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

CRIMINAL APPEAL No. 648 OF 2014

Santosh Bhaskar Derle)
Age 31 years, Occupation Government)
Servant, Resident of Taluka -Niphad)
Dist. Nashik)
(At present lodged in Nashik Central)
Prison))...Appellant

Versus

State of Maharashtra)
At the instance of Niphad Police Station)
Niphad, District Nashik)...Respondent

Mr. M.S. Mohite a/w. Mr. S.R. Phanse i/b. Mr. Amol A.
Patankar for Appellant

Mr. S.S. Pednekar -APP

CORAM : SMT.SADHANA S. JADHAV, J.

DATE : MARCH 1, 2019

JUDGMENT:

1. The Appellant herein is convicted vide judgment and order dated 22nd July, 2014 by the Additional Sessions Judge, Niphad in Sessions Case No. 3 of 2008 for the offence punishable under section 304-B of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of 8 years and to pay fine of

Rs.2,000/-, in default, to further undergo rigorous imprisonment for three months. He is also convicted for the offence punishable under Section 498A of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for two months. The Appellant is further convicted for the offence punishable under 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six months and also to pay fine of Rs.500/-, in default, to suffer further simple imprisonment for one month. All the substantive sentences are run concurrently. The Appellant is hereby acquitted of the offences punishable under Section 504 and 506 of the Indian Penal Code.

2. Such of the facts necessary for decision of this appeal are as follows.

3. The Appellant herein was married to Kalpana, who was resident of Niphad on 17th April, 2003. The Appellant was working in the Police Department of the State of Maharashtra. At the time of marriage, he was posted at Gadchiroli. Kalpana had accompanied him to Gadchiroli. The couple was blessed with a son within one year of marriage. Thereafter, a discordant note had struck between the couple. There were misunderstandings and

in January, 2005, Kalpana had been to her maternal house and refused to return back. In the interregnum, the Appellant was transferred to Shirpur, Dhule. It appears that in November, 2005, the Appellant had sent a legal notice to Kalpana seeking restitution of conjugal rights. With the intervention of relatives and parents, in May, 2007, Kalpana had returned to her matrimonial home. On 20th July, 2007, at about 5.30 p.m., Kalpana set herself on fire thereby immolating herself. She was rushed to Civil Hospital at Nashik. The police had informed Executive Magistrate, Prakash Nikale (PW1) on 20th July, 2007 at about 7.20 to 8.00 p.m. On 21st July, 2007, in the afternoon at 3.00 p.m., her statement was recorded by PW1, Executive Magistrate, serving as Nayab Tahasildar being Dying Declaration at Exhibit 38. The dying declaration was recorded on a printed format issued by the State of Maharashtra.

4. The Magistrate has inquired with her about the cause of burn injuries and she had replied that “On 20th July, 2007, her husband had assaulted her through out the day. Her mother-in-law had caused mental harassment to her, being fed up of the said ill-treatment, she had poured kerosene on herself and set herself on fire.” To the question, As to who had extinguished the fire?,

Kalpana had disclosed that “her husband had extinguished the fire and had admitted her in the hospital.”

5. On 27th July, 2007, the father of Kalpana, Bhausahab Tarle had lodged a report, contending therein that since 16th of July, 2007, the Appellant, who happens to be his son-in-law, lives at Shingwe. Everyday, he assaults Kalpana under the influence of alcohol. He demanded Rs.5,00,000/- and since the said demand was not fulfilled, she was meted with harassment and ill-treatment at the hands of her husband. They were demanding Rs.5,00,000/- from the complainant. On 20th July, 2007, since morning, Kalpana was assaulted by her husband under the influence of alcohol, demanding Rs.5,00,000/-, she was threatened of being thrown out of the house till she fulfills the demand and being fed up, she set herself on fire. This statement was made by the father on the basis of the disclosure made by Kalpana in the hospital. On the basis of the said report, Crime No. 81 of 2007 was registered at Niphad Police Station against the Appellant for the offence punishable under Sections 304B, 306, 498A, 323, 504, 506 r/w. 34 of the Indian Penal Code.

