

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 77 OF 1995

The State of Maharashtra.

... Appellant.

Versus

1 Yalappa Dashrath Gaikwad.

2 Dashrath Maruti Gaikwad

3 Chabutai Dashrath Gaikwad

4 Satish Dashrath Gaikwad.

... Respondents.

Ms. S.V. Sonawane, APP for State.

Mr. M.G. Shukla, advocate appointed for respondents.

CORAM : A.S.OKA &

SMT.SADHANA S. JADHAV,JJ

DATE : MAY 18, 2017

JUDGEMENT :(PER SMT. SADHANA S. JADHAV,J)

1 The State being aggrieved by the Judgment and Order dated 14/11/1994 passed by the 4th Additional Sessions Judge, Satara in Sessions Case No. 34 of 1994 thereby acquitting the accused of the offence punishable under section 302, 304 B and 498A read with Section 34 of the Indian Penal Code has filed the present appeal.

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) It is the case of the prosecution that Savita was married to Yalappa, son of the original accused No. 2 Dashrath on 18/5/1993. That on 13/8/1993 Savita was admitted in Civil Hospital, Satara with history of burn injuries.

(ii) Her statement was recorded by the Executive Magistrate, Satara, as it appeared to be a medico legal case. In the statement, she had disclosed to the Executive Magistrate that on 12/8/1993 at about 12 noon she was alone at home. Her mother-in-law had gone for grazing goats and her father-in-law and brother-in-law had been to Koregaon. Her husband returned home and picked up a quarrel with her. He suspected her character. He insisted upon her to go to her maternal house and fetch Rs. 1000/-. She had retaliated by saying that her parents had borne all expenses of marriage and that the financial condition of her parents is critical and they would not be in a position to pay money.

(iii) According to her, her husband suspected that she has some illicit relationship with some person in Baramati. In the said altercation, her husband poured kerosene on her person and set her ablaze. She rushed to the neighbour's house. Her husband had fled from the spot. Her aunt Alka @ Rekha Jadhav extinguished the flames. Thereafter, her in-laws had returned home. Other relatives had also come to see her.

(iv) She was taken to hospital at Koregaon and her statement was recorded. Thereafter, she was taken to Satara. Her husband and in-laws had not accompanied her to the hospital. That she was being harassed by her in-laws.

(v) On the basis of the said statement, Crime No. 26/1993 was registered against the accused for offence punishable under section 307, 498A read with Section 34 of the Indian Penal Code. She succumbed to the burn injuries on 18/8/1993 and thereafter section 302 of the Indian Penal Code was added.

(vi) After completion of investigation, charge-sheet was filed. The case was committed to the Court of Sessions and was registered as Sessions Case No. 34 of 1994.

3 The prosecution examined 16 witnesses to bring home the guilt of the accused. The learned Sessions Judge upon meticulous examination of evidence adduced by the prosecution had arrived at a conclusion that there was no clinching evidence to convict the accused persons of the offence charged against them and recorded a finding of acquittal which is under challenge.

4 The present case rests upon the dying declaration of deceased Savita and therefore, it would be necessary to determine as to whether the dying declaration passes the test of the ratio laid down by the Hon'ble Apex Court in the case of **Laxman v/s. State of Maharashtra reported in (2002) 6 SCC 710**. It would be necessary to examine as to whether the dying declaration was voluntary, truthful and hence would inspire the confidence of the Court.

5 P.W. 1 Avinash Ashtekar was a medical officer in Civil Hospital, Satara at the relevant time. He has deposed before the Court that Savita was admitted in the hospital at midnight. She had sustained 66% burn injuries. Her statement was recorded by Sub-divisional police officer at 1.45 a.m. He had endorsed in respect of her consciousness. According to him, Savita died on 18/8/1993. The cause of death of Savita was septicemia due to burn injuries.

6 It is admitted in the cross-examination that she was serious at the time of admission. He had advised administration of analgesic Pethidine injection and that the said injection apart from being analgesic is also sedative. The patient was in the state of shock at the time of admission. He had only given endorsement as far as her consciousness is concerned.

7 The next relevant witness is P.W. 3 Nirmala Annasaheb Gaikwad lives in the neighbourhood of Yelappa. According to her, the deceased was ill-treated by the accused. On 12/8/1993 at about 12 noon she had heard the cries "save me, save me". She saw the victim

rushing out of her house and her Saree had caught flames. She extinguished the fire by pouring water. Thereafter, the victim had rushed towards house of her maternal aunt Alka who lives at a distance of 50 ft.

