

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

CRIMINAL APPEAL NO. 261 OF 1999

Sunita Suresh Gaikwad alias Sunita Saifan Nadaf age 30 years, R/o. New Dhondiba Vasti, 248 Ramwadi, Solapur. V/s. The State of Maharashtra (on the complaint of deceased Noorjahan Saifan Nadaf)	... Appellant/Orig. Accused ... Respondent
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Mr. U.R. Agandsurve for the Appellant.
Mr. H.J. Dedhia, A.P.P. for the State.

**CORAM : INDRAJIT MAHANTY AND
V.K. JADHAV, JJ.**

Judgment reserved on : 29th NOVEMBER, 2018.
Judgment pronounced on : 10th DECEMBER, 2018.

JUDGMENT (Per V.K. Jadhav, J.):

1 This is an Appeal against conviction preferred by the sole accused. Appellant-Original Accused was convicted by the 3rd Additional Sessions Judge, Solapur, by judgment and order of conviction dated 15.03.1999 in Sessions Case No.52 of 1998 u/s.302 of I.P.C. and sentenced to suffer R.I. for imprisonment of life.

2 Brief facts of the prosecution case are as follows :-

Deceased Noorjahan got married with Saifan Nadaf about ten years back prior to the incident. She was residing with her children at Solapur. She was doing the tailoring business and her husband was also doing the same business. Her husband Saifan Nadaf had illicit sexual relations with the Appellant-Accused and Appellant-Accused was a keep of Saifan Nadaf. Saifan Nadaf was serving in the office of Municipal Corporation, Solapur, as a clerk. Later on, he left the service and started residing with the Appellant-Accused. Sometimes he used to visit the house of deceased Noorjahan. However, since one month prior to the incident, Saifan Nadaf did not turn up to the house of deceased Noorjahan. Deceased Noorjahan was also in need of money thus, she went to the house of the Appellant-Accused on Thursday at Ramwadi with her children. Appellant-Accused Sunita picked up quarrel with deceased Noorjahan and restrained her to reside in her residence. However, Saifan Nadaf convinced both of them. On 21.12.1997, at night again Appellant-Accused Sunita picked up quarrel with deceased Noorjahan for the same reason. Thereafter, Saifan Nadaf intervened into the matter and convinced them. He asked them to go to bed. On one side of Saifan Nadaf Appellant-Accused Sunita slept and on the another side of the room Noorjahan and her children slept. At about

3.30 a.m. deceased Noorjahan woke up due to the flames of the fire and in the light she noticed that Appellant-Accused was standing near her foot and she was possessing match box. Deceased Noorjahan caught the fire and her husband also woke up. She shouted loudly so her husband and the Appellant-Accused removed her burnt saree from her person. Deceased Noorjahan herself, her husband, Appellant-Accused and her children went to Ramwadi at the house of the elder mother and narrated the incident to her. Thereafter, she was taken to the hospital in auto-rickshaw.

3 On 22.12.1997, Head Constable Tadkal was on duty at Ramwadi Police chowky. He has received a message about burn entry in the hospital. He went to Civil Hospital and recorded the statement of deceased Noorjahan, after obtaining the necessary endorsement from the concerned Doctor about her fit mental state. On the basis of the said statement-cum-dying declaration (Exh.46), initially the crime came to be registered u/s.307 of the I.P.C. Furthermore, the Executive Magistrate also recorded the dying declaration (Exh.26). It is also the case of the prosecution that when deceased Noorjahan was taken to the hospital, concern Medical Officer also recorded the history. There are some neighbours before whom deceased Noorjahan has made an oral dying declaration. On 23.12.1997, deceased Noorjahan died in the hospital. Accordingly, Section 302 of I.P.C. was

added. After due investigation, the concerned Investigating Officer has submitted the charge sheet against the Accused. The learned Additional Sessions Judge has framed the charge against the accused for the offence punishable under Section 302 of I.P.C. The accused has pleaded not guilty to the said charge and claimed to be tried.

4 Prosecution has examined in all 16 witnesses to substantiate the charges levelled against the accused. The learned 3rd Additional Sessions Judge, Solapur, vide judgment and order of conviction dated 15.03.1999 convicted the Appellant-Accused for the offence punishable under Section 302 of I.P.C. and sentenced to suffer R.I. for imprisonment of life. Hence this Appeal.

