

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

CRIMINAL APPEAL NO. 724 OF 2002

Afsarkhan @ Ayyubkhan S/o Hussain Khan,
Age : 31 years, Occupation : Mistri,
R/o. Kiradpura, Near Macca Masjid, Galli No. 3,
Aurangabad (At present in Central Prison)
Harsool, Aurangabad.

Appellant...

Versus

The State of Maharashtra
Through Jawaharnagar Police Station,
Aurangabad.

**Respondent
(Orig. Complainant)**

.....
Mr G. B. Patunkar, Advocate (appointed) for the appellant
Mr R. V. Dasalkar, APP for respondent/State
.....

**CORAM : T. V. NALAWADE &
A. M. DHAVALA, JJ.**

RESERVED ON : 07.12.2017.
PRONOUNCED ON : 24.01.2018

JUDDGMENT (PER A. M. DHAVALA, J.) :-

1. This is an appeal by the accused against his conviction u/s 302 IPC and sentence of imprisonment for life passed by 3rd Ad-hoc Addl. Sessions Judge, Aurangabad, on 10.12.2002 in Sessions Case No. 235 of 2002.

2. The facts relevant for deciding this appeal may be stated as follows :

The FIR is registered on the basis of report submitted by Asst. Sub-Inspector Shinde at Jawahar Nagar Police Station, Aurangabad at C.R. No. I-17/2002 u/s 302 IPC. His report shows that, on 24.01.2002 at night time one Ashwini aged 30 years, R/o. Kabra Nagar (Indira Nagar), Aurangabad claimed to be wife of Afsar Khan (the accused) was brought in Ghati Hospital at Aurangabad in burnt condition. She had given oral dying declaration to Medical Officer that, on that night at 08:00 p.m. she had a quarrel with her husband and he had poured kerosene on her person and set her on fire. She had sustained 100% burns. Then she was shifted to burn ward and by the time Special Executive Magistrate reached the hospital at 10:45 p.m. she was unconscious. She died at 11:00 p.m. due to 100% burns. At the same time, her husband Afsarkhan was admitted in the same hospital with 70% burns. His statement was recorded. On the basis of this report, PW9 PI-S.B. Ambildhage conducted investigation. He visited the spot and seized kerosene can and match box from the spot. He recorded the statement of material witnesses. He arranged to conduct autopsy on the dead body and collected medical certificate of the accused. After recording statement

of material witnesses, he submitted charge-sheet in the court.

3. In due course, the case was committed to the court of sessions. The ld. IIIrd Adhoc Addl. Sessions Judge, Aurangabad framed charge u/s 302 at Exh. 6. The prosecution examined 9 witnesses. The main reliance is on the oral dying declaration in the form of history given by the patient to PW3 Dr. Varsha Kalyankar. The defence of the accused is of total denial. The ld. trial Judge accepted the evidence and convicted the accused. Hence this appeal.

4. Since the ld. advocate for the accused did not remain present, we have appointed Shri. G. B. Patunkar as advocate for accused at state expenses. He has taken us through the evidence on record. He argued that, deceased Ashwini had 100% burns and there is no proper evidence to show that she was physically and mentally fit to make statement. The dying declaration recorded is cryptic and incomplete. It does not show the full name of the deceased Ashwini. It is material as she has stated that her husband had killed her. It is the defence of the accused that, he is not the husband of deceased Ashwini and there is admission that one Devanand Garud was her husband. He argued that, the circumstances indicate that, the deceased might not have given any dying declaration. The evidence

of PW3 Dr. Varsha Kalyankar is not reliable. There is no evidence to show that, the deceased Ashwini was residing along with the accused. Hence, the accused deserves to be acquitted. He relied on following rulings :

- (i) **Ashok Kumar Vs. District Magistrate, Basti
AIR 2012 (Supp.) SC 31**
- (ii) **Sri Kajal Sarkar Vs. State of Assam 1993 Cri. L.J. 3869**

. It is held in these cases that dying declaration is not complete unless full name, address of the person are given in it. Therefore only because deceased in his dying declaration uttered first name similar to that of accused, it is not proper to accept the prosecution version based on such incomplete dying declaration that accused were culprits who caused injury to deceased.