8 It is further stated that the victim was brought to the house of accused at 4 p.m. By 8 pm. her parents had arrived and taken Sunita to Koregaon. P.W.3 has admitted in the cross-examination that she was acquainted with the victim even prior to her marriage. It is pertinent to note that in the examination-in-chief P.W. 3 has referred the victim as Sunita. However, in the cross-examination she has deposed that her name is Savita and not Sunita.

9 P.W. 4 Narayan Jadhav has been declared hostile by the prosecution.

10 P.W. 5 Suman Gaikwad happens to be the neighbour of the accused person. According to her, on the day of the incident at about 12 noon, she saw Savita ablaze in front of Nirmala's house.

Nirmala happens to be the sister of P.W. 5. Upon enquiry she had disclosed that her husband had set her ablaze. The witness has admitted in the cross-examination that she had seen Savita in flames but had not attempted to extinguish the fire.

11 P.W. 6 Janabai Jadhav is also a neighbour of the accused persons. She has categorically deposed before the Court that the husband of Savita was working at Ambernath and that she wished to accompany her husband. However, he had assured her that he would take her to Ambernath after Diwali. According to P.W. 6, she was informed by Alka that Savita had caught fire. People had already gathered there. Savita was made to change her clothes. P.W. 4 Narayan had called upon the husband of Savita.

12 That Savita was not happy while living at Kanher Khed and was yearning to go to Ambarnath. It is admitted in the cross-examination that Savita for the first time had disclosed the cause of injuries to her parents. It is also admitted that Savita had disclosed to her parents that since her husband was not taking her to

Ambernath, she had immolated herself. That her parents had told her to involve her husband accused Yelappa. It is reiterated that Savita had disclosed to all the people gathered around her that she had immolated herself.

13 P.W. 7 Ramchandra Gaikwad happens to be younger brother of accused Dashrath.

14 P.W. 8 Ashok Jadhav happens to be the father of deceased Savita. According to him, his daughter was ill-treated by all the accused. He had deposed before the court that on 12/8/1993 he had received a call from Yelappa informing him that Savita had received burn injuries and she needs to be taken to the hospital immediately. P.W. 8 immediately rushed home to see his daughter. According to him, when he reached the house of accused he saw Savita lying in the house of the accused and all the accused were sitting by her side. She was then taken to the hospital with the help of P.W. 7.

15 According to him, upon enquiry Savita had disclosed that she was set on fire by her husband Yelappa on account of non fulfilling of demand of Rs. 1,000/- coupled with the suspicion that she had illicit relations at Baramati. Upon being advised by the doctor at Kanher Khed, the injured was taken to Civil hospital, Satara. Savita had succumbed to burn injuries on 18/8/1993 at 8 p.m.

16 P.W. 8 had admitted in evidence that the letter was written by the accused to Savita on 28/7/1993 and was received by P.W. 8 which is marked at Exh. 33. The contents of the letter indicate that the accused Yelappa had rented a room at Ambernath and had informed his wife that he will take her to Ambernath after Ganesh festival and that they will reside there. P.W. 8 admits that he had not enquired about the cause of burn injuries of Savita. It is admitted that at the time of admission in the hospital, Savita was mourning in pain and had requested all of them not to converse with her as she was in pain.

17 It is also admitted by P.W.8 that when the police was recording statement of Savita, she was restless. That the statement was recorded in the presence of P.W.8 and his wife.

18 P.W.9 Vishwanath Raokhande is the Executive Magistrate who had recorded the dying declaration of Savita. According to him, he had recorded statement of Savita as per her say and had obtained her signature on the statement. The said statement is at Exh. 38. It is pertinent to note that P.W.9 has not deposed before the Court in respect of the contents of the dying declaration and therefore, all that is proved is that the statement was recorded by P.W. 9.

19 P.W.10 Dr. Shamala Mali was officiating as lady medical officer at Civil Hospital, Satara on 13/8/1993. According to her, statement of Savita was recorded in her presence. The said statement is at Exh. 44. She has admitted that there is difference between consciousness and fit mental state and there is no endorsement to the effect that Savita was in fit state of mind.