5 The learned Counsel for the Appellant submits that PW1 Ambadas Gaikwad has given a vague statement about the oral dying declaration. According to this witness, deceased Noorjahan when came outside of the house, she was in burnt condition. He had asked her as to how she sustained the burns and she told him that Appellant-Accused Sunita and Saifan Nadaf burnt her. The learned Counsel for the Appellant submits that in paragraph 5 of the cross-examination, the said witness has stated that when deceased Noorjahan came outside the house in burnt condition,

she fallen down on the ground and became unconscious. The learned Counsel for the Appellant submits that the entire theory of oral dying declaration before PW1 wiped out because of the said admission during the cross-examination. Furthermore, even if the theory of oral dying declaration before PW1 is accepted for the sake of discussion, PW1 has taken the names of Appellant-Accused and also Saifan Nadaf. It is not possible to find out as to the role played by each of them in the alleged incident. PW6 was the another neighbour, after giving call to her by Saifan Nadaf, she came outside of the house. According to her, Saifan Nadaf was standing by keeping deceased Noorjahan on his shoulder. Deceased Noorjahan was in burnt condition. Deceased Noorjahan informed to her that she was burnt by Appellant-Accused by referring her in a filthy language. Learned Counsel submits that PW1 and PW6 were there almost at the same time. PW1 has not stated anything about the presence of PW6 so also PW6 has not stated anything about PW1. They have contradicted each other on material part.

6 The learned Counsel for the Appellant-Accused submits that so far as the history recorded by PW7 Dr. Bhausaheb Pachundkar is concerned, it appears that deceased Noorjahan had taken the names of the Appellant-Accused and also Saifan Nadaf. The learned Counsel submits that PW15 who has also recorded the history, it appears that deceased Noorjahan had

though taken the names of Appellant-Accused and the said Saifan Nadaf, there is some confusion about the names and the benefit should go to the accused.

7 The learned Counsel for the Appellant-Accused submits that the dying declaration Exh.26 (recorded by the Magistrate at 8.00 a.m.) and the dying declaration Exh.35 (recorded by the Police Head Constable, Tadkal, at 4.35 a.m.) are not consistent on material aspect. It thus create doubt about their truthfulness. Mere fact that the name of the accused is common in all the dying declaration is not sufficient to convict. There is no corroborative evidence. The learned Counsel submits that the accused is entitled for the benefit of doubt.

8 The learned Counsel for the Appellant-Accused in order to substantiate his contention placed his reliance on the following cases :-

- 1 State of Punjab vs. Parveen Kumar,
(2005) 9 Supreme Court cases 769.
- 2 Rajesh Jagdamba Avasthi vs. State of Goa,
(2005) 9 Supreme Court cases 773.
- 3 Chinnamma vs. State of Kerala,
(2004) 12 Supreme Court cases 244.

9 The learned A.P.P. submits that there are consistent oral dying declaration before PW1 and PW6. Moreover, the history recorded by the Medical Officer also indicates that the deceased Noorjahan was set on fire

by the Appellant-Accused after pouring kerosene on her person. Further the dying declaration Exh.26 and Exh.35 are consistent on material aspect. The learned A.P.P. has supported the judgment of conviction. The learned A.P.P. submits that there is no substance in the Appeal and the Appeal is liable to be dismissed.

10 Prosecution evidence with regard to the oral dying declaration inspires no confidence. Though PW1 Ambadas has deposed about the oral dying declaration made to him by deceased Noorjahan as soon as she came outside of the house in a burn condition, however, in para 5 of the cross-examination he has stated that when deceased Noorjahan came outside of the house, she was found in burn condition, fell on the ground and became unconscious. It is thus not clear as to how deceased Noorjahan made oral dying declaration before him. If deceased Noorjahan became unconscious as soon as she came out of the house in burnt condition, the question of making oral dying declaration before PW1 Ambadas, would be out of question. Apart from this PW1 Ambadas has also deposed that there was a quarrel between Saifan Nadaf and deceased Noorjahan and the present Appellant-Accused was also present there. The said quarrel was continued upto 3.00 a.m. at night. He has further deposed that deceased Noorjahan made oral dying declaration before him that she sustained burns and the

