

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

902 CRIMINAL APPEAL NO.102 OF 2003

- 1) Amjad Shaikh Kamroddin Mansuri,
Age : 26 years, Occ.: Tailor,
- 2) Fatimabi w/o Kamroddin Mansuri,
Age : 46 years, Occ.: Household,
Both R/o.: Pinjar Galli, Shahada,
Dist. Nandurbar, **Appellants**
(At present undergoing sentence (Ori. accused Nos.2 &
in Dhule District Prison, Dhule) 4)

VERSUS

State of Maharashtra

Respondent.

...

Advocate for Appellants : Mr. Jaydeep Chatterji

APP for Respondent/State : Mr. S.B. Pulkundwar

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**CORAM : T.V. NALAWADE &
K.L. WADANE, JJ**

DATE : 21ST JUNE, 2018

JUDGMENT (PER : K.L. WADANE)

Original Accused Nos.2 and 4 preferred this
Appeal against the judgment and order passed by the
learned Additional Sessions Judge, Shahada, Dist.
Nandurbar in Sessions Case No.44 of 2001 dated

10.01.2003 by which the appellants are convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/-.

2. The brief facts of the matter may be stated as follows:

(I) The appellants are the permanent resident of Shahada Dist.Nandurbar. They are residing in a locality known as Pinjar Galli at Shahada. The original accused Nos.1 to 3 are the sons of appellant No.2. The marriage of the original accused No.1 Jamil Shaikh was solemnized with deceased Nasimbano. The accused persons were taking suspicion about the character of Nasimbano and were demanding dowry from her father, who is also residing in the same locality with his family members, in front of the house of the accused and as the demand was not satisfied, Nasimbano was subjected to the cruelty and ill-treatment.

(II) On 07.06.2001 at about 03.00 p.m., all the accused persons were present in their house. They

dragged Nasimbano to the bathroom, locally known as "Mori", where the accused No.3 Abdulla caught-hold her hands, the accused No.5 Khudijabi w/o Chhotu Mansuri (since deceased) caught-hold her legs, the accused No.4 sprinkled the Kerosene oil and the accused No.2 set her on fire by lightening the matchstick. Hearing her shouts, her father Majid Shaikh Nazir and sister Bilkisbi rushed there to whom Nasimbano narrated the incident. After the incident, Nasimbano was taken and admitted in the Municipal Hospital at Shahada and her dying declaration was recorded by naib tahsildr, Mr.Badgujar. The said dying declaration was treated as a First Information Report and initially the offence was registered under Section 307 of the Indian Penal Code and after the death of Nasimbano on 10.06.2001, the offence is altered and converted into Section 302 read with Section 34 of the Indian Penal Code. Nasimbano then transferred to the Civil Hospital, Dhule for better medical treatment, where, her dying declaration was recorded by Fajlur Rehman Abdul Salam Shaikh, Avval Karkun on 07.06.2001. During the investigation and

before filing of the charge-sheet, the original accused No.5 Khadijabi died on 24.07.2001. After completing the investigation, the charge-sheet was filed against all accused persons for the offence punishable under Sections 498-A, 302 read with Section 34 of the Indian Penal Code and under Section 3 & 4 of the Dowry Prohibition Act, 1961.

3. The case was committed to the Court of Sessions. The Additional Sessions Judge framed the charge against the accused persons and its contents were read over and explained to the accused, to which they pleaded not guilty and claimed to be tried.

4. In order to establish the guilt of the accused, the prosecution has examined in all 10 witnesses i.e. PW-1 Majid Shaikh Nazir (brother-in-law), PW-2 Shaikh Gulab Shaikh Isa (neighbour), PW-3 Jainoddin Masloddin Pinjari (brother of the deceased), PW-4 Fajlur Rehman Abdul Salam Shaikh, PW-5 Dr.Avinash Shamrao Ruikar (Medical Officer), PW-6 Chhagan Shankar Bagul (P.S.O.), PW-7 Bilkisbi Aziz Pinjari sister of the deceased), PW-8

Jayanand Wamanrao Jhaware (Executive Magistrate), PW-9
Dr.Rahul Shrinivas Hatolkar (Medical Officer) and PW-10
Sudhir Bhimsing Patil (P.I.and P.S.O.).

5. Besides the oral evidence of the prosecution witnesses, the prosecution has relied upon two dying declarations. One is at Exh.32 and another declaration is at Exh.52 and its copy is at Exh.39. Considering the evidence on record and upon hearing both the sides, the learned Additional Sessions Judge has convicted the present appellants/original accused Nos.2 and 4 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Hence, the present appeal.

