

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

CRIMINAL APPEAL NO. 202 OF 2003

Sheshrao s/o. Sahebrao Gadade,
Age 32 years, Occu. Agriculture,
R/o. Gadadewadi, Tal. Parli,
Dist. Beed.

....Appellant.

Versus

The State of Maharashtra

....Respondent.

Mr. A.R. Borulkar, Advocate for appellant.

Mrs. D.S. Jape, APP for respondent/State.

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

DATED : JUNE 20, 2018.

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

1) The appeal is filed against judgment and order of Sessions Case No. 62/2002, which was pending in the Court of Additional Sessions Judge, Ambajogai, District Beed. The Trial Court has convicted the appellant for the offence punishable under section 302 of Indian Penal Code (hereinafter referred to as 'IPC' for short) and he is sentenced to suffer imprisonment for life and to pay fine. Both the sides are heard.

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

Deceased Kamalabai was the wife of appellant. Her

marriage with the appellant had taken place about 10 years prior to the date of the incident. She has left behind one daughter aged about 5-6 years. She was cohabiting with the appellant at Gadadewadi, Tahsil Parli. Relatives of the husband were not living with them. From about two months prior to the date of incident, the daughter was living with the parents of the deceased.

3) From about four years prior to the date of incident, the appellant had started giving illtreatment to the deceased. He became addicted to liquor. To satisfy the lust, he used to sell household articles and even food-grains of the house for collecting money and he was using this money for purchasing liquor. He used to pick up quarrel with the deceased on petty counts and he used to give her beating when she tried to convince him to behave well and not to sell the household articles.

4) The incident in question took place on 4.7.2002 in the evening time. On that day, the appellant returned to home at about 7.00 p.m. and picked up quarrel with the deceased by asking her as to why 'Bhakri' (dinner) was not prepared for him. Then he assaulted her, poured kerosene on her person and set fire to her when she was inside of the house. The deceased started shouting. The neighbours rushed to their house to extinguish the fire. The appellant ran away.

The neighbours took her to Government Hospital Ambajogai where she was admitted.

5) In the Government Hospital, the dying declaration of the deceased was first recorded by Executive Magistrate at about 10.30 a.m. of 5.7.2002. She disclosed the aforesaid incident to Executive Magistrate. Her statement came to be recorded by police on 5.7.2002 and on the basis of the statement, the crime at C.R. No. 171/2002 came to be registered in Ambajogai Police Station for the offence punishable under section 307 and 323 of IPC. Accused came to be arrested. Police prepared spot panchanama. The statements of neighbours and relatives of the deceased on parents' side came to be recorded. Kamalbai succumbed to the injuries on 17.7.2002. The crime was then converted to make it for the offence punishable under section 302 of IPC. Police collected the P.M. report and filed chargesheet against the appellant for aforesaid offence. For proving the offence, the prosecution examined in all 13 witnesses. The Trial Court has believed the evidence of dying declarations and has convicted the appellant. There is only the evidence under section 32 of Evidence Act which can be considered separately. Other evidence can be in support of suicide, accident or homicide.

6) The learned counsel for the appellant mainly relied on

the history in respect of the incident given to the Government Hospital where Kamalbai was admitted. Dr. Ajit Jejurkar (PW 11), who was working in Ambajogai Hospital has given evidence on the case papers and on disclosure recorded by Ambajogai Hospital. He was examined to prove the fitness certificate given by him when the dying declaration was recorded. His oral evidence and the case papers at Exh. 35 show that a relative of husband's side was present when Kamalabai was admitted in hospital on 4.7.2002. She was formally admitted at 10.45 p.m. She died on 11.30 p.m. of 17.7.2002. This document shows that the mother of the deceased had also reached the hospital on 4th itself and it was informed to her that the condition of Kamalabai was critical. The first case paper prepared of Kamalabai at 9.30 p.m. of 4.7.2002 shows that Namji Nivrutti Gadade, relative of husband had brought the deceased to the hospital. History of accidental burn was given to the hospital. The evidence of Dr. Jejurkar (PW 11) in the cross examination shows that the history of accidental burn was written by the Chief Residential Doctor while preparing the case papers of indoor patient and history was given by the patient. This entry cannot be ignored as this was the first disclosure made in respect of the incident. The case papers show that at 10.30 p.m. of 4.7.2002, the history was again recorded and the history was given as accidental burn injuries due to fall of lamp at 7.00 p.m. of that day. Thus, not only on one

occasion, on two occasions the history was collected by the hospital which is Government Hospital and it was recorded in the case papers. Unfortunately, the Trial Court has not considered these entries which can be used as first disclosures made by the deceased to independent person like the doctor who was giving treatment to her. The delay caused in recording the dying declarations by Executive Magistrate and police is not explained which needs to be explained in case like present one.

7) Kacchi (PW 5), the Executive Magistrate has given evidence on the dying declaration recorded by him which is proved as Exh. 22. His evidence shows that requisition letter was given to him on 4.7.2002 at 11.00 p.m. and he went to the hospital on next day at about 9.30 to 11.00 a.m. On the dying declaration, time of recording is mentioned as 10.30 a.m. In this dying declaration, the deceased had disclosed that appellant had set fire to her inside of the house after pouring kerosene on her. It was disclosed that on that day the appellant had come to home under influence of liquor, he had picked up quarrel and during quarrel, he had done that act. It was also disclosed that the husband had suspicion about her character. She had disclosed that after setting fire to her, the husband had run away and neighbours had extinguished the fire and neighbours had admitted her in Ambajogai Hospital.