Appellant-Accused and Saifan Nadaf burnt her. PW1 Ambadas has deposed that the quarrel was going on between Saifan Nadaf and deceased Noorjahan and if the Appellant-Accused was present there (her presence in the house is not disputed) then the specific role to Appellant-Accused was not ascribed. PW6 Mahaboobbi has deposed that Saifan Nadaf called her from her house and when she came out from the house, she found that Saifan Nadaf was standing by keeping deceased Noorjahan on his shoulder who was in a burnt condition. On asking deceased Noorjahan as to how she has sustained burns, according to this witness, deceased Noorjahan has replied to her that she was burnt by “rand” (keep of Saifan Nadaf). It is pertinent that PW1 Ambadas and PW6 Mahaboobbi have not acknowledged the presence of each other when according to them, both were there when deceased Noorjahan came out of the house in burn condition. PW1 Ambadas has not deposed that deceased Noorjahan was taken to auto-rickshaw by Saifan Nadaf by keeping her on his shoulder. PW1 Ambadas has deposed that deceased Noorjahan became unconscious as soon as she came out of the house in burn condition. If this is so, then evidence of PW6 Mahaboobbi also inspires no confidence. PW6 Mahaboobbi has further admitted in her cross-examination that deceased Noorjahan was distantly related to her.

11 PW7 Dr. Pachundkar was on emergency duty at Civil Hospital, Solapur on 22.12.1997. At about 4.00 a.m. he has received a call to the effect that one burn patient name Noorjahan, has been admitted in the hospital. Accordingly, he attended the patient at about 4.15 a.m. He examined the patient and found 100% burn on her body. He has further deposed that on asking to the victim about burn injuries, she has disclosed before him that it was done by Appellant-Accused and Saifan Nadaf by pouring kerosene on her person and setting her on fire at about 3.30 a.m. Deceased Noorjahan had also explained to him that she had gone to stay at Saifan Nadaf's place before incident and she had fight with both of them i.e. Saifan Nadaf and Appellant-Accused. He has noted said history on case papers. PW15 Dr. Ramesh Ukrande was on duty in Casualty Department, Solapur, on 22.12.1997. Deceased Noorjahan was initially taken to the casualty ward and thereafter, shifted to burn ward. PW15 Dr. Ramesh Ukrande further deposed that deceased Noorjahan has disclosed before him that Appellant-Accused had poured kerosene on her person and set her on fire with the match-stick. PW7 Dr. Pachundkar has recorded the said history at about 4.15 a.m. whereas PW15 Dr. Ramesh Ukrande has recorded the history at about 4.10 a.m. Thus, there is a gap of only five minutes in between the history recorded by two Medical Officers attached to the Civil

Hospital, Solapur and deceased Noorjahan had made inconsistent statement about the cause in sustaining the burns. PW15 Dr. Ramesh Ukrande though written in the case papers that the history has given to him by deceased Noorjahan, for the reasons best known to him, has excluded the name of Saifan Nadaf in his oral evidence by giving some evasive explanations. We will discuss this particular part of the evidence in the later part after considering the evidence in respect of the written dying declarations Exh.26 and Exh.35 respectively.

12 PW10 P.H.C. Neminath Tadkal was on duty at Ramwadi Police Chowky on 22.12.1997 and he had taken the entry about this burn patient in the station diary at about 4.20 a.m. He went to the Civil Hospital and approached to PW15 Dr. Ramesh Ukrande, in-charge of the ward. He had enquired with the Doctor about condition of the patient and whether she was in a position to give her statement. According to him, PW15 Dr. Ramesh Ukrande has made endorsement to the effect that the deceased Noorjahan was conscious and able to give her statement. Accordingly, PW10 Dr. Tadkal recorded the statement-cum-dying declaration of deceased Noorjahan marked at Exh.35. We have carefully perused dying declaration Exh.35 and noted the following two prominent aspects :

i) Deceased Noorjahan had stated that on 22.12.1997 at about 3.30 a.m. she woke up due to heat of the flames and in the light she had seen Appellant-Accused standing near her foot and there was a match-box in the hand of Appellant-Accused which she has thrown out.

ii) She had raised hue and cry and Saifan Nadaf and the Appellant-Accused removed the burn saree from her person.

