

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

CRIMINAL APPEAL NO. 88 OF 2002

The State of Maharashtra

.....Appellant

v/s.

Shankar Bapu Jamdade

.....Respondent

Ms. A.A.Takalkar, APP for the Appellant-State.

Mr. Abhaykumar Apte, Adv. appointed for the Respondent.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : JANUARY 15, 2018.**

ORAL JUDGMENT :-

1. The State has challenged the Judgment and Order dated 23rd October, 2001 in Sessions Case No. 184 of 2000, whereby the learned 4th Ad-hoc Assistant Sessions Judge, Kolhapur has acquitted the respondent/accused of offence under Section 306 of the Indian Penal Code.

2. Since the accused was not represented by any advocate, Mr. Abhaykumar Apte is appointed as *amicus curiae*. Heard Ms. A.A.

Takalkar, learned APP for the State and Mr. Abhaykumar Apte, learned Counsel for the Respondent. I have perused the records and considered the submissions advanced by the learned Counsels for the respective parties.

3. The brief facts necessary to decide this appeal are as under :-

(i) Sunita Shankar Jamdade, wife of the respondent-accused had set herself ablaze on 26th June, 2000. She was admitted in Sangli Civil Hospital with severe burn injuries. PW9 who was on duty at the said hospital recorded the statement of Sunita. Said Sunita had alleged tht the respondent accused had subjected her to cruelty. He used to pressurize her to give divorce. He used to abuse her parents and used to ill-treat her. She claimed that due to the constant harassment and in a fit of anger, she poured kerosene on her body and set herself ablaze.

(ii) Sunita expired on 29th June, 2000. On 30th June, 2000 PW7- Dr. Sanjay Bhave had conducted post-mortem over the body of Sunita. He opined that said Sunita had expired due to shock as a

result of 94% burn injuries.

4. The statement of Sunita was forwarded to Jaisingpur Police Station. On receipt of the said statement, PW4 API Appasaheb Koli registered Crime No. 73 of 2000 for offence under Section 306 of IPC. He recorded the statements of the parents of the deceased, conducted panchanama, seized all the incriminating material and on completion of investigation he filed the chargesheet.

5. Upon the case being committed, charge was framed and explained to the accused. The accused pleaded not guilty and claimed to be tried.

6. The prosecution, in support of its case examined 10 witnesses. The statement of the accused was recorded under Section 313 Cr.PC. Upon appreciating the evidence on record and considering the submissions advanced by the learned Counsels representing the respective parties, the learned Adhoc Addl. Sessions Judge acquitted the respondent-accused of the aforesaid crime. Being aggrieved by

the said order, the State has preferred this appeal.

7. Heard Ms. Takalkar, learned APP for the State, and Mr. Apte learned Counsel for the respondent-accused. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

8. At the outset, it may be mentioned that in ***Aruvelu & Anr. vs. State represented by the Public Prosecutor, (2009) 10 SCC 206***, the Apex Court has observed thus :-

“39. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, a two Judge Bench of this Court of which one of us (Bhandari, J.) was a member had an occasion to deal with most of the cases referred in this judgment. This Court provided guidelines for the Appellate Court in dealing with the cases in which the trial courts have acquitted the accused. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. *The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.*

4. *The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.*

5. *If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused...*

40. *This Court in a recently delivered judgment State of Rajasthan v. Naresh @ Ram Naresh 2009(11) SCALE 699 again examined judgments of this Court and laid down that "An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused. This Court has dealt with the scope of interference with an order of acquittal in a number of cases."*

41. *Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."*

9. In the instant case, the dying declaration of the deceased Sunita was recorded by PW9 Maruti Shinde, who at the relevant time was on duty at Sangli Civil Hospital. The testimony of PW9 indicates that

on 26.10.2000 Sunita Jamdade was admitted in Sangli Civil Hospital with burn injuries. Dr. Niraj Rayate was on duty in the burns ward. He requested Dr. Rayate to examine the patient and to certify her condition. Accordingly, Dr. Rayate examined Sunita and certified that she was in a fit condition to make a statement. PW9 thereafter recorded the statement of Sunita, which is at Exhibit 32. He has stated that he had read over the said statement to Sunita and that she had confirmed that the contents of the statement were as per her say.

10. The prosecution has also examined PW5 Dr. Neeraj Rayate. This witness deposed that on 26th June 2000 he was on duty at Sangli Civil Hospital. On the said date, at about 1.45 pm a patient was admitted in the burns ward. The police personnel had visited the burns ward and had requested him to examine the patient and to certify whether she was in a fit condition to give her statement. He has deposed that he had examined the patient and certified that her condition was good and that she was capable of giving statement. He had made an endorsement to that effect on the statement /dying

declaration recorded by PW9.