5. Per contra, ld. APP Shri. R. V. Dasalkar supported the judgment. He argued that, the history was recorded by Dr. Varsha Kalyankar. She is independent witness and had no reason to falsely implicate anybody. Her evidence is supported by the fact that the accused had also sustained 70% burn injuries at the same time. Both were residing together and though deceased Ashwini was not wife, she was concubine of the accused. She had sustained injuries at her house where the accused was residing and therefore the ld. trial

Judge has rightly believed the witnesses and there is no scope for interfering with the conviction and sentence.

6. The points for our consideration with our findings thereon are as follows :

Sr.No.	Point	Finding
1	Whether deceased Ashwini met with homicidal death?	Not proved.
2	Whether the accused had committed murder of Ashwini by setting her on fire?	Not proved.
3	What order?	The appeal is allowed. The conviction of the accused is set aside and he is acquitted.

REASONS

7. There is evidence and not disputed that, the deceased Ashwini had sustained 96% burns. The prosecution has examined PW2 Dr. Bhale, who has conducted post-mortem on the dead body on 25.01.2002. His PM report is at Exh. 17. The deceased had 96% burns. There was kerosene smell found on her scalp hair. It is therefore clear and not in dispute that deceased Ashwini must have been drenched in kerosene and thereafter received burns which caused her death.

8. The main issue is whether it was accidental, suicidal or homicidal burns.

9. The prosecution has examined 9 witnesses and produced documents which can be grouped as follows :

[I] **Dying Declaration :**

(i) PW3 Dr. Varsha Kalyankar, who was Casualty Medical Officer. PW4 ASI Gangawane brought Ashwini in burnt condition to her. She made inquiry with her and recorded her history as per Exh. 19. It shows that, the deceased Ashwini had told her that, her husband had poured kerosene on her person at 08:30 p.m. And set her on fire. The name of the patient is shown as Ashwini Ayyub Khan, aged 30 years, residing at Kabra Nagar.

(ii) PW1 Dr. Sachin Ingle, who had attended the patient in burn ward from 09:50 p.m. till her death at 11:00 p.m. The case papers maintained by him are at Exh. 13.

[II] **Material Witnesses:**

(i) P.W.4 Rangnath, A.S.I. was a very material witness. As per directions of P.S.O., he had gone to the house of the

deceased and brought her in burnt condition to the hospital, but he has not stated details about the place and has not made any enquiry about the cause of burns with the deceased in transit.

- (ii) He had also examined the accused, who was admitted in burn ward with 70% burn injuries. He had stated that, he had sustained burns due to accidental blasting of stove. He was also referred to Burn Ward by PW3 Dr. Varsha Kalyankar after preliminary examination.
- (iii) PW6 Aruna Kasbe is neighbour. She has stated that, she was staying in Indira Nagar and Ashwini and Ayyub were her neighbours for two months before the incident. She had heard shouts of Ashwini at 08:00 p.m. and had seen her in flames. Due to fear, she did not go near her. Learned APP cross-examined her. She denied that, she had heard the quarrel between deceased Ashwini and accused and saw that accused was extinguishing the flames of Ashwini. P.W.6 Aruna had seen Ashwini catching fire, but she has not stated that the accused was present at that time in the house. P.W.4 Rangnath had

brought Ashwini from the house to the hospital, but he also has not stated that the accused was present in the house. There is no documentary evidence to show that the accused and Ashwini were co-habiting together as husband and wife.

- (iv) PW7 Shrirang is also the neighbour of Ashwini. He stated that he was tenant of landlady Sayeeda and Afsar was residing in adjoining wada (edifice). On the material day at 08:00 p.m., he had heard shouts of Ashwini and she coming out with burn injuries. However, there were shouting as 'जळाली-जळाली' (got burnt). He has also resiled from his statement. He has denied the prosecution story.

[III] **Medical Evidence :**

P.W.2 Dr. Swaroop Bhale had conducted post mortem showing 96% burns. Post mortem notes are at Exh.17. She died due to shock due to burns. His evidence is not material to connect the accused with the crime.

[IV] **Other witnesses :**

- (i) P.W.5 A.S.I. Eknath Shinde has merely attempted to obtain services of Special Judicial Magistrate to record dying declaration, but meanwhile Ashwini became unconscious and died at 11.00 p.m. Hence, his evidence is not relevant, however report received by him Exh.23 and letter to Special Judicial Magistrate Exh.24 show that Ashwini had sustained burns due to pouring of kerosene and setting her on fire by her husband. The report Exh.25 from A.S.I. Bhavsar from medical hospital shows the accused Afsarkhan, resident of Kabranagar had sustained burn injuries due to flaring up of stove and he was admitted in the hospital.
- (ii) P.W.8 Kashinath is a spot panch. He has not supported the prosecution.
- (iii) PW9 PI Ambildhage, the Investigating Officer. He has not carried out proper investigation and has not deposed properly. His evidence is cryptic.