Deceased Noorjahan had not stated about the pouring of a kerosene and set her on fire with the help of match-stick by the Appellant-Accused. Though in the later part of the said dying declaration Exh.35 , the conclusion has been recorded to that effect however, considering the aforesaid part of the dying declaration we infer that PW10 P.H.C. Neminath Tadkal has recorded the said conclusion which is usually done while recording the complaint or statement for registration of the crime. Dying declaration Exh.35 indicates that deceased Noorjahan woke up when she was already surrounded by the flames and after she raised hue and cry, Appellant-Accused and Saifan Nadaf removed the burnt saree from her person. She had not stated as to how she sustained burns and who set her on fire. It also appears that if at all Appellant-Accused set deceased Noorjahan on fire with the help of match-stick, there was no reason for her

to help her husband to remove the burnt saree from the person of deceased Noorjahan. Deceased Noorjahan had further stated in her dying declaration that after removal of the burn saree, she herself, Saifan Nadaf, Appellant-Accused and children went towards the house of her elder mother Mahaboobbi Nadaf who resides in the locality known as Ramwadi and further narrated the incident to her. The dying declaration Exh.35 came to be recorded at about 4.35 a.m. on 22.12.1997. On this background, dying declaration Exh.26 recorded by PW8 Executive Magistrate Bhimrao Talbhandare at about 8.00 a.m. on the same day require to consider.

13 Though the opinion of the concerned Medical Officer has been duly taken about the conscious state of mind of the deceased Noorjahan, on careful perusal of the dying declaration Exh.26 we noted the following prominent aspects :

- i) Deceased Noorjahan had stated that the keep of her husband had poured kerosene on her person and set her on fire on 22.12.1997 at about 3.00 a.m.
- ii) After the said incident the fire was extinguished by her husband, the keep of her husband and some outside persons by pouring water on her person.

It would not out of place to mention here that in the dying declaration Exh.35 deceased Noorjahan had stated that after the incident, she was taken to her elder mother Mahaboobbi Nadaf and Saifan Nadaf, Appellant-Accused and children accompanied her. Deceased Noorjahan had also stated that she narrated the incident to her elder mother. Even her dying declaration Exh.35 she had stated that she was sent to hospital from the house of her elder mother along with her sister Fatima. Saifan Nadaf, Appellant-Accused also accompanied her. It thus appears that before recording the dying declaration by the Executive Magistrate Exh.26 at about 8.00 a.m., deceased Noorjahan had been to her elder mother's house (Mahaboobbi) where she had narrated the incident and further she was also accompanied by her sister Fatima towards the hospital. In view of the same the possibility of the interference by the others could not have been ruled out. Furthermore even though deceased Noorjahan had made allegations against her husband Saifan Nadaf, neither Saifan Nadaf was arrested at any time nor he was charge-sheeted as an accused in this case. Thus, Saifan Nadaf was all the while free and remained in the company of deceased Noorjahan till her death. The dilemma in the mind of deceased Noorjahan was evident right from the recording of history by the concerned Medical Officers and also reflected from her dying declarations Exh.26 and Exh.35

respectively. In the result the dying declarations Exh.26 and Exkh.35 are inconsistent on material aspect. So far as the history recorded by the Medical Officers in casualty ward and also in the burn ward are concerned, as a result of the interference, deceased Noorjahan had given the history that Saifan Nadaf and the Appellant-Accused caused the burns on her person by pouring kerosene on her person and further exonerated Saifan Nadaf and made allegations against the present Appellant-Accused only.

14 In the instant case the prosecution has not followed the best evidence rule. The prosecution has not examined Saifan Nadaf if he was not arraigned as an accused and further the elder mother Mahaboobbi to whom deceased Noorjahan narrated the incident at the first instance.

15 In the case of *Tapinder Singh vs. State of Punjab*¹, the Supreme Court held that -

“ The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under section 32(1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of

¹ (1970) 2 SCC 113

necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances.”

16 It is well settled that Court has to examine dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may interested in the success of the investigation or which may be negligent while recording the dying declaration. If the truthfulness of the dying declaration cannot be doubted, it being a substantive evidence, the same alone can form a basis of conviction of the accused and the same does not require any corroboration whatsoever. Though dying declaration is entitled to a great weight, it is to be noted that accused get no opportunity to cross-examine. This is the reason that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or product of imagination.

