

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

Criminal Appeal No. 0669 of 2015

District : Dhule

1. Lotansing Sardarsing Girase,
Age : 41 years,
Occupation : Agriculture.
2. Sardarsing Daulatsing Girase,
Age : 69 years,
Occupation : Agriculture.
3. Jijkorbai Sardarsing Girase,
Age : 68 years,
Occupation : Household work.
4. Sunandabai Lotansing Girase,
Age : 38 years,
Occupation : Agriculture.

All R/o. Salve,
Taluka Sindkheda,
District Dhule.

.. Appellants.

versus

The State of Maharashtra,
Through Inspector,
Sindkheda Police Station,
Taluka Sindkheda,
District Dhule.

.. Respondent

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Mr. B.R. Warma, Advocate, for the appellants.

*Mr. R.V. Dasalkar, Additional Public Prosecutor,
for the respondent.*

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**CORAM : T.V. NALWADE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 21ST AUGUST 2018

JUDGMENT *[Per Smt. Vibha Kankanwadi, J.] :*

01. Present appeal has been filed under Sec. 374 of Code of Criminal Procedure, by original accused persons challenging their conviction for the offence punishable under Sec. 302 and 342 r/w. 34 of Indian Penal Code by learned Additional Sessions Judge, Dhule in Sessions Case No. 188 of 2014 on 08-07-2015.

02. The brief facts of the prosecution case was that one Anitabai Ramsing Girase was resident of Salve, Tal. Sindkheda, Dist. Dhule. She was residing with her husband, one daughter and one son. Her husband was an agriculturist as well as used to do driving on tractor. Accused No. 1 is the brother-in-law of Anitabai. Accused resides with his family adjacent to the house of Anitabai. Accused No. 4 is the wife of accused No. 1. Accused No. 2 is the father-in-law and accused No. 3 is the mother-in-law of Anitabai. Accused Nos. 2 and 3 were also residing adjacent to the house of Anitabai, separately. There was ancestral agricultural land to the family. Apart from that land, the family had also received piece of land in Bhudan movement. The said land could not be transferred in the name of family and therefore, Anitabai and her husband were asking accused No. 1 to

give them the land which was in the name of accused Nos. 2 and 3, since 6 months prior to 15-08-2014. Accused had not listen to the said demand. All the accused persons were raising quarrels with Anitabai.

03. It is the further prosecution story that all the accused had quarrelled with Anitabai around 9.30 p. m. On 14-08-2014. All of them entered the house of Anitabai and the accused No. 1 told that it is becoming a routine affair for Anitabai to demand share and therefore, now she should not be left. Accused No. 1 poured kerosene on the person of Anitabai. She was caught hold of by accused Nos. 3 and 4. Accused No. 1 had then ignited the match-stick and put the burning match-stick on her. All the accused persons then went outside the house and locked the door from outside. Anitabai caught fire and started shouting and was knocking the door. Thereafter the neighbours opened the door and extinguished the fire. Her husband and others took her to hospital around 1.30 a. m. of 15-08-2014. A. S. I. Khairnar recorded statement of Anitabai around 3.30 a. m. and on the basis of the said statement, First Information Report (FIR) vide C. R. No. 95 of 2014 came to be registered for the offence punishable under Sec. 307, 452, 342 r/w. 34 of Indian Penal Code. Thereafter second statement of Anitabai was recorded by Executive Magistrate.

04. During the course of investigation, the

panchnama of the spot was executed. Certain articles came to be seized at that time. Statements of certain witnesses were recorded. Accused persons came to be arrested. In the meantime, Anitabai succumbed to the injuries on 19-08-2014. After executing the inquest panchnama, the dead body was sent for post mortem. The clothes of the deceased as well as accused persons which were on their person, came to be seized under panchnama. The seized muddemal was sent for chemical analysis. Post mortem report was collected. Offence punishable under Sec. 302 of IPC came to be added. After the completion of investigation, charge sheet was filed.

05. Charge came to be framed against all the accused persons, after committal of the case before Sessions Court. All of them have pleaded not guilty. Prosecution has examined 8 witnesses in order to bring home the guilt of the accused. Statement of the accused persons under Sec. 313 of Code of Criminal Procedure has been recorded on the basis of incriminating circumstances. Taking into consideration the evidence of the prosecution and hearing both sides, the learned Additional Sessions Judge, Dhule has held all the accused guilty of committing offence punishable under Sec. 302 r/w. 34 of IPC and all of them have been sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- each in default to suffer simple imprisonment for two months. All the

accused persons have been further held guilty of committing offence punishable under Sec. 342 r/w. 34 of IPC and have been sentenced to suffer rigorous imprisonment for six months. Appellants have challenged this conviction.

