that time, the deceased was not talking properly. Her father-in-law, husband, sister-in-law and brother of her husband were near her and they told him that she sustained burns, while preparing tea on the stove. Further it is alleged that due to the harassment caused to her by the accused on 20.09.2000 at 7.30 a.m., the deceased herself poured kerosene on her person and set her on fire. PW-2 lodged complaint as above in MIDC Police Station, Ahmednagar on 23.09.2000. After receiving the complaint treating the same as FIR, Crime No.118 of 2000 for the offences punishable under sections 498-A, 323, 504 read with section 34 of the Indian Penal Code was registered at 16=20 hours in the said police station. ASI Yusuf Shaikh started investigation initially. It appears that prior to registering the crime as above on 20.09.2000 on the basis of station diary entry in the above said police station regarding sustaining burns to the deceased, ASI

Shaikh Yusuf visited the spot of incident i.e. the house of accused No.1, which has been shown by accused No.4 and ASI Yusuf Shaikh prepared panchanama of said spot and seized iron stove under the said panchanama [Exh.35].

5. During investigation on 24.09.2000, ASI Yusuf Shaikh gave letter to Tahsildar/Executive Magistrate, Ahmednagar to record dying declaration of the deceased, who was admitted in Booth Hospital, Ahmednagar in injured condition. Accordingly, Tahsildar Jagtap [PW-1] after receiving said letter at 3=15 p.m. on that day immediately reached Booth Hospital, Ahmednagar and met Residential Medical Officer of the said hospital and told him that he has to record dying declaration of the patient/deceased and asked him to tell whether the patient was fit to give statement or otherwise. Thereupon, PW-1 recorded dying declaration [Exh.30] of the deceased, wherein she stated that the incident took place on 20.09.2000 at 7.30 a.m. and when she went out of the house at 7.00 a.m. to lift cow-dung, at that time

accused No.4-Shivaji and accused No.5-Mahadeo pushed her 2-3 times and accused No.4 poured kerosene on her person and threw match stick on her person. Accused No.5 and the neighbours extinguished the fire. Accused No.5 and her mother-in-law's brother Bhau Daunde sent her to Ahmednagar by jeep. Said dying declaration was recorded between 3.55 p.m. to 4.10 p.m.

6. After recording dying declaration as above, offence under section 307 of the IPC was added in the crime already registered against the accused. While the deceased was taking treatment in Booth Hospital, she succumbed to the injuries on 25.09.2000. Therefore, offence punishable under section 302 of the IPC was added in the above crime and further investigation was carried by API Shaikh Rauf [PW-7]. He prepared inquest panchanama of the dead body. He got the post mortem done by Dr.S.D. Patil and Dr. Borhade. Said Doctors issued port mortem report. It was opined that death was caused due to cardiorespiratory failure due to septicemic shock

due to 95% burns. API Shaikh Rauf [PW-7] recorded statement of witnesses including statement of mother of the deceased. So also, he prepared another panchanama of spot of incident [Exh.48] i.e. the site in front of the house of the accused on 26.09.2000, where the kerosene was allegedly poured on the person of the deceased and she was set on fire. The accused were arrested.

7. After completion of investigation, the Investigating Officer [PW-7] submitted charge-sheet in the Court of JMFC, Ahmednagar against the accused for the offences punishable under sections 498-A, 302, 323 read with section 34 of the IPC. The learned Magistrate committed the case to the Sessions Court, Ahmednagar as the offence punishable under section 302 of the IPC was exclusively triable by the Court of Sessions and it was assigned to the Additional Sessions Judge, Ahmednagar for trial.

8. The charge was framed against all the accused

for the offences punishable under section 498-A read with section 34 of the IPC against all accused and against accused Nos.4 and 5 for the offences punishable under sections 302 and 504 of the IPC individually or in furtherance of their common intention read with section 34 of the IPC. The accused pleaded not guilty to the charge and claimed to be tried. Their defence is denial and that the deceased sustained burns accidentally. They have not examined any witness in defence.

9. The prosecution has examined in all seven witnesses and relied upon panchanamas and dying declaration referred above. On considering the evidence adduced by the prosecution, the learned Additional Sessions Judge, Ahmednagar acquitted all the accused of the offences U/s. 498-A, 302 and 504 r/w Sec.34 of the IPC by the impugned judgment and order.