17 So far as the multiple dying declarations are concerned, in case of *Amol Singh vs. State of Madhya Pradesh*², relied upon by the learned Counsel for the Appellant, the Supreme Court in para 13 of the judgment

² (2008) 5 SCC 468

has made the following observation :

“13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See: Kundula Bala Subrahmanyam v. State of A.P. [(1993) 2 SCC 684]. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

18 In a case of **Suresh s/o Arjun Dodorkar (Sonar) vs. State of Maharashtra**³, relied upon by the learned Counsel for the Appellant in para 9 of the judgment, the Division Bench of this Court has made the following observations :

“9. A perusal of both the dying declarations reveal that there are inter se variance. In the dying declaration at Exh. 24 Vimal had stated that the appellant, under the influence of liquor, used to beat her as he was of suspicious nature. She states that when she had asked him to take his dinner, the appellant had quarrelled with her and, therefore, in anger she had gone to sleep. While she was asleep, the appellant had poured kerosene on her and had set her ablaze. In

3 2005 ALL MR (Cri) 1599

the dying declaration at Exh. 27 Vimal had stated that in the evening she had sent the daughter of her neighbour for purchasing wheat, but as the said girl had not gone, she had herself gone and purchased wheat. According to her, the appellant, on his return, asked her as to why she had gone for purchasing wheat and what was the relationship between Vimal and the shopkeeper. The appellant then went out of the house and returned back at about 7.00 or 7.30 p.m. carrying a small plastic Can of kerosene. Vimal had asked her husband to take his dinner but her husband had said that he would not eat anything prepared by her as she was of loose character. On so saying her husband poured kerosene on her and set her ablaze. It would thus be seen that in respect of the incident there is a major variance though there is a common thread in both the dying declarations that it was the appellant who had set her ablaze. In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations, there is consistency in respect of the name and the number of accused. However, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs. 24 and 27, as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. In our opinion, therefore, no reliance can be placed on the dying declarations at Exhs. 24 and 27.”

19 In a case of *State of Punjab vs. Parvin Kumar*⁴, relied upon by the learned Counsel for the Appellant in para 10 of the judgment, the Supreme Court has made the following observations:

*“10. While appreciating the credibility of the evidence produced before the Court, the Court must view the 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 one 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 declarations. It may be that if there was any other reliable evidence on record, this Court could 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 Vs. State of Mysore*, AIR 1965 SC 939, and *Khusal Rao Vs. State of Bombay*, 1958 SCR 552.”*

20 In the instant case considering the inconsistency which is material in nature in the dying declarations Exh.26 and Exh.35 respectively, we are of the considered opinion that the aforesaid dying declarations are not reliable and have not been made voluntarily. Even though no specific role in the form of overtact has been ascribed to Appellant-Accused in the

4 (2005) 9 SCC 769

dying declaration Exh.35, specific overtact has been ascribed to the Appellant-Accused in the dying declaration Exh.26 which came to be recorded approximately four hours after recording the first dying declaration Exh.35. So far as dying declaration Exh.35 is concerned, no overtact was attributed to the Appellant-Accused, it would not be safe to rely on it without corroboration. Furthermore, though in the history recorded by the Medical Officer, deceased Noorjahan had made the allegations against Saifan Nadaf and the Appellant-Accused without specifying their individual acts, on subsequent occasion deceased Noorjahan had exonerated her husband Saifan Nadaf and made the allegations only against the Appellant-Accused. In the result we do not find any of the dying declaration reliable, truthful. Except the dying declaration, there is no other corroborative piece of evidence even though the prosecution had a best evidence available. The prosecution has not examined Saifan Nadaf when he was not arraigned as an accused as a witness to the incident nor examined the sister Fatima and the elder mother Mahaboobbi of deceased Noorjahan. The learned Judge of the trial court has not considered the same. It is well settled that in an Appeal filed in the High Court against the order of conviction especially where a life sentence is awarded, the High Court is under a duty to consider the matter in detail. The Appellate Court

has every right or power to re-appreciate the entire evidence and substitute its own findings and it is not bound by the findings of the trial Court on question of fact. This Court has full power to re-appreciate the evidence and come to a conclusion independently. In the result the prosecution has failed to prove the case against the Appellant-Accused beyond reasonable doubt. The Appellant-Accused is entitled for the benefit of doubt thereof.

21 Hence, we proceed to pass the following order :

- i) Appeal is hereby allowed.
- ii) The judgment and order of conviction under Section 302 of the I.P.C. dated 15.03.1999 passed by the 3rd Additional Sessions Judge, Solapur, in Sessions Case No.52 of 1998 sentencing thereby the Appellant-Accused to suffer R.I. for imprisonment of life, is hereby quashed and set aside.
- iii) Appellant-Accused Sunita Suresh Gaikwad alias Sunita Saifan Nadaf is hereby acquitted for the offence punishable under Section 302 of the I.P.C. vide Sessions case No.52 of 1998.

(V.K. JADHAV, J.)

(INDRAJIT MAHANTY, J.)