

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

CRIMINAL APPEAL NO. 1413 OF 2011

Shri Rakesh Rajan Nayar
Age 24 years, Occ: Driver,
R/o. Dinkar Nimhan Chawl,
Nimhan Mala, Pashan
District Pune
(At present in Yerwada Jail)

..Appellant
(Org. Accused)

v/s.

1. The State of Maharashtra
2. Ku. Nandini Rajan Nayar
Age minor, Occ: Student
(since minor through her
Grand-mother Smt. Nayar
R/o. Dinkar Nimhan Chawl,
Nimhan Mala, Pashan
District Pune.

..Respondents

Ms. Nasreen Ayubi for the Appellant
Mr. Rajan Salvi APP for the respondent.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
JUDGMENT RESERVED ON : 14th AUGUST, 2017.
JUDGMENT PRONOUNCED ON: 12th JANUARY 2018.**

JUDGMENT.

1. The appellant herein was an accused in Sessions Case No. 343

of 2010, and who shall be hereinafter referred to as accused, has challenged the judgment dated 10th March, 2011 whereby the learned Addl. Sessions Judge, Pune has convicted him for the offence under Section 304(ii) of Indian Penal Code and sentenced him to undergo rigorous imprisonment of 7 years and to pay fine of Rs.5000/- in default to undergo simple imprisonment for three months.

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

The accused was married to Rohini Nayar and they were blessed with a girl child. On 5.10.2010 at about 21.30 hours, the accused came home with a bottle of thums up and liquor and started consuming liquor. When his wife Rohini told him not to consume alcohol, he flung a plate at her. He thereafter banged her head against the wall and threatened to kill her. It is alleged that the accused sprinkled kerosene over her and set her ablaze. The accused thereafter tried to extinguish the fire by pouring water on Rohini and later took her to Jeevandeep hospital. She was referred to YCM hospital and later to Sasoon Hospital. The Police Constable on duty at Sasoon hospital informed Chatursinghi Police Station that

a patient with burn injuries was admitted in Sasoon Hospital. PI Shivaji Jawale came to the hospital and upon ascertaining that Rohini was in a fit condition to give a statement, he recorded her statement and registered crime no.623 of 2010 for the offences under Section 307, 498A and 506 of Indian Penal Code.

3. PW7 Shivaji Jawale, PI, conducted the scene of offence panchanama and seized the clothes of the deceased as well as the other incriminating material found at the place of the incident. He recorded the statements of the parents of Rohini and other witnesses. The accused came to be arrested on 6.2.2010. Said Rohini expired on 11.2.2010 and as such the offence which was initially registered under Section 307 IPC was converted to Section 302 of IPC.

4. The post-mortem over the body of Rohini was conducted by PW6 Dr. Mahesh Tengale. He opined that the death of Rohini was due to shock as a result of burn injuries. Upon completion of investigation, chargesheet was filed for the offences under Section 302, 408A and 596 of IPC. The case being Sessions triable, was

committed to the Court of Sessions.

5. Upon committal of the case, charge was framed and explained to the accused. He pleaded not guilty and claimed to be tried. Prosecution, in support of its case examined 7 witnesses. The statement of accused was recorded under Section 313 Cr.P.C. The accused had filed a written statement wherein he had claimed that the Nylon saree of Rohini had caught fire while she was trying to remove the milk vessel from the stove. He had stated that he had extinguished the fire and brought her to Jeevndeep Hospital. He has stated that he had married Rohini against the wishes of her parents and that the parents of Rohini were not in talking terms with them. He has stated that the parents of Rohini came to Sasoon Hospital and that the police had prepared a false dying declaration in connivance with the parents of Rohini.

6. Upon appreciating the evidence on record, the learned Addl. Sessions Judge, Pune held that the prosecution had proved that the accused had threatened to cause death of Rohini and poured

kerosene on her and set her on fire. The learned Addl. Sessions Judge, however, held that the evidence on record clearly indicated that the accused had tried to put off the flames and in the process he too had sustained injuries. The accused had himself taken Rohini to the hospital. The learned trial Judge held that the said conduct of the accused reveals that the accused did not have an intention to cause death of Rohini. In the light of the said findings, the learned trial Judge acquitted the accused of the offence under Section 302 of IPC and held him guilty of offence under Section 304(ii) and 506 of IPC and sentenced him as stated above. The learned Judge further held that there was no evidence to prove that the accused had otherwise subjected his wife to harassment and cruelty within the meaning of Section 498A of IPC and hence acquitted the accused of the offence under Section 498A of IPC.

7. The State has not challenged the acquittal of the accused under Section 302 and 498A of IPC. Being aggrieved, by the conviction and sentence for offence under Section 304(ii) IPC, the accused has preferred this appeal.

8. I have perused the records and considered the submissions advanced by the learned Counsel for the applicant and the learned APP for the State. The case of the prosecution rests mainly on the dying declaration (Exh.10), recorded by PW10 and oral dying declaration made by the deceased to PW3 Balika Mungale and PW4 Bhimrao Mungale.

9. Before adverting to the appreciation of evidence and considering the submissions advanced by the learned Counsels for the respective parties, it would be appropriate to consider the decision of the Apex Court 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 eliciting 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):

. 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]

. 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)]

. 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)]

. 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)]

. 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)].

. 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)]

. 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)]

. 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)].

. 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)]

. 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)]

. 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)] .”

10. 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.

11. 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 summarised 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.”

12. 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.

