

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

Criminal Appeal No. 680 of 2002

Syed Jabbar s/o Syed Hussain,
Age 33 years,
Occupation : Labourer,
R/o Jafrabad, Taluka Jafrabad,
District Jalna.

.. Appellant.

Versus

The State of Maharashtra.

.. Respondent.

Shri. G.A. Kulkarni, Advocate, holding for Shri. R.S. Deshmukh, Advocate, for appellant.

Shri. S.J. Salgare, Additional Public Prosecutor, for respondent.

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

Judgment reserved on : 25 September 2017

Judgment pronounced on : 11 October 2017

JUDGMENT (Per T.V. Nalawade, J.):

1) The appeal is filed against the judgment and order of Sessions Case No.21/1999 which was pending in the Court of the learned 2nd Additional Sessions Judge,

Jalna. The appellant-accused is convicted and sentenced for an offence punishable under section 302, Indian Penal Code. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :

The deceased Taherabe was a daughter of Abdul Khan Pathan. She was given in marriage to the brother of present appellant-accused more than 2 years prior to the date of the incident. The deceased was living with her husband and one issue in a room of the house. The brothers of the husband of the deceased were living in separate rooms in the vicinity. Even the house of the father of the deceased was in the vicinity of this place and the brothers of the deceased were living with her father, Abdul Khan.

3) The incident in question took place on 10-10-1998 at about 9.00 p.m. Husband of the deceased was not at home and he had left after taking dinner. The present appellant was present in his house and his sister Yasmin was also present. Yasmin was living with her parents. On

that date there was some altercation between the deceased and Yasmin. Due to quarrels which the deceased had with Yasmin, the appellant became angry. He first gave abuses to the deceased and then set her on fire after pouring kerosene on her person. When she started shouting, persons in the vicinity rushed and they extinguished the fire. She was shifted to Civil Hospital Jalna. In the Civil Hospital her statement was recorded as dying declaration by Police Head Constable Kadam. On the basis of this statement, the crime came to be registered for offences punishable under sections 307, 504 and 34 of Indian Penal Code. On the next day, on the requisition given by police, the Executive Magistrate recorded her dying declaration after midnight hours of the night between 10 and 11 October 1998. Both, Kadam and the Executive Magistrate Nandedkar had obtained opinion of the doctor of the Civil Hospital about fitness of the deceased before recording the dying declaration.

4) P.S.I. Khedkar who was attached to Jafrabad Police Station took over investigation of CR No.46/1998 which was registered on the basis of aforesaid statement

of the deceased. During course of investigation spot panchanama was prepared which was of the room where the deceased was living. Statements of some witnesses came to be recorded who were father and brothers of the deceased. Taherabi succumbed to the injuries on 15-10-1998. The offence was converted to make it one under section 302 IPC and statements of some witnesses were again recorded. Inquest panchanama was prepared and the dead body was referred for post mortem examination. The doctor who conducted post mortem examination gave opinion that the death took place due to cardiac respiratory arrest due to septicemia and shock due to 97% superficial to deep burns. Charge-sheet came to be filed against the present appellant only. Charge was framed for offence of murder. The prosecution examined in all 8 witnesses. The accused took defence of total denial. During statement given under section 313 of the Code of Criminal Procedure he contended that he was not at home and his wife also sustained burn injuries when she was making attempt to extinguish the fire. He has examined three witnesses in defence including one doctor who had given treatment to his wife on the burn injuries.

5) The trial Court has believed the evidence given on the two recorded dying declarations and also oral dying declarations on which evidence is given by father and other relatives of the deceased.

6) When death takes place due to burn injuries the death can be accidental, suicidal or homicidal. Due to this probability, the surrounding circumstances need to be considered by the Court when the case rests only on the statements given by the deceased which are admissible under section 32 of the Evidence Act.

7) The first dying declaration was recorded by Kadam (PW 5), Police Head Constable in the Civil Hospital between 11.15 p.m. and 11.30 p.m. on 10-10-1998, the date of the incident. The incident had taken place at about 9.00 p.m. Kadam (PW 5) has given evidence that before recording the statement of the deceased he obtained opinion of Dr. Paritkar about the fitness of the deceased and when the doctor gave opinion that she was fit, he recorded the statement. He obtained thumb impression of the deceased on the statement and obtained

endorsements of the doctor on the statement to the aforesaid effect. This document is given exhibit 28.