06. It will not be out of place to mention here that all the accused persons have been acquitted of the offence punishable under Sec. 452 r/w. 34 of IPC. Prosecution has not preferred any appeal challenging this acquittal.

07. Heard learned Advocate Shri. B. R. Warma for appellants / original accused No. 1 to 4 and learned A. P. P. Shri. R. V. Dasalkar for prosecution/respondent. Perused the record and proceedings.

08. It has been submitted on behalf of appellants that prosecution has heavily relied on the dying declaration-cum-FIR Ex.25. It was recorded by ASI Khairnar. However, he could not be examined as he had then passed away. PW 3 Bapu Badgujar is the police officer who had issued the memo Ex.24. PW 1 Mayanand Bhamre is the Executive Magistrate who had recorded the dying declaration. The evidence on the point of dying declaration is not at all inspiring confidence. PW 08 Dr. Mohit More is the Medical Officer who had endorsed on the dying declaration. He has stated that Anitabai had received injuries to her hands, including

the thumbs. Therefore, question arises how her thumb impression would have been taken? The thumb mark on the dying declaration has not been attested. It has come in the cross examination of PW 2 Udeysing Girase, that Anitabai had told that her husband had consumed liquor and there was quarrel between her and her husband. She told that in the heat of anger, she has set herself to fire. These facts brought on record in the cross of prosecution witness, though he was examined in the capacity of panch, are required to be considered; because we can not forget that this witness is neighbour of Anitabai and had reached the spot immediately after the incident.

09. It has been further submitted on behalf of appellants that the learned Trial Court has acquitted all the accused persons from the charge of offence punishable under Sec. 452 r/w. 34 of IPC. If they had not entered in the house of Anitabai, how they could have committed her murder. The description in spot panchnama would clarify that it was a case of suicide. No traces have been found on any wall or other article from the house. It has also come in evidence that there was an attempt to commit suicide by Anitabai in the past. She was having two grown up children. Prosecution has not examined them. Husband was admittedly not present in the house. Therefore, on the basis of such evidence, learned Trial Court ought to have acquitted all the accused persons.

10. Learned A. P. P. has submitted that both the dying declarations are consistent with each other. PW 8 Dr. Mohit More has certified that Anitabai was in a fit mental state when her statements were recorded. Perusal of Inquest panchnama would clarify that there was ink to the thumb. That means, it was in such a position that its mark / impression can be taken. The situation of the house of Anitabai would show that its entrance was abutting road. There were closed walls. There is no mention of traces of burns to the wall. It can not be taken as sign of suicide. Though the father of the deceased has later on turned hostile, his testimony at the most would be discarded. Only dying declarations were sufficient to prove the guilt of the accused persons. They had quarrels with deceased as she was demanding share from the land. They had motive to get rid of her on that count. The reasons given by learned Trial Court are correct.

11. At the outset, it can be said that prosecution has tried to rely upon two written dying declarations and oral dying declaration. Prosecution has not examined husband of the deceased. No doubt, he was admittedly not present at the time of incident. But as per the prosecution story, he arrived immediately after incident and had taken Anitabai to hospital. It was but natural for him to ask his wife the reason behind the incident and the names of

culprits. However, prosecution preferred not to examine him.

12. It is the prosecution story that PW 3 PHC Bapu Badgujar, who was on duty with Dhule City Police Station received phone call from PC Ishi that Dr. More from Civil Hospital has reported about the admission of Anitabai in 95% burn condition around 1.45 a. m. of 15-08-2014. ASI Khairnar was asked to take down her statement. Ex. 25 has been taken by him, however ASI Khairnar could not be examined due to his death. The said dying declaration therefore, came to be proved through PW 3 Badgujar, who has identified the handwriting of ASI Khairnar. This dying declaration can not be taken into consideration, as the person before whom it was made, could not be examined. There was no opportunity to accused to cross him.

