

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 249 OF 2003

Sk. Gulab @ Gulam s/o Sk. Ahemad,
Age: 30 years, Occu: Labour,
R/o Narayanpur, Tq. Gangapur,
District Aurangabad.

....Appellant

Versus

The State of Maharashtra

....Respondent

Mr. P.R. Katneshwarkar h/f Mr. A.N. Walujkar and Mr. S.P. Pandav,
Advocates for appellant.

Mr. P.G. Borade, APP for respondent/State.

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

RESERVED ON : 23/11/2017

PRONOUNCED ON : 18/11/2017

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Sessions Case No. 204/01, which was pending in the Court of learned 1st Ad-hoc Additional Sessions Judge, Aurangabad. The appellant is convicted and sentenced for the offense punishable under section 302 r/w. 34 of Indian Penal Code (hereinafter referred to as 'IPC' for short). Both the sides are heard.

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

Deceased Jaheda was daughter of Shaikh Ismail, who is resident of Pandharohal, Tahsil Gangapur, District Aurangabad. The deceased was given in marriage to real brother of present appellant about 10 years prior to the date of incident. The deceased has not left behind any issue. The husband of deceased was suffering from tuberculosis (T.B.) for about two years prior to the date of incident. After that the husband of the present appellant started taking suspicion against Jaheda that she had illicit relations with neighbour. The name of neighbour is mentioned in the record. It is the case of prosecution that there was illtreatment from the husband and brother of husband to the deceased and they used to even give beating to the deceased due to aforesaid suspicion.

3) The incident started from the night between 24.1.2001 and 25.1.2001. At about 2.30 a.m. of 25.1.2001 the husband started giving beating to the deceased in his house out of the aforesaid suspicion. He wanted to extract confession of deceased about the illicit relations. The deceased did not confess. In the morning, at about 8.00 a.m. appellant came to the house of deceased and after that he and the husband of the deceased started giving beating to the deceased. They wanted to extract confession of the deceased. She did not confess. Then the appellant took a can of kerosene which was present in the house and poured kerosene on

the person of deceased. The husband of deceased set fire to her. When she started shouting the neighbours gathered. The husband extinguished the fire, but it was a show as the neighbours had reached the house after hearing the shouting of deceased.

4) The deceased was shifted to Government Hospital Aurangabad. The dying declaration of deceased came to be recorded in Civil Hospital and on that basis, on 25.1.2001 the crime at C.R. No. 10/01 came to be registered in Waluj Police Station for the offences punishable under sections 307, 323, 34 of IPC against the present appellant and his brother, husband. The deceased blamed both the appellant and her husband for the incident and she narrated the aforesaid incident. The dying declaration of deceased was recorded by Special Executive Magistrate and also by police.

5) Police prepared spot panchanama on 25.1.2001. The pieces of partly burnt clothes of deceased, having smell of kerosene came to be taken over. There were pieces of bangles. Can of kerosene was also taken over.

6) Jaheda died on 26.1.2001 and then the crime came to be converted to one punishable under section 302 r/w. 34 of IPC. Chargesheet was filed for aforesaid offences. The husband of Jaheda

died during pendency of matter in the Trial Court and so, the case was tried only against present appellant. The appellant pleaded not guilty and he took the defence of total denial. The prosecution examined seven witnesses. The Trial Court has based the conviction on dying declaration of Jaheda and imprisonment for life is given to the appellant.

7) The case of prosecution rests entirely on the evidence of dying declarations. When a person dies due to burn injuries at the residential place and inside of the house, there are possibilities like accidental death, suicidal death and homicidal death. These possibilities need to be kept in mind while appreciating the evidence given in a case like present one.

8) Ramesh Pawar (PW 5), ASI was attached to Waluj Police Station at the relevant time. He has deposed that he received information at about 10.15 a.m. on 25.1.2001 and he went to Ghati Hospital, Government Hospital Aurangabad. He has deposed that he obtained opinion of doctor from Civil Hospital regarding the fitness of deceased for giving the statement and then he recorded the statement. He has given evidence that he had read over the statement to the deceased and only when she admitted the contents, he obtained the thumb impression of the deceased on

statement. The statement is proved in his evidence as Exh. 16.

9) On Exh. 16, no time of recording of statement is mentioned. The doctor from whom the certificate was obtained by Pawar (PW 5) is also not examined. The bed head ticket/case papers are also not produced. In the evidence, Pawar (PW 5) has tried to say that he had requested the Executive Magistrate to record the statement and Executive Magistrate recorded the statement first. The evidence of Pawar (PW 5) does not show that he himself was satisfied about the fitness of deceased before recording the statement.