10. Aggrieved by the impugned judgment and order, the appellant/State has filed this appeal only against

accused Nos.4 and 5/respondents on several grounds mentioned in appeal and prayed to set aside the impugned judgment and order.

11. We have heard learned APP and learned Counsel appearing for the respondents/accused Nos.4 and 5. With their assistance we have perused the evidence adduced by the prosecution. We have perused the impugned judgment.

12. There is no dispute that the deceased was married to accused No.2 in 1991 and after marriage she went to the house of accused for co-habitation. On 20.09.2000 while she was residing with the accused at Majale Chincholi, she sustained 95% burns at about 7=30 a.m. Thereafter, accused No.5-Mahadeo and Bhau Daunde – maternal father-in-law of deceased sent her by jeep in Booth Hospital, Ahmednagar. The deceased succumbed to burn injuries on 25.09.2000 in the said hospital.

13. The case of the prosecution is that death of the

deceased is homicidal, accused Nos.4 and 5 pushed her in the morning on the day of incident and then accused No.4-Shivaji poured kerosene on her person and threw match stick on her person and set her on fire. The accused have denied the same and on their behalf it was suggested to PW-2 – father of the deceased that she sustained burns due to stove blasting and as such according to them her death is accidental. To prove that death of the deceased is homicidal, that the accused Nos.4 and 5 are responsible for her death, that all the accused have caused cruelty to the deceased and accused Nos.4 and 5 had intentionally insulted the deceased, the prosecution has relied upon evidence of following categories.

- (i) The post mortem report - Exh.24.
- (ii) The dying declaration – Exh.30 recorded by PW-1 in presence of Dr.Palve [PW-6].
- (iii) Evidence of PW's 2 & 3—parents of the deceased

14. As regards post-mortem report Exh.24, same is admitted by the accused. It shows that the deceased sustained 95% burns. Further it shows cause of death as,

"cardiorespiratory failure due to septicemic shock due to 95% burns". But said cause of death is not sufficient to infer that the deceased sustained burns accidentally or said burns were caused to her by pouring kerosene and after setting her on fire by the accused No.4 or 4 and 5 as alleged by the prosecution. Therefore, the post mortem report is of no help to the prosecution to infer that the death of the deceased is homicidal.

15. The next material piece of evidence relied upon by the prosecution to prove that death of the deceased is homicidal, is the dying declaration – Exh.30. This dying declaration [Exh.30] shows that it was recorded on 24.09.2000 by the Tahsildar – Jagtap [PW-1]. PW-1 has deposed that he received requisition letter on 24.09.2000 at about 13=15 hours requiring him to record dying declaration of the deceased, who was admitted in the hospital. His evidence shows that immediately he reached to Booth Hospital, Ahmednagar. There he met the Residential Medical Officer of the said hospital and told

him that he has to record dying declaration of the patient. Said Doctor took him to the patient. He asked the Residential Medical Officer as to whether the patient was fit to give statement or otherwise. The Residential Medical officer examined the patient clinically and gave his opinion that the patient was capable to give declaration. The Residential Medical officer had put certain questions to the patient about her name, place of residence etc. He requested the relatives of the patient to quit the premises. The Residential Medical Officer put fitness endorsement in his presence at the top of the dying declaration. PW-1 further deposed that he introduced himself to the patient. He also told the patient the purpose of his visit. Then he started to put questions to the patient and at the same time he started writing her replies given to his questions. He recorded statement of the patient as per her reply given to him. After having recorded statement of the patient, he obtained thumb impression at the bottom of the dying declaration. He personally attested the thumb impression

of the patient and also signed the dying declaration. He stated that the dying declaration Exh.30 shown to him is the same. Thereafter, he again requested the Residential Medical Officer to verify whether the patient had given her declaration and she was capable physically to give the same and the Medical officer put certain questions to the patient, satisfied that the patient was all along conscious while her statement was being recorded.

16. In the cross-examination, PW-1 has stated that there was severe pain to the patient when her dying declaration was recorded. She was giving statement with interruption and with low tone. He personally did not satisfy about mental condition of the patient. He could not tell by which mode the Medical Officer examined the patient. According to him, the Medical Officer might have examined the patient within ten minutes. As stated earlier, the patient/deceased had sustained 95% burns.