8) Deorao (PW 6) was working as incharge of out post of aforesaid hospital. He has given evidence that he recorded the statement of Kamalabai on 5.7.2002 at about 10.30 a.m. Almost the same time is mentioned in previous dying declaration. The time of endoresement of the doctor is, however, given as 10.45 a.m. The time of recording is not mentioned on Exh. 24, though there is time of endoresement made by the doctor. In this dying declaration, the deceased disclosed that on 4.7.2002 at about 7.00 p.m. the deceased had returned to home and had picked up quarrel. She disclosed that the accused then assaulted her, poured kerosene on her person and set fire to her. She disclosed that appellant had become angry as no Bhakri was prepared for him by the deceased at that time. She disclosed that she shouted and then the husband ran away and the fire was extinguished by the neighbours. She disclosed that the husband was addicted to liquor and on petty count, he was giving illtreatment to her. In this dying declaration, she did not disclose that the husband had suspicion about her character and at the relevant time, he was under influence of liquor. However, on other material points, there is inconsistency between the two dying declarations.

9) The prosecution has examined Rangnath (PW 7), father

of deceased, Kausalyabai (PW 8), mother of deceased and Kasturbai (PW 9), sister of the deceased. These close relatives of the deceased on parents' side were expected to give evidence on the disclosure made to them against accused by the deceased. All the three witnesses are declared hostile. Their evidence and aforesaid record show that they had reached the hospital on 4.7.2002 itself. They have denied that there was illtreatment to the deceased from the appellant and the deceased had disclosed to them that the appellant, husband had set fire to her to finish her. The relevant portions of their police statements are duly proved in the evidence of Police Officer as contradiction, but that cannot help the prosecution much. There is no explanation with the prosecution as to why the relatives of the deceased on parents' side are not supporting the prosecution. They were present in the hospital right from 4.7.2002, but they did not approach police for giving report by contending that the deceased had made disclosure to them of any kind. Thus, on one hand, there are two recorded dying declarations and on the other hand, there is evidence of parents and relatives of the deceased showing that it is not their case that there was illtreatment to the deceased from appellant and in the incident, the appellant had set fire to the deceased. If accused had set fire to the deceased, in ordinary course, these close relatives of deceased would have given evidence against the accused.

10) In view of the aforesaid circumstances, it was necessary for the prosecution to give some evidence in corroboration of the recorded dying declarations. The neighbours are examined, but the neighbours have also not supported the case of prosecution. There is nothing on record to show that at the relevant time, the husband was present in the house. There was no injury on his person. The spot panchanama at Exh. 40 shows that there are many houses in the vicinity of the house of the appellant and all these neighbours would have witnessed some part of the incident and they could have seen the accused in the house or outside of the house if after setting on her fire he had run away.

11) The spot panchanama shows that one glass having smell of kerosene and one matchbox was lying there, but no other sign was there about the incident. It was prepared on 5.7.2002 at 16.00 hours. Police collected kerosene can from this house, glass and the match box. The contents of dying declaration already quoted show that the particulars about the incident are not specifically given and aforesaid articles were found on the spot. The evidence does not show that afterwards husband had opportunity to return home and to rearrange the things. This Court has already observed that other circumstances can support suicide or even accident.

12) There can be many reasons for sustaining burn injuries. There can be many reasons for committing suicide also. When a person dies due to burn injuries, the Court is expected to take much care to ascertain as to whether it is case of accident, homicide or suicide. Many times, when petty incident takes place a person like the deceased commits suicide and such possibility needs to be kept in mind by the Court while appreciating the evidence. In the present case, the first disclosure was of accidental burns and both the first disclosures were made on 4.7.2002. The recorded dying declarations are of the next day. Though there is no explanation with the prosecution with regard to the variance in record, if surrounding circumstances are considered and particularly the versions of the deceased are considered, it is difficult to base conviction on the aforesaid two recorded dying declarations. In the present case, there is no evidence on the genesis of the incident except the versions given in recorded dying declarations and there are inconsistent disclosures in the record of case papers. In such cases, neighbours can play vital role, but there is no evidence of neighbours in support of the case of prosecution. This Court has no hesitation to hold that the material of recorded dying declarations does not inspire full confidence and there is possibility of either tutoring, prompting or vindictiveness or the product of imagination. In view of existence of

inconsistent dying declarations, it was necessary for the prosecution to give some evidence in corroboration of recorded dying declarations, but there is no such corroboration.

13) Reference can be made to some observations made by the Apex Court in two cases reported as follows :-

(i) **AIR 1992 SUPREME COURT 1817 [Smt. Paniben Vs. State of Gujarat],**

(ii) **(2001) 5 Supreme Court Cases 254 [Uka Ram Vs. State of Rajasthan].**

In both the cases, the precautions which need to be taken by the Court before relying upon the dying declaration are mentioned. It is observed that the conviction can solely be based on dying declaration if there is no other probability than given in the dying declaration and which is appearing on the basis of material produced before the Court. In the second case, in view of the mental condition of the wife as she was mental patient, the Apex Court observed that it was necessary for investigating agency to ensure whether the incident was suicidal or homicidal. In the first case, when the dying declaration was answering every test and worthy of acceptance, the theory of suicide was not probable and the Apex Court held that the conviction for offence of murder was proper. It was also bride burning case. Facts and circumstances of each and every case are always different. On facts, in the present matter, the conviction

cannot sustain and as already observed corroboration was necessary to the recorded dying declaration in the present matter. In the result, following order.

ORDER

- (i) The appeal is allowed.
- (ii) The judgment and order of the Trial Court convicting the appellant for the offence punishable under section 302 of IPC is hereby set aside.
- (iii) Appellant/accused stands acquitted for the aforesaid offence.
- (iv) Fine amount, if any, deposited by the appellant is to be returned to him.
- (v) Bail bonds of the appellant already given are to continue for the period of six months for filing appeal by the State against this order.

[K.L. WADANE, J.]

[T.V. NALAWADE, J.]

ssc/