10) There is document like M.L.C. given to Government Hospital by police at Exh. 15. This document shows that the husband of deceased had given history to police of the incident and he had admitted the deceased in the hospital. He had informed to police that the clothes of deceased had caught fire accidentally due to the flames of stove (भडका उडाल्याने). It was informed that the incident had taken place at 8.00 a.m. and the document at Exh. 15 shows that Jaheda was admitted in Government Hospital at 10.00 a.m. Though on Exh. 15, there is the certificate regarding fitness of the deceased for giving statement, as the doctor is not examined, who gave this certificate, that certificate cannot be read in evidence.

11) In Exh. 16, there are following things :-

(i) The husband of deceased was not making earning for livelihood and the deceased was required to do labour work to earn livelihood.

(ii) Her marriage had taken place in the year 1991 and she was cohabiting with the husband at the relevant time. The parents of the husband were, however, living separate. The present appellant, brother in law was living at Narayanpur, but there is no specific mention that he was living in the same house.

(iii) From about 2 months prior to the date of incident, husband and brother in law had started giving illtreatment to her. They were even giving beating to her by saying that she had illicit relations with one neighbour. (The name of the neighbour is mentioned in the dying declaration.)

(iv) On 25.1.2001 at about 2.30 a.m. the husband started giving beating to her and he was insisting that she should admit that she had illicit relations with the said neighbour.

(v) At 8.00 a.m. of 25.1.2001 again beating was given to her for the same reason. Brother in law then came

and then he also gave beating as they wanted to extract confession from her.

(vi) She did not give confession and due to that, brother in law poured kerosene on her person and husband set fire to her by using matchstick.

(vii) She shouted.

(viii) The neighbours gathered and then husband created a show that he was extinguishing the fire.

12) There is no mention in Exh. 16 as to who shifted the deceased to Government Hospital from the residential place. They were living at Narayanpur, Tahsil Gangapur and she was shifted to Aurangabad city where Civil Hospital is situated. It is already mentioned that in Exh. 15, the requisition letter given by police for taking opinion, there is mention that the husband had admitted her in the Civil Hospital, Aurangabad.

13) The Executive Magistrate Shinde (PW 7) has given evidence that on 25.1.2001 Police Head Constable Pawar (PW 5) came to him and he was requested to record the dying declaration. He has given evidence that he went to Ghati Hospital, obtained opinion of doctor and then recorded the statement of deceased. He has given evidence that when he recorded the statement, he had

asked the relatives of deceased to go out of the burn ward where the deceased was kept. His evidence also does not show that he himself got satisfied by putting some questions about the fitness of deceased. The dying declaration recorded by Shinde (PW 7) bears thumb impression of deceased and that document is proved as Exh. 24.

14) The contents of Exh. 24 are as follows :-

(i) The husband was living separate from his relatives like parents. Brother in law, appellant was living in Narayanpur.

(ii) From about two months prior to the date of incident, husband and brother in law were harassing her by taking suspicion over her character and they were saying that she had illicit relations with the neighbour. (The name of neighbour is mentioned in dying declaration).

(iii) On 25.1.2001 at about 2.30 a.m. husband started giving beating to her as he wanted to extract confession about the illicit relations.

(iv) At 8.00 a.m. of 25.1.2001 the husband was at home and then brother in law came there and they together started assaulting her as they wanted to extract confession about her illicit relations.

(v) When the deceased refused to admit that she had illicit relations, brother in law poured kerosene from can present in the house and then the husband set fire to her by using matchstick.

(vi) She shouted.

(vii) The neighbours gathered.

(viii) Her husband extinguished the fire, but it was only a show for neighbours.

There is time of recording mentioned on Exh. 24 as 1.10 p.m. to 1.40 p.m.

15) On Exh. 24 also, there is no endorsement of doctor, regarding fitness of deceased. Thus, both Pawar (PW 5) and Shinde (PW 7) have given evidence that they used the endorsement made about the fitness on Exh. 15. It is already observed that the doctor is not examined to prove that the deceased was fit to make the statement. The evidence also shows that both these witnesses did not get satisfied about the fitness by putting some questions to the deceased. They are entirely relying on the endorsement made on Exh. 15 by the doctor, but the said doctor is not examined. The evidence of Executive Magistrate further shows that the relatives of the deceased were present by her side and he was required to ask

them to leave the place. This evidence is also important as brother of deceased has avoided to admit that he had reached the Civil Hospital prior to recording of the dying declaration of the deceased.