13. In the instant case, the evidence of PW7 Shivaji Jawale reveals that he was on duty at Chaturshinghi Police Station on 5.2.2010. At about 16.00 hours he had received a message from Sasoon Hospital that a patient by name Rohini Nayar was admitted in the hospital with burn injuries. PW7 deputed PHC Pansare to verify the facts. Accordingly PHC Pansare visited the hospital and informed PW7 that said Rohini had sustained severe burn injuries. PW7 therefore went the hospital and verified from the Medical Officer whether the patient was in a fit condition to make a statement. The doctor on duty examined Rohini and made an endorsement that the patient was conscious, well oriented and in sound state of mind to make a statement. PW7 thereafter recorded the statement of Rohini and treated it as First Information Report and registered Crime No. 62 of 2010 for the offence under Section 498, 307 and 506 of IPC. The said statement was read over and explained to Rohini and she had confirmed that the same was as per her say.

14. PW2 Dr. Sharad Vaze has deposed that he was on duty in burns ward of Sasoon Hospital as a resident doctor. A patient by name Rohini Nayar was brought to the burns ward. He examined the patient. She was conscious, oriented and had 72 % burns. He has deposed that the patient had stated that her husband had set her ablaze on 5.2.2010 at about 10 p.m.

15. PW2 has further deposed that the police had come to the burns ward and inquired with him about the fitness of the patient. He once again examined the patient and confirmed that she was conscious, oriented and in sound state of mind to make a statement. He has deposed that the police had recorded the statement of the said patient in his presence. He had made an endorsement on the said statement at Exhibit 10 certifying that the patient was conscious, oriented and in a fit condition to make a statement. He has deposed that the patient expired on 6.2.2010 at 9.45 a.m.

16. The post-mortem over the body of the deceased Rohini was conducted by PW6 Dr. Mahesh Ingale. The testimony of this witness vis-a-vis the autopsy report at Exh.19 reveals that Rohini had sustained 68% burn injuries and that the cause of her death was “shock due to burns”.

17. The evidence on record reveals that deceased Rohini was admitted to Sasoon Hospital with burn injuries. She was examined by PW2 and she had informed him that the accused had set her ablaze. PW7 had also recorded the statement of Rohini (Exh.10). The evidence of PW7 vis-a-vi the dying declaration at Exh.10 clearly indicates that Rohini had stated that on 5.2.2010 at about 10 p.m. the accused had come home with a bottle of thums up and liquor, and that when she prevented him from consuming liquor, he flung a plate at her and banged her head against the wall. The accused threatened to kill her and thereafter sprinkled kerosene over her and set her ablaze. She rushed to the bathroom and tried to extinguish the fire by pouring water on her body. The accused also tried to extinguish the fire and thereafter took her initially to

Jeevandeep Hospital and thereafter to YCM hospital and later to Sasoon Hospital.

18. The dying declaration recorded by PW7 is consistent with the oral dying declaration made to PW2. The evidence on record also indicates that the deceased was conscious, well oriented and in a mentally fit condition to make the statement. The said statement was read over and explained to her and was as per her say. The dying declaration at Exh.10 does not suffer from any infirmity and can form the basis of conviction. Furthermore, the statement as recorded in Exh.10 is also consistent with the oral dying declaration made by the deceased to her parents PW3 Balika Mungale and PW4 Bhimrao Mungale. These witnesses have deposed that on being informed that Rohini was admitted in Sasoon Hospital with burn injuries, they rushed to the hospital. They have stated that Rohini had told them that on 5.2.2010 at about 10 p.m. the accused had come home with liquor bottle and when she had prevented him from consuming alcohol, he had flung a plate at her. The accused banged her head against the wall and

threatened to kill her. Rohini had further told them that the accused had sprinkled kerosene over her and set her ablaze. She had also informed them that the accused had tried to extinguish the fire and later brought her to the hospital. The oral dying declaration given to these witnesses is consistent with the history given by the deceased to PW2 as well as the dying declaration recorded by PW7. There is nothing on record to indicate that the dying declaration was a result of tutoring or prompting. In my considered view, the dying declaration is true, voluntary and beyond suspicion and hence there is no reason to discard or disbelieve the same.

19. The testimony of PW1 Namdeo Kunjia , the witness to the scene of offence panchanama indicates that he had visited the room/ tin shed wherein the incident had occurred. He had stated that there was a stove and a match box in the said room. The has stated that the room smelt of kerosene. He has stated that the burnt saree, peticoat and some pieces of burnt blouse were found at the place of the incident. The said incriminating articles were seized and sealed

in his presence under panchanama at Exhibit Exhibit 8.

20. The testimony of PW7 indicates that the incriminating material which was seized from the place of incident was forwarded to the Government Regional Forensic Laboratory for forensic examination. The CA Report at Exhibit 30 clearly proves that kerosene residue was detected on the saree and peticoat of Rohini. The fact that the room smelt of kerosene and that kerosene was also detected on the clothes of Rohini not only falsifies the defence that the saree of Rohini had caught fire while she was trying to remove the milk vessel from the stove, but corroborates the case of the prosecution that the accused had poured kerosene on Rohini and set her ablaze.

21. The evidence adduced by the prosecution amply proves that the accused had poured kerosene over Rohini, set her ablaze and caused her death. The prosecution had therefore proved the complicity of the accused in the above crime.

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

the appeal has no merits and is accordingly dismissed.

(ANUJA PRABHUDESSAI, J.)