6. We have heard the arguments advanced by Mr.Jaydeep Chatterji, the learned Counsel appearing for the appellants and Mr.S.B. Pulkundwar, the learned APP appearing for the respondent/State.

7. During the argument, Mr.Chatterji, the learned Counsel for the appellants has invited our attention to certain admissions given by the witnesses during their cross-examination, particularly, Mr. Chatterji pointed

out that it has been admitted by the witnesses, that both the hands were burnt and therefore, by referring the relevant evidence in the cross-examination, Mr. Chatterji argued that, it is impossible for the Executive Magistrate to obtain the thumb impression of the deceased Nasimbano on the respective dying declarations. Mr.Chatterji further pointed out that the material contradictions between two dying declarations in reference to the particular act of the original accused No.1 and 3. According to Mr.Chatterji, the dying declarations are suffered from serious infirmities and from material contradictions between two dying declarations therefore, it is unsafe to believe on such dying declarations.

8. As against this, the learned APP Mr.Pulkundwar for the respondent/State argued that considering the statement of the deceased in two dying declarations at Exh.32 and Exh.52, it appears that the version of the deceased in those two dying declarations is consistent and reliable about the allegations against the present appellants. The act done by the present appellant Nos.1

and 2 are specifically narrated by the accused in clear words before the executive magistrate. Therefore, the learned APP submits that the learned Additional Sessions Judge had rightly believed the part of the declarations and remaining part of the declaration was not free from the material infirmity and therefore, part of the dying declaration was rightly disbelieved and ignored by the Additional Sessions Judge.

9. Looking to the submissions made by both the sides, it is material to note that PW-1, the brother-in-law of the deceased deposed that on 07.06.2001 at about 03.00 p.m., he noticed that there was a crowd at the house of Kamroddin i.e. the father of the accused No.1 and he saw the smoke coming out from the *Wada*. He entered into the house and found that Nasimbano was lying in totally burnt condition. He further deposed that the accused persons were not allowing her sister-in-law and father of Nasimbano to enter in the house.

10. Shaikh Gulab (PW-2) is a neighbourer. He has not stated anything. Besides the original evidence of

above two witnesses, the prosecution has relied upon the oral dying declaration of Nasimbano given to her brother - Jainoddin Pinjari (PW-3) and Bilkisbi (PW-7). On perusal of the evidence of Jainoddin, it appears that he deposed that on 06.06.2001 at 10.00 p.m., he went to Hospital at Dhule, where, Nasimbano informed him that, all the accused persons taken her to the bathroom (*Mori*), accused Nos.1 and 3 caught-hold her hands, another accused Khudijabi caught-hold her legs, accused No.4 i.e. the present appellant No.2 sprinkled Kerosene on her person and the accused No.2 i.e. appellant No.1 set her on fire by lightening the matchstick.

11. Looking to the evidence of Bilkisbi (PW-7) on the same point, she has stated that Nasimbano informed her that the accused Nos.1 and 3 caught-hold her hands, the grand mother-in-law (Khudijabi) caught-hold her legs, accused No.4 poured kerosene on her person and accused No.2 set her on fire by lightening the matchstick. On perusal of the versions of these witnesses, it appears that their versions as to the disclosure by Nasimbano to the extent of the present

appellant is consistent.

12. The prosecution has strongly relied upon two dying declarations i.e. Exh.32 and 52. Exhibit 52 is the dying declaration recorded by Mr.Badgujar, Executive Magistrate (since deceased). Chhagan Bagul (PW-6) deposed that the Executive Magistrate, Badgujar produced the copy of dying declaration Exh.39 on the basis of which the offence is registered bearing Crime No.94/2001 against the accused persons. The original dying declaration is at Exh.52 and to prove this dying declaration, the prosecution has examined Jayanand Jhavare, Executive Magistrate (PW-8), who deposed that on 07.06.2001, Mr. Badgujar recorded the dying declaration, which was kept in safe custody. This witness has produced the original dying declaration in the Court. He identified handwriting and signature of Mr. Badgujar. The contents of the dying declaration dated 07.06.2001 are proved by the evidence of Jayanand Jhavare (PW-8). Another declaration is at Exh.32, which was recorded in the Civil Hospital at Dhule at about 22.10 hours. On careful perusal of these dying

declaration, it appears that in dying declaration (Exh.52), deceased Nasimbano stated that accused No.5 taken her to *Mori* and caught-hold her legs, accused No.3 caught-hold her hands, accused No.4 poured kerosene on her person, accused No.1 caught-hold her hands and accused No.2 set her on fire.