20 Upon perusing Exh. 44, it appears that elaborate statement of Savita was recorded. According to her, she got married on 18/5/1993. She has narrated all details not only of the incident in question but about the service of her husband, the ill-treatment meted out to her at the hands of her mother-in-law. The story narrated by Savita Exh. 44 is inconsistent with the statement recorded earlier.

21 In her statement at Exh. 44 Savita has stated that on 12/8/1993 there was a quarrel between her husband and herself. He had demanded Rs.1,000/- for repaying the loan at Ambernath. That he had then suspected her having illicit relations with some person at Baramati. It is further stated that she was sweeping the floor and at that time, suddenly she smelt kerosene and realised that her husband had poured kerosene on her. She had fainted. She heard her husband closing the door and fleeing from the scene of offence. She had requested her maternal aunt Nirmala to extinguish fire and that Nirmala had extinguished the fire by pouring water. In the meanwhile her grand-mother Janabai had reached the house of Alka

who also happened to be her relative. That her grand-mother had informed her that she should tell everybody that she had accidentally caught burns while cooking on the stove. It is further stated that her in-laws had come to her house but had refused to take her hospital. Her husband had also refused to take her to the hospital and somebody informed her parents telephonically and when they came they had taken her to the hospital at about 8 p.m.

22 P.W. 12 Santosh R. Gaikwad happens to be the first paternal cousin of accused Yelappa. He had been to Satara and brought grand-mother of Savita i.e. Janabai at about 5.30 p.m. According to him, he had also seen Savita in flames.

23 P.W. 14 Dr. Ashok Salunkhe was the medical officer at Koregaon. According to P.W. 14, Savita was admitted in the hospital at about 10.30 p.m.. She was conscious at the time of admission. She had sustained burn injuries to the extent of 50 to 60% superficial to deep. The statement of Savita was recorded by police head constable Damakale.

24 P.W. 15 Gangadhar Damakale is the head constable who had recorded statement of Savita which is at Exh. 50. He has also not disclosed about the contents of Exh. 50.

25 P.W. 16 Jay Jadhav is the SDPO, who has recorded the statement of Savita, which is at Exh. 44.

26 Upon perusal of the entire evidence adduced by the prosecution, it is clear that the dying declarations are inconsistent in nature. Reliance can be placed on the Judgment of this Court in the case of **Suresh S/o Arjun Dodorkar(Sonar) vs. State of Maharashtra reported in 2005 ALL MR (Cri) 1599**. The relevant portion reads as under :

“Dying declaration-Multiple dying declarations-In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected-The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination.”

27 That the evidence of all the witnesses are also inherently inconsistent and their evidence is at variance with each other and therefore, it can be safely inferred that the dying declarations are not voluntary, truthful and hence do not inspire confidence of the court.

28 Reliance can be placed on the Judgment of the Division Bench of this Court in the case of **Tukaram Dashrath Padhen & ors. v/s. State of Maharashtra reported in 2012 ALL MR (Cri) 2754.** The Hon'ble Court has observed as follows :

“the conviction can be recorded on the dying declaration alone if the court finds the dying declaration to be wholly reliable. It is, therefore, necessary for the Court to scrutinize the evidence and place reliance on the dying declaration only if the evidence in respect of the recording of the dying declaration is of “sterling” quality.”

29 Moreover the contents of the dying declaration have not been proved. This Court cannot be oblivious of the fact that this is an appeal against acquittal. In the case of **Sambasivan & ors. v/s. State of Kerala reported (1998) 5 SCC 412**, the Hon'ble Apex Court has held as follows :

“The principles with regard to the scope of the powers of the Appellate Court in an appeal against acquittal, are well-settled. The powers of the Appellate Court in an appeal against acquittal are no less than in an appeal against conviction. but where on the basis of evidence on record two views are reasonably possible the Appellate Court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial court in acquitting accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the Appellate Court can interfere with the order of acquittal.”

30 In any case, in an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the Appellate Court would not interfere with the order of acquittal unless there is perversity of fact and law. The paramount consideration of the court would be to do substantial justice and avoid miscarriage of justice. Hence, the finding recorded by the trial court does not warrant any interference. Hence, the appeal fails. The appeal is accordingly dismissed.

31 Before parting with the Judgment, we record our appreciation for the assistance rendered by learned Advocate Shri M.G. Shukla appointed as an amicus curiae. The advocate would be paid professional fees in accordance with law.

(SMT. SADHANA S. JADHAV,J)

(A.S.OKA, J)