17. PW-6-Dr. Nilima Palve, who had examined the

deceased at the time of recording dying declaration Exh.30 has stated that PW-1 - Jagtap, Executive Magistrate came to her at 2=00 p.m. and told her that he wanted to record statement of the deceased. Therefore, he wanted to ascertain whether the patient was capable to give statement or otherwise. She stated that she accompanied PW-1 to burn ward. She examined the patient and found that the patient was conscious and oriented and in a condition to give statement and she was well oriented. She stated that she put certain questions to the patient and the patient replied the same. Therefore, she concluded that the patient was mentally fit to give statement. Accordingly, she put endorsement on the top of dying declaration Exh.30 with her signature. Thereafter, PW-1 recorded statement of the patient in her presence and nobody was present there and the patient gave statement in her presence. After recording the statement she gave endorsement that the patient was all along conscious while her statement was being recorded.

18. In the cross-examination, Dr.Nilima Palve (PW-6) deposed that she has brought case papers and she can produce the same. The history of the patient was accidental one. So also she has stated that the condition of the patient on 23.09.2000 at 10.00 p.m. was very poor. On 24.09.2000 at 08.00 a.m. general condition of the patient was poor and on that day at about 10.00 a.m. I.V. line was out. Hence, medicines could not be given. On that day at 04.00 p.m. as per the record, the patient was conscious and she was talking. However, at that time general condition of the patient was poor. Central Nervous System and Cardiorespiratory System were found failure. Such failure caused physical and mental impact on the patient. She had examined the pulse and B.P. and temperature of the patient. She has not recorded the same anywhere. Further, she stated that before her the Magistrate did not introduce himself to the patient. Perhaps by that time, she might have left the ward to attend the other patients. Therefore, entire statement of the patient could not be recorded in her presence.

Therefore, she could not put remark that she was present all along. She stated that she used to sit in casualty room of the hospital, since she was Casualty Medical Officer. She admitted that the Magistrate after having recorded statement came to her room and then she put her endorsement on it. So also she admitted that she put endorsement to complete the procedural aspects mechanically.

19. From the above evidence of both PWs 1 and 6, it is not clear as to which questions were put by them to the patient/deceased to ascertain whether she was in a position to give statement on 24.09.2000 between 03.55 p.m. to 04.10 p.m., when dying declaration Exh.30 was recorded. So also, there is no consistency in the evidence of PW-1 and PW-6 in respect of presence of Doctor PW-6, while PW-1 was recording statement/dying declaration [Exh.30]. Moreover, it is clear from the evidence of PW-6 Dr. Palve that on 24.09.2000 patient was conscious but general condition of the patient/deceased

was poor at 04.00 p.m.. Moreover, it is clear from the evidence of PW-6 – Doctor that she was given letter by PW-1 – Special Executive Magistrate in the hospital at 02.00 p.m. on 24.09.2000 while as per evidence of PW-1, on that day he received letter of MIDC Police Station requesting him to record dying declaration of the deceased at 03.15 p.m. Therefore, it is doubtful whether PW-1 had really met Dr. Palve [PW-6] at 02.00 p.m. on the above said date. Therefore, it is doubtful whether the patient was in a position to give statement on 24.09.2000, as claimed by PW's 1 and 6.

20. As referred above, PW-1 Tahsildar – Jagtap has simply stated that he asked questions to the patient and started writing replies given by the patient to his questions and as such he recorded dying declaration [Exh.30], as per replies given by the deceased. He has not stated about the actual contents of dying declaration [Exh.30] as referred earlier in detail in para 5 (supra) about the involvement of accused Nos.4 and 5 in pushing

her and involvement of accused No.4-Shivaji in pouring kerosene on her person and setting her on fire by throwing match stick on her person. Therefore, it cannot be said that the contents of Exh.30 – dying declaration are proved by the prosecution. This conclusion is based on the ratio laid down by Division Bench of this Court in the case of **Sk. Bibal @ Chunnu Shaikh Nizam Vs. State of Maharashtra, 2010 All MR (Cri) 779**, wherein it was held that merely stating that dying declaration was recorded as per the narration of injured, would not amount to proving the contents of the dying declaration. Similarly, PW-1 has simply stated that he obtained thumb impression of the deceased on the dying declaration. He does not claim that he read over the contents of dying declaration to the deceased and on her saying that said contents are as per her say, he obtained her thumb impression on the dying declaration. Therefore, it cannot be said that the dying declaration [Exh.30] is the statement as per the say of the deceased. Another aspect to be noted is that in presence of Dr. Palve – PW-6, the