8) The contents of Exhibit 28 show that the deceased disclosed as follows :-

(i) Her husband was not at home at 9.00 p.m. and she was alone in the room. Nothing is mentioned in Exhibit 28 about the issue when the deceased had a child.

(ii) Accused gave abuses to her on the ground that she had picked up quarrels with his sister Yasmin and then poured kerosene on her person and pushed her towards electric stove.

(iii) Due to electric stove her clothes caught fire.

9) Nandedkar (PW 6) who recorded the second dying declaration has deposed that he obtained the opinion of Dr. Paropkari regarding the fitness of the patient and when the doctor gave opinion that she was fit, he recorded the statement between 00.05 hours and 00.35 hours of the same night. He has deposed that he obtained thumb impression of the deceased on the statement and

obtained endorsements of the doctor regarding fitness of the patient. The dying declaration is proved at Exhibit 33.

10) The contents of Exhibit 33 are as under :-

(i) On 10-10-1998 at about 9.00 p.m. she had quarrel with present appellant as Yasmin instigated the accused.

(ii) During quarrel the appellant poured kerosene on her person and set fire to her by using a burning piece of paper.

(iii) Her husband was not at home and her in-laws were present in other room.

(iv) She shouted when her clothes caught fire and due to that her in-laws rushed to her room and they extinguished the fire.

(v) There was dispute between the appellant and her family as her daughter aged about one and half years used to enter the house of the appellant and due to that there used to be frequent quarrels.

11) There is evidence of oral dying declaration given by Abdul Khan (PW 1), father of the deceased. He has deposed that on that night when one lady Ashu Begum informed him that his daughter had sustained burn injuries, he went to her matrimonial place. He has deposed that when he inquired with the daughter she disclosed that there was harassment to her from her sister-in-law and the present appellant-accused and on that date there was quarrel between her and her sister-in-law. He has deposed that she disclosed that her sister-in-law and the present appellant poured kerosene on her person and set her on fire. He has given evidence that he and his son shifted the deceased Taherabi to Government Hospital. Even if the other circumstances like some omissions with relation to the previous statement are ignored it can be said that, this dying declaration is not consistent with the aforesaid two recorded dying declarations. PW 1 has deposed against the sister-in-law of the deceased also by saying that she was also involved in the incident in which fire was set to the deceased.

12) Inayat Khan (PW 2), brother of the deceased, has given evidence which is similar to the evidence of PW 1. He has also deposed that the deceased disclosed that present appellant and her sister-in-law poured kerosene on her person and she was set on fire. These oral dying declarations are not consistent with the recorded dying declarations.

13) The evidence of PW 1 and PW 2 shows that they learnt about the incident from third persons and then they went to the matrimonial house of the deceased. The evidence of PW 2 shows that when he rushed to home after learning of the incident he saw that a jeep was already hired for shifting the deceased and it was parked in front of his residential place. Though not specifically deposed by these two witnesses, it can be said that the relatives on parents side of the deceased like PW 1 and PW 2 had shifted the deceased to Civil Hospital and from that moment they were in the company of the deceased.

14) Sk. Fattu (PW 4) is examined to give evidence that he had heard altercations going on between deceased Taherabe and present appellant when he was at the back

side of his house and he had tried to convince the appellant not to quarrel. He has deposed that after 15 to 20 minutes of his return to his house, he heard shouts and so he again rushed to the spot and at that time he saw that Taherabe was completely burnt. In the cross examination of this witness it is brought on the record that he had stated before police that he went to the house of the deceased only when he saw crowd gathered in front of that house. Similarly, some omissions which amount to contradiction from the evidence of PW 1 and PW 2 were pointed out to them and they are duly proved in the evidence of investigating officer Khedkar (PW 7). Before police PW 1 in the statement dated 12-10-1998 had stated that even after learning about the incident he had not gone to the matrimonial house of the deceased and he had stayed at home with children. PW 2 had stated before police that when he learnt about the incident he had directly come to the residential place and the deceased was already brought there. These omissions can be ignored and the remaining evidence like the evidence given on the dying declarations can be analysed and appreciated.