13. The second dying declaration Exh.32 is proved by the oral evidence of Fajlur Rehman Abdul Salam Shaikh (PW-4) and Dr.Rahul Shrinivas Hatolkar (PW-9). Fajlur Rehman (PW-4) deposed that he recorded dying declaration Exh.32 in presence of Dr.Hatolkar, medical officer (PW-9). Dr.Hatolkar (PW-9) deposed that at the time of recording the dying declaration, patient was conscious and oriented and there were endorsements to that effect and blow that he signed. In dying declaration Exh.32, the deceased Nasimbano stated hat on 07.06.2001 at about 15.00 hours, her mother-in-law Fatimabi and brother-in-law Amjad (appellants) poured kerosene and set her on fire by lightening the matchstick.

14. So looking to the contents of these two dying

declarations, it appears that the statement of the deceased as to the act of the present appellants is clearly mentioned that the accused No.4 poured kerosene on her person and accused No.2 set her on fire by lightening the matchstick. This version in the above two dying declarations is consistent supported by the oral dying declaration made by the deceased before Jainoddin (PW-3) and Bilkisbi (PW-7)

15. From the material contradictions and variance in the statement in two dying declarations, about the act done by the accused No.1, 3 and 5 are not consistent with the alleged act committed by the other accused persons. Therefore, the learned Additional Sessions Judge has rightly acquitted the other accused persons. One more important incriminating circumstance is that the burn injuries found on the person of the accused No.2 Amjad and detection of kerosene on the clothes of the accused No.4 i.e. *kurta* and *paijama*.

16. Exhibit 17 is the arrest panchanama dated 07.06.2001, from which it appears that the accused

Nos.1, 2 and 3 were arrested, at that time the accused No.2 was having burn injuries on his right palm and right toe. Exhibit 18 is the arrest panchanama of the accused No.4 Fatimabi dated 07.06.2001, at that time there were abrasion and burn injuries on her person and the clothes on her person was smelling kerosene, those were attached and sent to the chemical analyser. From the report of the chemical analysis, the kerosene was detected on *Kurta* and *Paijama* of accused No.4. These two panchanamas (Exh.17 and 18) admitted panchanamas, therefore, its contents can be read in evidence. Another most important and connecting circumstance is that, the burn injuries were found on the person of the appellants coupled with the detection of kerosene on the clothes of the accused No.4 are the circumstances positively indicates the involvement of the present appellants in the crime and this piece of the evidence supports the dying declarations as to the certain act committed by the present appellants. Therefore, even the part of the declarations which are found to be consistent and coupled with the other corroborative evidence can safely

be relied upon.

17. The learned Counsel for the appellants has relied upon the observations in a case report in **State of Punjab V/s. Parveen Kumar, AIR 2005 SC 1277**, which observed as follows:

"While appreciating the credibility of the evidence produced before the Court, the Court must view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but none name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declaration. It may be that if there was any other reliable evidence on record, this Court would have considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to

corroborate another piece of unreliable evidence. The High Court while considering the evidence on record has rightly applied the principles laid down by this Court in *Thurukanni Pompiah and another v. State of Mysore*, AIR 1965 SC 939, and *Khusal Rao v. State of Bombay*, 1958 SCR 552."

18. We have gone through the facts and observations of the above case, in which the version in two dying declarations were quite different and not consistent with each other and no other evidence in the form of corroboration was available. Therefore, it was held that mere fact that two different versions are giving one name is common in both of them cannot be a ground for convicting the named person. In the present case there is corroboration to this version in the dying declaration in the form of oral dying declaration before Jainoddin Pinjari (PW-3) and Bilkisbi Pinjari (PW-7) coupled with the burn injuries sustained to the present appellants and detection of the kerosene on the clothes of accused No.4. Therefore, the observations of the Apex Court in the cited authority are not applicable to the facts of the present case.

19. In view of the above and on perusal of the findings recorded by the Additional Sessions Judge, it appears that the learned Additional Sessions Judge has rightly convicted the present appellant Nos.1 and 2 on the basis of the cogent and reliable evidence. Hence, on re-appreciating of the evidence, we are of the same opinion and therefore, the present appeal is liable to be dismissed and accordingly, it is dismissed.

[K.L. WADANE]
JUDGE

[T.V. NALAWADE]
JUDGE

sarowar