11. It may be mentioned that as far as the dying declaration is considered, the law is well settled, In ***Shantabai vs. State of Haryana, AIR 2007 SC 2709*** the Apex Court has summarized the law on the dying declaration as under:

*“..Though the dying declaration is entitled to great weight, it is worthwhile to note that the appellant has no power of his cross examination. Such a power is essential for elicIn the case of ***Shantabai vs. State of Haryana, AIR 2007 SC 2709*** the Apex Court has summarized the law on the dying declaration as under:iting the truth as an obligation of other could be. This is the reason the court also insists 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 deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after the clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as a absolute rule of law that the dying declaration in form of sole basis of conviction unless it corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be sumed up as under as indicated in Smt. Paniben v. State of Gujrat (AIR 1992 SC 1817):*

- (i) *There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munna Raja & Anr. v. State of Madhya Pradesh (1976) 2 SCR 7640]*
- (ii) *If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of Uttar Pradesh v. Ram Sagar Yadav and Ors. [AIR 1985 Sc 416 and Ramavati Devi v. State of Bihar AIR 1983 SC 1640]*
- (iii) *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. [See K. Ramchandra Reddy & Anr. v. The Public Prosecutor (AIR 1976 SC 1994)]*
- (iv) *Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg v. State of Madhya Pradesh (1974 (4) SCC 264)]*
- (v) *Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. [See Kaka Singh v. State of M.P. (AIR 1982 SC 1021)].*
- (vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Ors. v. State of U.P. 91981 (2) SCC 654)]*
- (vii) *Merely because a dying declaration does contain the details as to the occurrence it is not to be rejected. [See State of Maharashtra v. Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617)]*
- (viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Oza and Ors. v. State of Bihar (AIR 1979 SC 1505)].*
- (ix) *Normally the Court in order to satisfy whether*

deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanahau Ram and Anr. v. State of Madhya Pradesh. (AIR 1988 SC 912)]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. V/s. Madan Mohan & Ors. (AIR 1989 SC 1519)]

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Ofcourse, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra (AIR 1982 SC 839)] .”

12. In the case of ***Shaikh Bakshu and Ors. v/s State of Maharashtra 2007 (11) SCC 269***, the Apex Court has emphasized the requirement of reading over and explaining the contents of the statement to the victim/deceased.

13. In the case of State of ***Madhya Pradesh V/s. Dal Singh and Others AIR 2013 SC 2059***, the Apex Court has reiterated the law on the dying declaration as under :

“The law on the issue can be summarized to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for

the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.”

14. The law is therefore well settled that the dying declaration, which is admissible in evidence on the principle of ‘nemo moriturus proesumitur mentiri’ – a man will not meet his maker with a lie in his mouth’, can form basis of conviction if after careful scrutiny, the court finds it to be true, voluntary, reliable and inspires full confidence.

15. In the instant case, the evidence on record, particularly the postmortem report reveals that said Sunita had suffered 94% burn injuries. Considering this fact, it was necessary for PW5 Dr. Rayate to verify whether said Sunita was in mentally fit condition to give her statement. As rightly observed by the learned Sessions Judge, he had

not considered this fact and had not certified that she was in a mentally fit condition to make a statement. This fact itself is sufficient to render the dying declaration inadmissible.

16. Furthermore, a perusal of the dying declaration reveals that Sunita was married to the respondent about 11 years prior to the date of the incident and that they had two children from the said wedlock. Her statement indicates that the accused is an alcoholic and that he used to constantly tell her to give divorce. She had stated that on 26th June, 2000 at about 10 a.m. had once again told her to give divorce. She has stated that on the same day at about 12:00 p.m. in a fit of rage, she poured kerosene on her body and set herself ablaze. On hearing her shouts, her mother-in-law and sister-in-law came to her house and tried to extinguish the fire and thereafter took her to the hospital. Thus the statement at Exh.32 indicates that Sunita had committed suicide as the respondent accused used to constantly harass her for giving divorce.

17. It may be mentioned that in order to attract the offence under

Section 306 of IPC the prosecution had to establish that the accused had abetted commission of suicide. The term abetment is defined under Section 107 of IPC and the same reads thus:

---107. Abetment of a thing.- A person abets the doing of a thing, who -

(First) — Instigates any person to do that thing; or
 (Secondly) —Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
 (Thirdly) — Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

18. Thus the essential ingredients of abetment are :-

- (i) instigating a person to committ an offence ; or
- (ii) engaging in conspiracy to committ it ; or
- (iii) intentionally aiding a person to commit it.

19. In the instant case, having charged the accused for an offence

under section 306 of IPC, the prosecution was required to establish that the accused had instigated or intentionally aided his wife Sunita to commit the suicide. The dying declaration of Sunita indicates that she had set herself ablaze being annoyed by the constant demand for divorce by the accused. Suffice it to say that mere demand for divorce cannot be considered as instigation or provocation to commit suicide.

20. PW1 Maruti Mane, the father of the deceased Sunita, has claimed that the respondent-accused used to dispute the paternity of the son and used to harass Sunita by doubting her chastity. PW2 Shevanta Mane, the mother of Sunita, claims that the accused used to beat her daughter on suspicion, and he used to constantly tell her to give him divorce. She has stated in her cross examination that they had not lodged any complaint against the accused for harassing her daughter. As stated earlier, the dying declaration does not indicate that the respondent accused had ever doubted the chastity of the deceased or had disputed the paternity of their son.

21. The evidence of PW1 and PW2 is therefore not consistent with

the cause stated in the dying declaration. There is no evidence to prove that the accused had in any manner incited or provoked Sunita to commit suicide. Hence, the learned Judge was justified in giving benefit of doubt to the accused. The findings recorded by the learned trial Judge are based on the evidence on record. The findings are neither illegal nor perverse. Considering the facts and circumstances of the case as well as the principles laid down by the Apex Court in *Ghurelal supra*, in my considered view, this is not a case which warrants interference with the order of acquittal.

22. Under the circumstances and in view of the discussion supra, the appeal is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)