6. On 27th July, 2007, a subsequent statement was recorded by the Police Sub-Inspector, Ramchandra Deokate of Byculla Police

Station while Kalpana was admitted in Masina Hospital at Mumbai. The said dying declaration was marked at Exhibit 61. Kalpana had disclosed in the said dying declaration the details of her marital life. She had alleged that on 20th July, 2007, her father-in-law was not at home. Her husband and mother-in-law were at home. She was being assaulted since morning. They had leveled false allegations against her, suspecting her character. She was locked up in a room. Finally to get rid off all these troubles, got herself set on fire at around 5.30 p.m. She had specifically stated that she was fully burnt from her neck onwards. She was transferred from Nashik Hospital to Masina Hospital.

7. Needless to say that the case of the prosecution rests implicitly on the two dying declarations, which are at Exhibit 38 and Exhibit 61. After the investigation was completed, charge-sheet was filed. The case was committed to the Court of Sessions and registered as Sessions Case No. 3 of 2008. The prosecution examined eight witnesses to bring home guilt of the accused.

8. PW1 is the Magistrate, who has recorded the dying declaration which is at Exhibit 38. He has deposed before the Court that he had received a letter from the police station to record the dying declaration of Kalpana, who is admitted in Nashik Civil

Hospital. He had been to the hospital along with requisition letter. There he had met Dr. Smt. Khan. Dr. Khan (PW6) had verified as to whether the injured was in a position to give her statement. Accordingly, after she endorsed in affirmative, statement was recorded. The Learned Magistrate by way of abundant caution, had asked Dr. Khan and the relatives of Kalpana to leave the Ward and the statement of Kalpana was recorded. The Magistrate has deposed that he had personally verified as to whether the injured was conscious and oriented. She had disclosed to the Magistrate that on 20th July, 2007, her husband was beating her continuously, her mother-in-law was torturing her and, therefore, she had set herself on fire. Her husband admitted her in the hospital. He has categorically stated that he had read over the statement to the injured and had obtained her signature below the statement. The Magistrate has categorically stated in the cross examination that except 7 questions, which are formulated in the printed form, he had not inquired any further. It is elicited in the cross examination that in his presence, the doctor had not verified as to whether the patient was conscious and oriented to answer the question. It is pertinent to note that on the basis of the dying declaration, PW1 has categorically stated that in the course of

recording the statement, Kalpana had not disclosed anything about the demand of money.

9. At this stage, the learned counsel for the Appellant has submitted that the very fact that the Magistrate has stated in the substantive evidence that there was no allegation of demand of money by Kalpana, is sufficient to hold that no case is made out under Section 304B of the Indian Penal Code.

10 Upon perusal of Exhibit 38 as well as Exhibit 61, it is clear that in Exhibit 38, there is no allegation that a demand of Rs.5,00,000/- was being made on 20th July, 2007. Whereas, in Exhibit 61, it is stated that by leveling false allegations, she was assaulted and locked up by her husband. At this stage, it would be relevant to note that even after recording of the first dying declaration when the patient was admitted in Masina Hospital at Mumbai on 26th August, 2007, the admission notes of the Masina Hospital would show the following endorsement:-

“History given by patient herself. 25 years' old female patient with alleged history of accidental flame burns on 20th July, 2007 at 5 pm, while her cloths came in contact with flames of gas/chulla, burn injuries on face, neck, chest, abdomen, both upper and lower extremities and back. Total 75 - 80%. Total BSA burnt. Patient was taken for treatment in Nashik

Hospital, then she was shifted to Masina Hospital on 27th July, 2007 at 5 pm.”

On 27th July, 2007, Dr. Smita Chogale of Masina Hospital had informed the police station (Byculla) as follows:

“This is to inform that Mrs. Kalpana Derle, Female 25 years came to Masina Hospital on 27th July, 2007 at 5 pm with alleged history of accidental flame burns on 20/7/2007 at 5 pm. Total BSA approx 75% - 80%. Patient shifted from Nashik Rugnalaya.

This Court cannot be oblivious of the facts that both the dying declarations are consistent as far as the prelude to the incident is concerned. There is no variance in the incident. Upon plain reading, it can be held that both the dying declarations are consistent in respect of material aspects of the incident and hence, it would be justified to place implicit reliance upon the dying declarations. Prelude to the incident would assume significance in order to appreciate the culpability of the Appellant and to appreciate the role played by the Appellant which triggered the cause for the said immolation. It is seen from records and proceedings that at the time of admission in the hospital at both the places i.e. at Nashik as well as Mumbai, the Appellant had a major role to play inasmuch as to mislead the investigating

agency. The history recorded at both the places is at variance and the same need not be taken into consideration in view of the written dying declarations which are proved to the hilt.