15) The evidence of aforesaid three witnesses does not show that they had seen the appellant in that house when they reached the house of deceased after learning about the incident. The evidence on the record and even the dying declarations show that the in-laws of the deceased and even her sister-in-law, who could have been made accused, were at home, at the residential place but they are not examined as witnesses by the prosecution. Thus, there is only evidence of dying declaration to show that the appellant was present there. It was 9.00 p.m. and even the husband of the deceased was not at home and so it was necessary for the prosecution to show that anybody had seen the appellant in the vicinity of the house of the deceased or at least in his own room situated in the same campus when they rushed to the spot after learning about the incident. If the in-laws of the deceased had extinguished the fire and the deceased had no grievance against the in-laws, they could have given information about the starting of the incident and also about extinguishing fire by somebody or by them. In the first dying declaration nothing was disclosed as to who had extinguished the fire. All these circumstances are relevant

but there is no evidence given by the prosecution on such circumstances.

16) The spot panchanama is proved in the evidence of one Pathan (PW 3). The spot panchanama at Exhibit 25 and the evidence of Pathan show that the size of the room where the deceased was living was 10×15 ft (in the substantive evidence the size is given as 10×10 ft) and this room had roof of six tin-sheets. In the map this house is shown separate from the remaining portion of the house and that map is proved as Exhibit 38 in the evidence of the Investigating Officer (PW 7). There are houses of Mohd Azam and others in the vicinity. Those neighbours are also not examined. Thus, there is no convincing evidence which can be called as independent with the prosecution to show that immediately after hearing the shouts of the deceased, persons who rushed to the spot had seen the accused on the spot or in the vicinity of the spot of offence. These circumstances can be used against the prosecution as it indicates that the prosecution avoided to lead such evidence.

17) In the first dying declaration the deceased disclosed that electric stove was on and her clothes caught fire due to electric stove. Though in the second dying declaration she disclosed that a piece of burning paper was used to set her on fire and kerosene was poured on her person prior to that, the spot panchanama at Exhibit 25 does not show that panchas had smell of kerosene in the room. They noticed water inside of the room showing that the fire was extinguished by using water in the room. One tin box of kerosene was available in room having smell of kerosene but there was no kerosene inside of the tin box. Under the spot panchanama only one article, the aforesaid tin box was taken over. The evidence does not show that the clothes of the deceased were taken over or pieces of partly burnt clothes of the deceased which could have been found on the spot were taken over and they were sent to C.A. office. There is virtually no explanation on these circumstances. If kerosene was used for setting fire to the deceased in ordinary course police would have collected relevant articles or at least the clothes of the deceased and the clothes could have sent to C.A. office. The evidence of the

investigating officer shows that no such attempt was made and there is no explanation to that lacuna.

18) There is one more circumstance in the spot panchanama. This document (Exhibit 25) shows that out of aforesaid six tin-sheets used for the roof, one tin sheet of western side appeared to be removed. There was electric stove inside of the room and the fire had not reached to other articles. No explanation is given by any witnesses of the prosecution on this circumstance. It was necessary for police to find out as to why and who had removed the tin-sheet of room where the incident had taken place. If it was removed in the past for some other reason, that explanation also could have been given. The prosecution has not given that explanation and the defence has used that circumstance in defence and the evidence is given through defence witnesses on that circumstance. Shahinbi (DW 2), wife of the appellant, is examined as a defence witness. She can be called as interested witness but in ordinary course police ought to have recorded her statement as she was living by the side of the room of the deceased. She has deposed that her

house is situated at a distance of 30 to 40 feet from the house of the deceased and after starting of the fire they noticed that door of the room was closed from inside and due to that Gaffar, other brother of the accused lifted the tin sheet of the room for entering in the room. She has deposed that after opening of the door by Gaffar, the deceased who was in flames came out and she virtually fell on her. She has deposed that due to this she sustained burn injury as her clothes also caught fire. In the cross-examination, the learned APP suggested her that she fell on the person of the deceased or the deceased had caught hold of her. These suggestions show that the State is not disputing that this lady was present at the place of the incident at the relevant time. Defence has examined Dr. Chavan (DW 3) to prove that this lady had sustained burn injuries and the extent was 8 to 10% over back and 3 to 5% burns on right forearm. This witness had examined DW 2 at about 12.30 p.m. on 11-10-1998. The certificate issued by this doctor is proved at Exhibit 56. In view of the aforesaid circumstances this Court holds that the State has not disputed that this witness was present there and she had sustained burn injury in the incident. It was

necessary for the State to get examined DW 2 and explain the injuries on the person of this lady but the defence was required to examine the witnesses to bring this evidence on record.