dying declaration [Exh.30] was in-fact not recorded because as referred earlier her evidence shows that she had left the ward of burn patients to attend other patients and after statement was recorded, PW-1 came to her room and then she put her endorsement. Said Doctor has also not stated about the contents of dying declaration - Exh.30. Moreover, she also does not claim that said dying declaration was read over to the patient. For all the reasons discussed above, we hold that the prosecution has failed to prove that the dying declaration [Exh.30] is trustworthy and reliable statement of the deceased. Therefore, it cannot be said that on the day of incident i.e. on 20.09.2000 both accused Nos.4 and 5 abused or pushed the deceased and thereafter accused No.4-Shivaji poured kerosene on her person and set her on fire by throwing match stick, on the basis of dying declaration Exh.30.

21. Another reason to hold that the dying declaration [Exh.30] is not reliable and trustworthy is

that it has come in the evidence of both PW-1 and Dr. Palve [PW-6] that earlier to dying declaration [Exh.30] dated 24.09.2000, there was another dying declaration. PW-1 has stated that from police report he came to know that the dying declaration of the patient prior to recording dying declaration [Exh.30] was recorded. PW-6 has also stated that she was aware that before dying declaration Exh.30, earlier statement of the deceased was recorded and Dr.Arun Pawar had examined the patient at that point of time. The Investigating Officer API Shaikh Rauf [PW-7] has also stated in the cross-examination that on 20.09.2000 the dying declaration of the deceased came to be recoded and that he has produced that statement of the deceased along with record. It appears that said statement/dying declaration dated 20.09.2000 is in the record and proceedings. Said is of course not proved. But if it is considered, it shows that at that time the deceased had stated that she had given complaint against nobody and she sustained burns due to blasting of stove. Thus, even if said earlier statement is not proved, the

fact remains that the prosecution has suppressed the fact of recording said earlier statement/dying declaration, which does not suite to the prosecution. This also creates doubt about truthfulness of dying declaration [Exh.30].

22. Now coming to the evidence of parents of the deceased, which is mainly on cruelty to the deceased, PW-2 father of the deceased has stated that after marriage of the deceased with accused No.2-Trimbak, she was treated properly for about two years. Then they started cruelty to the deceased on account of amount of Rs.25,000/- which was required for construction. He stated that he is a poor man and accused purchased horse. Further he deposed that he came to know about the illtreatment to his daughter, when he reached to the hospital. About the incident of sustaining burns to the deceased, he stated that he had no talk with the deceased after he saw her in the hospital. He, of course, stated that accused No.4 poured kerosene on the person of

deceased and accused No.5 set her on fire. This evidence is contrary to the evidence of dying declaration [Exh.30], as the deceased did not attribute role of setting her on fire by pouring kerosene on her to accused No.5. Moreover, he (PW-2) has not stated how he came to know about role as above of accused Nos.4 and 5. When deceased did not talk to him, when he reached in hospital, he should have stated in that respect, because he is not eye-witness to the incident. Therefore, his evidence about involvement of accused Nos.4 and 5 in the incident of causing burns to the deceased is not believable.

23. In the cross-examination, PW-2 deposed that accused are residing separate. So also, he deposed that he does not know whether accused own 16 acres land or otherwise and own she-goats or otherwise. He stated that the accused are economically sound than him. He stated that he is having other relatives in the village of the accused and he did not tell said relatives about the

demand of Rs.25,000/- of the accused. Thus, it is clear from his evidence that the accused are residing separate. The financial condition of the accused is better than him. Moreover, he did not disclose alleged illtreatment to the deceased to his relatives from the village of the accused. So also, it appears from his evidence that the deceased did not disclose to him alleged cruelty to her prior to the incident during 11 years period after her marriage. Therefore, his vague evidence is not sufficient to state that really all the accused or accused Nos.4 and 5 caused cruelty to the accused.