13. Prosecution has therefore, relied on the dying declaration recorded by PW 1 Bhamre - Executive Magistrate. If we consider the dying declaration Ex. 15 recorded by this witness, then the fact that emerges is that it is on printed form. The questions are already printed, which are presumptive. Ex. 15 bears thumb mark on the name written. PW 1 Bhamre has not explained as to whether it is the signature of the deceased and the thumb mark is obtained on it or he had written the name and then obtained thumb mark on it. PW 8 Dr. More had given endorsement on both the

dying declarations. According to him, the patient was examined by him before he gave endorsement. He had found her conscious and in a position to give statement. It was so, then why he had not recorded the history from patient. The medical paper Ex. 51 would show that the history was given by relative. In his cross examination recorded on 15-06-2015 he has clearly stated that when the patient was admitted she gave the history that she poured kerosene herself on her person and set herself on fire and accordingly he has informed the police. Thereafter, it appears that the witness was recalled. In his re-examination, he has stated that as per the papers, the history was given by the relative of the patient namely Khumansing Tarasing who was the father-in-law of the said patient. The fact to be noted is that the name of father-in-law is not Khumansing. He is Sadarsing. Secondly Ex. 51 does not say name of the relative, therefore, from where he has made that statement is not understandable. Another fact which is brought on record is that the burn injuries to the patient were to the extent of 18%. He admits that palm including thumbs were burnt. Therefore, a question has cropped up as to how PW 1 Bhamre would have taken thumb mark of the deceased on Ex. 15. No doubt, the inquest panchnama shows that there was ink to the thumb, but it also says that the hand was burnt. Therefore, a doubt is created in the mind of the Court.

14. PW 2 Udeysing is the panch to the spot panchnama. He has proved the said panchnama Ex. 19. Perusal of the same would show that there were no fire marks on the side walls. There is absolutely no mention of latch system available to the door of the house in the said panchnama. We can not presume it. All the houses have latch system is a general statement, however, what kind of system was there at that place should have been brought on record. Secondly, it is stated that the spot was shown by one Ravindra Gulabrao Jadhav. What is the relation of this witness with deceased and her family has not come on record. He has not been examined by the prosecution. Thus, the corroborative facts have not been brought on record.

15. Important fact is that, though PW 2 Udeysing was examined in the capacity of panch, yet it has come on record that he is the neighbour of deceased. In his cross, he has admitted that he was sleeping in the courtyard, when he heard shouts of Anitabai. He as well as other 3-4 persons went to the house of Anitabai and had extinguished the fire. He does not say that the latch was opened by any one of them before extinguishing the fire. He has also stated that 2-4 persons had made inquiry with deceased as to how she caught fire. Anitabai told them in the presence of this witness that her husband had consumed liquor and there was quareel between him and her. In the heat of

anger, she had poured kerosene on her person and ablaze herself. Thus, he has tried to support the accused in his cross. Interestingly, he has not been declared as hostile and prosecution has not put questions in the nature of cross to this witness. Thus, when opportunity was available, it was not utilized by prosecution. Therefore, the said fact told in the cross of this witness will have to be taken into consideration. The said story was also affirmed by PW 8 Dr. More in cross.

16. PW 4 Gumansing is the father of the deceased. He has deposed that he had reached Civil Hospital around 4.00 a. m. His daughter told him that all the accused entered her house around 9.00 to 9.30 p. m. on 14-08-2014. Accused No. 1 had poured kerosene on her person. Accused Nos. 3 and 4 had caught her. Accused No. 2 had given matchstick to accused No. 1 and then accused No. 1 had thrown it on her person. It was also told to him by the deceased that she was put to fire on the count of agricultural land. Thus, in his chief, he has supported prosecution; however, in cross, he has supported accused persons. He has admitted that the deceased had told him that there was quarrel between her and her husband on the count of his habit of drinking liquor. He has also admitted that deceased was suffering from mental illness and she was under treatment for that purpose. She was getting allusion that accused persons would set her to fire. He has

negatived the oral dying declaration given in his chief. Thus, the testimony of this witness is not useful to prosecution. What is required to be noted is that, in his chief, this witness has stated that the dispute between her and accused regarding share in property was going on since 6 years. If that is so, then where is the proximity.

17. The post mortem report Ex. 41 shows that the probable death of Anitabai is "Septicaemia following thermal burns". Therefore, only on the basis of post mortem, it is not possible to arrive at the conclusion that her death is homicidal in nature. It may be due to suicidal burns or accidental burns also.