19) The defence has examined one Mohd Naim (DW 1) who has given evidence that he is immediate neighbour of the deceased. He has deposed that he was present when Gaffar lifted the tin-sheet from the roof of the house of the deceased when there was fire and after entering the room he opened the door of the house by removing latch from inside. He has given evidence that deceased came outside when she was in flames and she fell on the wife of the appellant, accused. He has given evidence that his cousin Mohd Azam was also present on the spot. The house of Mohd Azam is shown in the map which is already mentioned by this Court. This witness is cross-examined by the learned APP but in the evidence of this witness also it was not brought on the record that accused was present there at the relevant time.

20) The aforesaid circumstances show that there is no corroboration to the contents of both the recorded

dying declarations. In the oral dying declarations there is exaggeration which is already mentioned. When the witnesses were available who could have described the incident, they are not examined by the prosecution. The evidence shows that there used to be frequent quarrels between the deceased and the present appellant. Different reasons are given for the quarrels in the two dying declarations. It can be said that the deceased did not like the present appellant. Thus, on one hand it can be said that there is evidence on motive and on the other hand it can be said that there is evidence to show that there was reasons for falsely implicating the appellant.

21) It is true that dying declaration can be acted upon without corroboration. This proposition is subject condition that the Court needs to be satisfied that the dying declaration is true and it was voluntarily given. It is already observed that the witnesses like father and brother of the deceased had shifted the deceased to the hospital and there was possibility of tutoring the deceased. Due to the inconsistencies in the two recorded dying declarations already quoted, regarding the manner

in which the offence committed is described and the lacunae due to which the manner of the incident cannot be believed, the dying declarations have become highly suspicions. There is possibility that due to vindictiveness, the appellant's name is mentioned in the dying declarations. There is evidence that on that day there was quarrels as mentioned in the dying declarations and the deceased was feeling insulted and due to that there is possibility that she took steps to commit suicide. There is also possibility of sustaining of injuries accidentally as there is no independent evidence to show that kerosene was used. This Court holds that it was necessary for the prosecution to have corroboration of independent circumstance and as there is no such corroboration, benefit of doubt needs to be given to the accused [reliance is placed on the case reported as **(2001) 5 SCC 254 - Uka Ram vs. State of Rajasthan**].

22) Learned Additional Public Prosecutor placed reliance on the case reported as **(1976) 3 SCC 618 (K. Ramachandra Reddy v. The Public Prosecutor)** and the learned counsel for the appellant placed reliance on the

case reported as AIR 1965 SC 939 (**Thurukanni Pompaih v. State of Mysore**). In the case cited by the learned Additional Public Prosecutor the Apex Court has laid down that corroboration is not necessary to dying declaration if accepted as true and voluntary. There is no dispute over the proposition. In the other case cited by the learned counsel for the appellant it is laid down that the Court must be satisfied that the declaration is truthful and to ascertain the reliability, the dying declaration needs to be subjected to close scrutiny. The Apex Court has laid down that as there is no opportunity to test veracity by cross examining in such a case, it is the duty of the Court to see and ascertain that the declaration is truthful. It is observed that if the version of the deceased of the entire occurrence is untrue, the Court may in the facts of that case consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. There cannot be dispute over this proposition also. In view of the facts of the present matter, this Court has considered the surrounding circumstances and also the inconsistencies in the recorded and the oral dying declarations. This Court holds that due to the

circumstances mentioned by this Court benefit of doubt needs to be given to the appellant. The trial Court has virtually not considered the aforesaid circumstances of the matter and the trial Court has given conviction by presuming that as there is evidence of dying declarations, story given in the dying declarations needs to be believed. The judgment and order of the trial Court cannot sustain in law.

23) In the result, the appeal is allowed. The judgment and order of the trial Court delivered in Sessions Case No.21 of 1999 (by learned 2nd Additional Sessions Judge, Jalna) by which the appellant is convicted and sentenced for offence punishable under section 302 of Indian Penal Code is hereby set aside. The appellant stands acquitted of the offence for which he was charged and tried.

24) The bail bonds of the appellant to continue for a further period of three months to give opportunity to the State to challenge the decision of this Court.

Sd/-
(S.M. GAVHANE J.)
rsl

Sd/-
(T.V. NALAWADE, J.)