24. It is pertinent to note that PW-2 - father of the deceased lodged complaint/FIR on 23.09.2000 [Exh.32] in MIDC Police Station, Ahmednagar. He deposed that the contents of the said complaint/FIR are correct. In the said FIR the allegations regarding demand of Rs.25,000/- by the accused are made. So also, it is alleged that the deceased was caused cruelty on account of not lifting cow-dung and that the new horse was not good etc. The

last allegation made in the FIR is that on boaring to the harassment caused to the deceased, on 20.09.2001 at 7.30 a.m., the deceased herself poured kerosene on her person and set her on fire. Thus, when PW-2 admits that contents of the said FIR are true, it apparently shows that death of the deceased was suicidal.

25. The evidence of PW-3 mother of the deceased is that at that point of time accused used to reside jointly. Initially life of the deceased was smooth. But then accused started illtreating her, since the deceased could not meet out their demand of Rs.25,000/- made by them for construction of the house. She deposed that accused had also purchased a horse and on that count they used to beat the deceased. She claimed that she came to know about the same from the deceased, whenever the deceased in those days used to come to her house. She further deposed that she could meet the deceased 15 days prior to the incident at her house when the deceased had come to her house out of anger. She stated that the

deceased was beaten at her matrimonial house and the deceased disclosed about illtreatment caused to her by the accused and that she had agreed to give Rs.25,000/- to the accused. In the cross-examination, she stated that she did not enquire to her relatives who reside in the village of accused about illtreatment caused to the deceased. So also they did not move to police station to that effect. So also, she did not go along with daughter to ascertain the fact of illtreatment to her. She deposed that she and her relatives were in the hospital for seven days. Further, she admitted that they all have decided to lodge complaint against accused and accordingly complaint was lodged. Moreover, she admitted that the accused own total 15 acres land and each accused has independent house. It is clear that the deceased was married to accused No.2, 11 years prior to the incident in 2000. If it was case that she was harassed by the accused, as deposed by PW-3, PW-3 would have earlier lodged complaint against accused about the illtreatment to the deceased. Admittedly, no such complaint was made

to police. So also, it appears that financial condition of the accused is sound. Therefore, the evidence of PW-3 is not sufficient to infer that either of the accused or accused Nos.4 and 5 caused cruelty to the deceased.

26. For the reasons discussed here-in-above, as per the dying declaration [Exh.30] dated 24.09.2000 recorded by PW-1, death of deceased was homicidal and as per the FIR Exh.32, it was alleged by the father of the deceased that the deceased committed suicide. Therefore, in any case, it cannot be said that death of the deceased was homicidal and possibility of her death being accidental or suicidal cannot be ruled out. The Trial Court held that death of the deceased is homicidal on the basis of post-mortem report, inquest panchanama and spot panchanama. Said finding of the Trial Court is incorrect. The only evidence relied upon by the prosecution to connect the accused with the death of the deceased is dying declaration [Exh.30] and as observed earlier, it is held that said dying declaration is not trustworthy and

reliable, therefore, it cannot be said that accused Nos.4 and 5 have abused the deceased on the date of incident on 20.09.2000 in the morning and that accused No.4-Shivaji poured kerosene on her person and set her on fire by match-stick. Therefore, we hold that the above referred evidence adduced by the prosecution is not sufficient to infer that the accused Nos.4 and 5 caused cruelty to the deceased, intentionally insulted her and caused her death by setting her on fire after pouring kerosene either individually or in furtherance of their common intention and as such the prosecution has failed to prove offences punishable under sections 498-A, 302 and 504 of the IPC individually against the said accused or in furtherance of their common intention, read with section 34 of the IPC. The Trial Court has rightly held that the prosecution has failed to prove said offences against accused Nos.4 and 5/respondents, against whom present appeal is filed. Therefore, we hold that the view taken by the Trial Court in acquitting the respondents/accused Nos.4 and 5 of the aforesaid offences is a reasonably

possible view and it cannot be said that the said view taken by the Trial Court is erroneous or the same is not in accordance with the evidence. Therefore, there is no ground to interfere with the impugned judgment and order of acquittal of accused Nos.4 and 5/respondents. As such, we hold that the appeal being devoid of merits, same is liable to be dismissed. Accordingly, we dismiss the same.

27. The Bail bonds furnished by the respondents/accused Nos.4 and 5 shall stand cancelled. They shall furnish fresh personal bond and surety bond of Rs.15,000/- (Rupees Fifteen Thousand) each as per section 437-A of Code of Criminal Procedure, before the Trial Court. The Trial Court shall get the said compliance done.

[S.M.GAVHANE, J.]

[T.V.NALAWADE, J.]