

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

**CRIMINAL APPLICATION NO. 1537 OF 2017
IN
CRI. APPEAL NO. 627 OF 2017**

Vivek Uday Chaudhary .. Applicant

Vs.

The Union Territory of Dadra & Nagar
Haveli and others .. Respondents

....
Mr. Pawan Mali Advocate appointed for the Applicant
Ms. P.H. Kantharia along with Ms. Deepali Patankar Advocate for
the Union Territory of Dadra & Nagar Haveli
....

**CORAM : SMT.V.K.TAHILRAMANI ACTING C.J.
AND M.S.KARNIK, J.**

DATED : DECEMBER 13, 2017

ORAL ORDER [PER SMT. V.K.TAHILRAMANI, J.]:

1 Heard both sides.

2 The applicant has been convicted under section 302 of
IPC for causing the death of his wife Santoshi by pouring
kerosene on her and setting her on fire. The applicant is now

seeking bail.

3 The prosecution has relied on two dying declarations which are at Exh. 12 and Exh.16. Dying Declaration Exh. 12 was recorded by PW 2 Executive Magistrate Mrs. Parmar. Dying Declaration Exh.16 was recorded by PW 3 Police Head Constable Rathod. In both the dying declarations, Santoshi has stated that her husband poured kerosene on her and set her on fire.

4 The learned counsel for the applicant submitted that both the dying declarations cannot be relied upon because PW 1 Harcharan who is the father of Santoshi, has turned hostile. He submitted that the evidence of the father also shows that when she was taken to the hospital in an Ambulance, his daughter was not in a condition to speak. He submitted that when witnesses do not support the prosecution, especially close relatives like father, mother and other close relatives, the dying declaration would be suspect.

5 To support the above contention, learned counsel for

the applicant placed reliance on the decision of the Supreme Court in the case of **Bawa Ram and Another Vs. Union Territory, Chandigarh**, reported in **(2009) 13 SCC 270**. He pointed out that in the said case, the Supreme Court has observed that it is true that dying declaration can be the sole basis of conviction even when eye witnesses do not support the prosecution case, however, when eye witnesses resiled from their statements and they have categorically stated that the deceased was mentally unsound and was having suicidal tendency, the dying declarations cannot be relied on. It is seen that in the case of **Bawa Ram (supra)**, eye witnesses PW Nos. 2 to 7 had turned hostile. In the present case, there is no eye witness. PW 1 Harcharan who was the father of the deceased, was not an eye witness to the incident. He has not stated that his daughter was mentally unsound and having suicidal tendency as was the case in **Bawa Ram (Supra)**. As the facts in the present case are not similar to Bawa Ram, the said decision would not apply to the present case.

6 Thereafter the learned counsel for the applicant submitted that as far as dying declaration Exh. 16 which is

recorded by PW 3 Police Head Constable Rathod is concerned, PW 3 has stated that he asked Dr. Amit Rana to ascertain whether the patient was in a condition to give statement and Dr. Rana told him that she was in a condition to give statement. He pointed out that Dr. Rana does not state anything in his evidence about anyone approaching him to enquire whether the patient was in a condition to give statement. On going through the evidence of PW 3 Police Head Constable Rathod and PW 5 Dr. Rana, we do find this contention to be correct. However, the fact remains that there is another dying declaration which is relied upon by the prosecution i.e. Exh. 12 which is recorded by PW 2 Executive Magistrate Mrs. Parmar. As far as this dying declaration (Exh. 12) is concerned, the Doctor who stated that the patient was in a fit condition to give statement, was not examined, however, the Executive Magistrate Mrs. Parmar has stated that when she went near the victim, she asked all the people near her to go out, then she had discussion with the patient to verify whether the patient was in a condition to give a statement. Thereupon, Mrs. Parmar was satisfied that the patient was in a condition to speak. Thereafter, she recorded the statement of the patient. It is not necessary that only when

the Doctor certifies that the patient is in a condition to speak then only, the dying declaration can be relied upon. Even if the person recording the dying declaration is satisfied that the patient is in a condition to give statement, the said dying declaration can be relied upon.

7 The Apex Court in the decision in the case ***Laxman Vs. State of Maharashtra***, reported in ***AIR 2002 SC 2973***, has relied on a three- Judges' decision of the Apex Court in the case of ***Koli Chunilal Savaji and Another Vs. State of Gujarat*** reported in ***1999 (9) SCC 562***, wherein it was held that if the materials on record indicate that the deceased was fully conscious and was capable of making a statement, the dying declaration of the deceased thus recorded cannot be ignored merely because, the doctor had not made the endorsement that the deceased was in a fit state of mind to make the statement in question. In view of the decision of the Supreme Court in the case of ***Laxman (supra)***, we are of the opinion that the dying declaration Exh. 12 recorded by PW 2 Executive Magistrate Mrs. Parmar can be relied on. The dying declaration shows that the applicant poured kerosene on his wife Santoshi

and set her on fire. In this view of the matter, we are not inclined to grant bail. Application for bail is rejected, however, hearing of the appeal is expedited.

8 Office to prepare the paper-book on urgent basis and place the matter for directions as soon as the paper-book is ready.

M.S.KARNIK, J.

ACTING CHIEF JUSTICE

kandarkar