16) Shaikh Ismail (PW 1), father of deceased has given evidence that there was illtreatment to the deceased as both the accused were suspecting that deceased had illicit relations with neighbour. He has deposed that 2-4 days prior to the date of incident, the deceased had disclosed to Shaikh Shamir (PW 3), his son that there was illtreatment to her. Shaikh Shamir (PW 3) has given evidence that about 8 days prior to the date of incident, such disclosure was made by the deceased to him. The evidence of both father Shaikh Ismail (PW 1) and brother Shaikh Shamir (PW 3) does not show that they had made inquiry with both the accused about the illtreatment and about the suspicion they were taking about the character of deceased. There is vague evidence of the witnesses that they used to convince Jaheda as well as accused.

17) Shaikh Ismail (PW 1) has deposed that on the day of incident, he learnt about the incident at about 3.30 p.m. and he learnt it from Shaikh Shamir (PW 3). He has deposed that Shamir had informed that in the incident, accused No. 2, appellant had poured kerosene on the person of deceased and accused No. 1,

husband had set fire to the deceased. He has given evidence that he went to Civil Hospital after learning about the incident and there, deceased made similar disclosure to him.

18) Shaikh Shamir (PW 3) has given similar evidence. Both Shaikh Ismail (PW 1) and Shaikh Shamir (PW 3) have not given evidence on the period since when accused Nos. 1 and 2 had started taking suspicion. The evidence of father, however, shows that husband was sick for quite some time.

19) Shaikh Shamir (PW 3) has given evidence that when he received the information about the incident on 25.1.2001, he was in campus of company with the employer. He has deposed that he went to Civil Hospital in the evening and till that time, he was at home though he had left the campus of company. He has given evidence that in Civil Hospital the deceased disclosed that on the previous night husband had given severe beating to the deceased and in the morning, both husband and appellant had given beating to her and both had set fire to her.

20) The cross examination of Shaikh Shamir (PW 3) shows that he tried to avoid to admit that he had rushed to the Hospital immediately on the learning about the incident. The evidence

showing that the relatives of deceased were present by her side is already discussed when the evidence of Executive Magistrate is discussed. In the cross examination, Shaikh Shamir (PW 3) has admitted that he has stated before police that he learnt about the incident at about 8.00 a.m. itself and then he had left the company. The spot panchanama at Exh. 10 is proved in the evidence of Vazirkhan (PW 2) and this document shows that Shaikh Shamir (PW 3) had shown the spot to police and panchas. The spot panchanama was drawn between 14.05 and 14.35 hours of 25.1.2001. The contents of the spot panchanama falsifies the evidence of Shaikh Shamir (PW 3) that he had not rushed to the Civil Hospital after learning about the incident at 8.00 a.m. This circumstance cannot be ignored as due to such conduct adverse inference can be drawn and the circumstances have created a probability that there was possibly tutoring to the deceased before recording of the dying declaration.

21) Vazirkhan (PW 2), panch witness on the spot panchanama has given evidence that kerosene stove was present in the house and it was in working condition. The panchanama at Exh. 10 shows that the stove was not seized. This witness is cross examined by defence to show that he had also rushed to the spot after starting of fire as he is neighbour of deceased. He has admitted in the cross examination that accused No. 1, husband extinguished

the fire and husband shifted the deceased to the hospital. He has given evidence that Jaheda disclosed to him that her clothes had caught fire accidentally due to flames of stove. He has stated in the evidence that accused No. 2, present appellant, runs a garage at Waluj. As this witness was only on spot panchanama, not much weight can be given to the other evidence given by him. He had not approached police to give statement of aforesaid nature.

22) The time of spot panchanama is shown as 14.05 to 14.35 hours of 25.1.2001 and it was prepared at Narayanpur, not in Aurangabad city. The time of dying declaration recorded by Executive Magistrate is shown as 1.00 p.m. and that was recorded in Civil Hospital, Aurangabad. There is no mention of time of recording of statement on the dying declaration proved in the evidence of Pawar (PW 5). These circumstances have created suspicion about the time of recording of dying declaration and also the voluntariness of the statement.

23) In the spot panchanama at Exh. 10, following things were noted :-

(i) The house consist of one room, having roof of tin sheets. The size of the room was 8 x 12 ft. and in the same room, arrangement was made for cooking the food.

(ii) There was kerosene stove, but no kerosene was present in the stove and it appeared that it was not in use. However, in Exh. 10, there is no other mention to show that other alternate arrangement was made for cooking food. This circumstance also creates doubt about the fairness of the investigation.

(iii) The pieces of partly burnt clothes of deceased were lying in the room and the pieces of her bangles were also lying there. Match stick box was lying on the floor and the room has a smell of kerosene.

(iv) One kerosene can was present in the room at one window. Except the kerosene stove which is mentioned in the spot panchanama all other articles mentioned in the spot panchanama were taken over and seized by the police.