10. At this stage, we must also mention here that, the ld. trial Judge has not properly recorded the statement u/s 313 Cr.P.C. He has asked nine material questions out of which 3 are formal in nature and not connected with the crime. It is the duty of the trial Judge to put all incriminating circumstances before the accused person and give him opportunity to explain the circumstances appearing against him. In this regard, the learned advocate Shri. Patunkar has rightly relied on **Ajay Singh v State of Maharashtra AIR 2007 SC 2188**.

11. Point Nos. 1 and 2 are so connected that those cannot be discussed separately.

12. It appears from evidence of PW4 ASI Gangawane that, the police station received information that one lady person was burnt in Kabra Nagar area and the PSO directed him at 07:00 to 07:30 p.m. on 24.01.2002 to go to Kabra Nagar and take her to the hospital. It suggests that Ashwini sustained burns before 7 p.m. He had accordingly gone to Kabra Nagar and brought Ashwini in Rickshaw to Ghati Hospital. His evidence is cryptic of only four lines. He has not deposed in which place the deceased Ashwini was found. He has not stated whether Ashwini was conscious or unconscious or whether he

asked her how she sustained injuries and whether she disclosed about the same to him. It seems that, the ld. APP in the trial Court did not make any inquiry in this regard nor the ld. trial Judge bothered to find out the truth. His evidence shows that, the Investigating Officer even has not recorded his statement. He admitted that, he had not seen the accused in the said house.

13. Admittedly, PW3 Dr. Varsha is wife of PSI Mundhe. It is not known where PSI Mundhe was deputed. PW4 ASI has denied that he was working under PSI Mundhe. His evidence shows that, the house of Ashwini was in thickly populated area.

14. Evidence of PW3 Dr Varsha shows that, on 24.01.2002, she was Casualty Medical Officer in Ghati from 02:00 to 08:00 p.m. She stated that at 09:35 p.m. ASI PW4 Gangawane from Jawahar Nagar Police Station brought burn patient to her. It is not explained or clarified how PW3 Dr. Varsha was working in the hospital till 09:35 p.m. when her duty hours were only upto 08:00 p.m. Dr. Varsha examined Ashwini and took entries in the MLC register. She had produced the MLC registers along with xerox copies thereof Exh. 19. She told that, she asked Ashwini how she sustained burn injuries. Ashwini gave history that, her husband poured kerosene on her

person and set her on fire. On examination, she found that Ashwini was having 100% burn injuries, still the patient was conscious. She immediately gave information to the police and prepared admission papers and sent her to burn Ward No. 22 and 23. The case papers maintained by her do not disclose the full name of Ashwini. It is shown that, on 29.01.2002 at 09:35 p.m. Ashwini Ayyub Khan, aged 30 years, R/o. Kabra Nagar was brought and she recorded history narrated by the patient that, at 08:30 p.m. on 24.01.2002, her husband poured kerosene on her person and set her on fire. The time of 8:30 p.m. does not match with timing given by PW4 ASI Gangawane who stated that he at 07:00 to 07:30 p.m. was asked to help the burnt patient. She recorded that, the patient was conscious but had superficial to deep burns to all over her body and she referred the patient for admission in Ward No. 22 and 23 and gave intimation to the police. Copy of the intimation letter is not produced.

15. The name Ashwini Ayyubkhan does not make it clear whether Ashwini was daughter or wife of Ayyub Khan. Pertinently, the name of the accused is Afsar and not Ayyub but his name is shown as Afsar @ Ayyub. The accused has denied that he was husband of Ashwini. In cross-examination of PW9 PI-S.B. Ambildhage, he admitted that, the investigation revealed that

Ashwini was wife of Devanand Garud, resident of Chhawani whereas; the name of the accused was Afsar Khan. The evidence of PW1 Dr. Sachin Ingle shows that, Ashwini was brought to burn ward at 09:50 p.m. He had examined her at 10:05 p.m. and maintained her record as per copy of case paper Exh. 30. According to him, at the time of arrival the patient was conscious. He had asked history to the patient and recorded the same. The patient became unconscious at 10:40 p.m. which is recorded in the case papers.