18. Prosecution has not examined husband of the deceased to bring it on record that there was dispute between him and accused persons regarding property. Prosecution has not examined the children of the deceased, who ought to have been present in the house in normal course. There is no explanation from prosecution about the whereabouts of children at the time of incident. The incident is stated to have taken place around 9.00 p. m. If we consider the surrounding of the house of deceased, it can be seen that there are houses adjacent thereto. So somebody might have seen accused persons going in the house of deceased. Somebody might have heard the quarrels. But none of the neighbours also have been examined. Under these

circumstances, the dying declaration can not be relied upon. Learned Trial Court has only relied on the dying declaration in order to convict the accused persons. Learned Trial Court failed to consider that in spite of availability of other evidence, it was not collected and it was not adduced. When better quality of evidence is unnecessarily withheld by the prosecution, it is unsafe to rely only on the dying declaration.

19. Reliance can be placed on the decision in *K. Ramchandra Reddy and Anr v/s. The Public Prosecutor [AIR 1976 SC 1994]*; wherein it has been held that, *"The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration"*. If the dying declaration is suspicious then it can not be acted upon without corroboration. The dying declaration recorded in this case is suspicious for the reasons aforesaid and therefore, there ought to have been strong corroborative evidence. Deceased Anitabai had reason to implicate the accused persons and therefore, it was unsafe to rely on her statement alone.

20. One more fact is required to be considered. Learned Trial Court has acquitted all the accused persons from the charge under Sec. 452 r/w. 34 of IPC. Reason given is that the prosecution has not brought

evidence about "preparation to commit offence". It appears that it was in the mind of learned Trial Court that 'preparation' should be physical only. There can be mental preparation also, but that was not considered. The result or meaning of the acquittal from that charge is that accused persons did not enter the house of deceased. If they did not enter the house, how they could have committed murder and then wrongfully restrained deceased from coming out? Therefore, the learned Trial Court ought to have considered all the aspects of the case.

21. Learned A. P. P. has relied on the decision in *Ashabai and Anr v/s. State of Maharashtra [2013 DGLS (SC) 9]* wherein there were four dying declarations. Though there were improvements in them, yet the consistent part was considered and conviction was awarded as all the dying declarations were found to be made in fit state of mind. Same view was taken in *Amol Singh v/s. State of M. P. [2008 DGLS (SC) 779]*. The facts here in this case are different. Here the first dying declaration can not be considered. Secondly, there is cloud of false implication of the accused in dying declaration recorded by Executive Magistrate.

22. Further reliance has been placed by learned A. P. P. On *M Sarvana @ K D Saravana v/s. State of Karnataka [LEX (SC) 2012 7 57]*. In this case it is held that, "Where it is found that dying declaration was made willingly and was truthful and

involving accused in crime, conviction can be recorded on such dying declaration". Further in Salim Gulab Pathan v/s. State of Maharashtra through SHO [AIR 2012 SC 2176] same view has been taken. It is to be noted that whether a dying declaration satisfies the conditions and whether it is reliable as true, would depend on facts of each case. In this case, we do not find the dying declaration to be true and free from suspicious circumstances for the aforesaid reasons.

23. Learned Advocate for appellants has also relied on certain decisions of this Court as well as that of Apex Court. The summary of these decisions can be that if the dying declaration is free, willingly given and not the outcome of tutoring, given in fit mental state, then it can be relied upon. In those cases relied by him, the dying declaration / declarations were held to be not reliable.

24. Taking into consideration the above discussion, we are of the opinion that prosecution had failed to prove the charges against all the accused persons beyond reasonable doubt. The conclusion arrived at by the learned Trial Court is wrong and therefore, the conviction awarded to the accused persons / appellants deserves to be set aside. Hence, following order.

ORDER

1. The judgment and order of learned Additional Sessions Judge, Dhule delivered in Sessions Case No. 188 of 2014 on 08-07-2015 is hereby set aside.
2. All the appellants stand acquitted of the offence punishable under Sec. 302, 342 r/w. 34 of Indian Penal Code.
3. Appellant No. 1, 2 and 4 are in jail. They be set at liberty forthwith, if not required in any other crime.
4. The bail bonds of accused No. 3 are to continue for six months vide Sec. 437A of Code of Criminal Procedure.
5. The remaining accused to execute bail bonds before their release, which shall remain in existence for the period of six months in view of Sec. 437A of Code of Criminal Procedure.
6. The fine amount, if any, deposited by the appellants is to be refunded to them.
7. The bond will be of the same amount on which the appellant No. 3 was released on bail.

(Smt. Vibha Kankanwadi)
JUDGE

(T.V. Nalawade)
JUDGE

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Govindrao
Puranik

Digitally signed
by Bhagwan
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