24) The spot panchanama, Exh. 10, shows that on the west side of the house deceased, there is house of Janbi Pathan. On the north side, there is house of Shaikh Musa. On east side, there was road and beyond that there was the house of Shaikh Akbar. In front of house, there was Ota portion and beyond that there was some open space. As the house of deceased was having roof of tin sheets, it was possible for the neighbours to hear the shouting if it was

coming from the house of deceased. The neighbours could have even felt that there was fire. Though there are these circumstances, no neighbour is examined by the prosecution as witness.

25) The aforesaid discussion shows that it is the husband who admitted the deceased in the Civil Hospital and he had given information that it was a case of accidental burns. He is dead. No evidence is there to show that appellant was present in the house or in the vicinity of the house except the contents of dying declaration. In view of these circumstances, due to non examination of neighbours, adverse inference needs to be drawn against the prosecution.

26) Shaikh Ismail (PW 1), father of deceased has admitted that accused No. 1 was suffering from T.B. for about two years. In the dying declaration, it is also mentioned that husband was not doing anything to earn for livelihood. This circumstance is important as that can be also reason for committing suicide. Even the suspicion about the character can be also reason for committing suicide.

27) When a person dies due to burn injuries, in circumstances like present one, it becomes necessary for prosecution to prove convincingly that it is a case of homicide. The

evidence of Dr. Zine (PW 4) shows that the death took place due to 85% burn injuries. But, on internal examination, Dr. Zine (PW 4) found following injuries :-

"C/o. subgallecl contusions. One over vertex 4 cm x 1 cm. Reddish coloured. Another at middle of forehead which is 2 x 2 cm. faint reddish in colour as compared above."

Due to these injuries, doctor has given evidence that aforesaid injury can be also the cause of death and the opinion is as follows :-

"Death due to shock due to 85% superficial to deep burns. Associated finding subgalleal contusion one at fore head (middle) another at vertex. "

There is no mention of causing of injury of aforesaid nature in dying declaration. Doctor is not sure about the exact cause of death though the burn injuries are also described as antemortem in nature. This circumstance again creates doubt about the fitness of deceased for giving statement. Due to these circumstances, it was necessary to have case papers on record, but the prosecution has not produced those case papers. Whenever there are such injuries, the first suspicion goes against the husband as he has the opportunity to cause such injuries. When the allegations are against brother in law, it becomes necessary to show that he was either living with the deceased in the same house or that at the relevant

time, he was present in the house or atleast in the vicinity of the house. If the neighbours had rushed to the spot after hearing the shouting, they would have definitely noticed present appellant in the vicinity if he was there. Due to absence of evidence of neighbours, it is not possible to believe that present appellant was also present at the relevant time.

28) The learned counsel for the appellant, accused placed reliance on the observations made by the Apex Court in the cases reported as **AIR 1994 SC 840 [Maniram Vs. State of Madhya Pradesh]** and **2002 CRI.L.J. 4095 [Laxman Vs. State of Maharashtra]**. In aforesaid cases the Apex Court has laid down that the satisfaction of the person who recorded dying declaration about the fitness of the deceased also needs to be proved. In the case reported as **(2006) 3 Supreme Court Cases 161 [M. Mani Vs. State of T.N.]**, it is laid down by the Apex Court that if the contents of dying declaration are suspicious in nature, the Court should look for corroboration. It is further observed that if the Court finds that statement is not true, conviction cannot be based on such dying declaration if there is no corroboration. Thus, the surrounding circumstances need to be considered by the Court for basing conviction on the dying declaration. In the case reported as **2000 (2) Mh.L.J. 3 (Bombay High Court) [Manohar Dadarao Landge**

Vs. State of Maharashtra], it was held that the material witnesses ought to have been examined. It was held that the dying declaration was not reliable in that case.

29) The facts and circumstances of each and every case are always different. The relevant facts of the present matter are already discussed. The main circumstance which is in favour of the appellant is that he is brother in law of deceased and there is no evidence except the contents of dying declaration that he was present in the house of deceased at the relevant time. There is no medical evidence to prove that the deceased was fit to give the statement and there are surrounding circumstances which have created suspicion about the fitness of the deceased for giving the statement. There is possibility that the present appellant had no role to play in the incident. The husband is dead and he had informed to police that the deceased had sustained injuries accidentally. In view of these circumstances, this Court holds that the Trial Court has committed serious error in giving conviction to the appellant for the offence of murder. Interference is warranted in the decision of the Trial Court.

30) In the result, the appeal is allowed. The judgment and order of Trial Court, convicting and sentencing the accused for the offence of murder punishable under section 302 r/w. 34 of IPC is

hereby set aside. The appellant stands acquitted of the offence for which the charge was framed against him. The bail bonds of the appellant stand cancelled. The fine amount, if any, deposited by the appellant is to be returned to him.

[ARUN M. DHAVALÉ, J.]

[T.V. NALAWADE, J.]

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