16. The case paper Exh. 13 shows that, the name of the patient is Ashwini Afsar Khan and name of near relative is shown as P. V. Gangawane. The evidence on record however shows that, PW1 Gangawane had only taken her to hospital. The case papers shows that, he has not recorded history when the patient was admitted at 09:50 p.m. He had recommended for arrangement for MLC statement. He had received the reference letter showing the history as “नव-याने अंगावर रॉकेल टाकून जाळले” recoded by CMO PW3 Dr. Varsha Kalyankar. Surprisingly, the history shows that, the patient had sustained burn injuries at 06:30 p.m. but Dr. Varsha has recorded that the alleged incident took place at 08:30 p.m. Her status is shown as married. Her vital parameters are shown to be stable. She had no cyanosis. The patient is shown as conscious till 10:40 p.m.

The evidence of PW1 Dr. Sachin does not support that the patient had given history of pouring kerosene and setting her on fire by the accused/husband. Pertinently, PW1 ASI Gangawane was the first person who had opportunity to record her dying declaration. He was with her from her house till the hospital but he has not stated anything about dying declaration.

17. P.W.3 Dr. Varsha has not properly recorded the history given by Ashwini. She has not made enquiry as to whom she was married, where she was residing and who was her husband

18. The learned trial Judge has given importance to the fact that evidence of P.W.6 Aruna that the accused and Ashwini were co-habiting together has gone unchallenged. He did not consider the fact that she was residing at Indiranagar, whereas the accused and Ashwini were residing at Kabranagar. Besides, at the time of incident the accused was not seen by her in the house. Though PW3 Dr. Varsha recorded history of setting Ashwini on fire by her husband, Dr. Sachin Ingle PW1 recorded history by patient as burns at 06:30 p.m.

19. It is also to be noted that as per the evidence of witnesses, Ashwini had sustained 100% burns whereas as per post mortem

notes, she had sustained 96% burns. After sustaining burns by her, somebody had given a phone call to the police and P.S.O. sent P.W.4 Rangnath to the house of Ashwini. Then he brought her to the hospital. It must have taken quite sometime. P.W.4 Rangnath has not stated that Ashwini made any statement to him about the cause of her burns at her residence or during the journey. The alleged statement was made at 9.35 p.m. and admittedly, at 11.00 p.m. Ashwini died. She had become unconscious at 10.40 p.m. Considering the high percentage of burns, there are serious doubts as to whether Ashwini was physically and mentally conscious to make a statement or not.

20. Considering all above facts, we have serious doubt about physical and mental condition of Ashwini to make a statement as well as making of statement by Ashwini to P.W.3 Varsha and we also find that the dying declaration is not clear and cogent. The name of husband is not recorded. P.W.3 Varsha has not stated that Ashwini told her name as Ashwini wife of Ayyubkhan. The accused was present in the burn ward, but Ashwini was not asked whether he was her husband. Therefore, even if dying declaration is believed to be true, still it is difficult to hold that Ashwini was referring to the accused. There is difference in the name of the accused as Afsarkhan and Ayyubkhan. Besides, Ashwini was married to Devanand Garud.

There is possibility that considering Ashwini's illicit relations with a Mohammedan, Devanand could have set her on fire. Considering all the facts, we find that dying declaration and other evidence is not cogent, reliable and trustworthy to prove the prosecution case beyond reasonable doubt. The learned trial Judge did not properly appreciate these facts while holding the accused guilty. Hence, the conviction and sentence are not sustainable. Hence, we pass the following order:

ORDER

- (I) The Criminal Appeal is allowed.

- (II) The judgment of conviction and sentence delivered by III Ad hoc Additional Sessions Judge, Aurangabad in Sessions Case No.235 of 2002 on 7.12.2002 is hereby set aside. The accused stands acquitted of offence punishable under Section 302 of Indian Penal Code. His bail bonds stand cancelled. He shall furnish P.R. bond of Rs.10,000/- with like solvent surety under Section 437-A of Cr.P.C.

(III) We appreciate the valuable assistance given by advocate Shri. G. B. Patunkar on our request and quantify his fees at Rs. 7000/- which shall be paid by the State Legal Service Authority.

[A. M. DHAVALA]
JUDGE

[T. V. NALAWADE]
JUDGE

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