In the case of **Kushal Rao Vs. The State of Bombay [1958 AIR 22]**, the Hon'ble Apex Court has considered the very defence of Section 32(1) of the Evidence Act and has observed as follows:

“This provision has been made by the Legislative, advisedly, as a matter of sheer necessity - by way of an exception to the general rule that hearsay is no evidence and that evidence, which has not been tested by cross-examination, is not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the Legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death has been accorded by the Legislature as

special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that circumstance would affect the admissibility of the statement, but only its weight. There is no absolute rule of law or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon and made the basis of a conviction.

11. In the present case, it is clear that there is no attempt by the deceased to implicate the accused or to exaggerate the allegations. It is recorded within 24 hours of the incident. It is pertinent to note that the defence has not objected the line of treatment given at Nashik Hospital to the deceased. The line of treatment and the effect of it on the dying declaration is also not challenged in appeal. This Court has observed that the injured was administered 'Fort-win'. However, since it is neither challenged by the accused, no opportunity was given to the doctor to explain as to whether it would have a sedative effect on the injured before recording of the statement and, hence, the

same need not be taken into consideration today. Through out the period lasting from 20th July, 2007 to 26th of August, 2007, the accused has attempted to give different pictures of the transaction leading to burn injuries. He has reiterated the same in his explanation under Section 313 of the Criminal Procedure Code.

12. Despite medical aid, Kalpana had succumbed to burn injury on 26th August, 2007. The postmortem note would show the cause of death as septicemia following 74-75% epidermal burns.

13. The learned counsel for the Appellant submits that both the dying declarations at Exhibits 38 and 61 would make out no case of 304B of the Indian Penal Code. It is submitted that deceased Kalpana was residing with her parents from January, 2005 to May, 2007 and, therefore, it cannot be said that she was harassed and ill-treated to such an extent that it would amount to cruelty, which would drive her to cause injury to herself as contemplated under Section 498A of IPC.

14. Upon perusal of the evidence adduced by the prosecution, it appears that the Appellant herein was a close relative of the deceased.

15. PW3 Manisha Tarle, happens to be the mother of the deceased. She has deposed before the Court that Kalpana was abused and assaulted by both the accused on account of insufficient dowry. That the Appellant had demanded Rs.5,00,000/- from Kalpana for his transfer from Shirpur. She has deposed before the Court that Kalpana had telephonically informed her about the said demand and ill-treatment to her. It is specifically stated that since parents could not fulfill the demand, Appellant had left Kalpana in her maternal house for two years. PW3 has stated that son of maternal uncle of the accused, happens to be her nephew and his name is Sahebrao @ Bhausahab Tarle. The said witness has not been examined.

16. In view of the above mentioned facts, it would be necessary to determine as to whether an offence under Section 304B, 498A, 323 of IPC is made out. As far as the demand of dowry is concerned, it appears from the evidence adduced, that demand was made prior to Kalpana leaving her matrimonial house i.e. prior to January, 2005. The most important aspect is that there is no allegation of demand of dowry just before her death as is clear from the dying declaration.

17. The learned counsel for the Appellant rightly submits that when there is no allegation in the dying declaration as far as demand of dowry is concerned, no case is made out under Section 304B of the Indian Penal Code.

18. It is true that the dying declaration has to be accepted or rejected in totality. It is, therefore, clear that no offence punishable under Section 304 B is made out against the the accused person.

19. As far as Section 498A of IPC is concerned, there are two letters written by the deceased to the accused when she was residing with her parents during the period 2005 to 2007. In the said letters, she has specifically stated that there were some faults on her part also and that there was more misunderstanding, due to which a discordant note had struck between the couple. There were certain fallacies on her part also. That there was failure in reasoning which would render the arguments futile. It is submitted that the said letters have been proved by none other than the sister of the deceased. This Court is constrained to appreciate the said letters, which would lead to an inference that the Appellant had not harassed his wife with a view to force her to meet any unlawful demand for any property or valuable security and it was not

coupled with such a willful conduct which is of such a nature as is likely to drive a woman to commit suicide or to cause injury or danger to live, limb or health. Moreover, from May, 2007 to July, 2007 i.e. just before the incident, there was no willful conduct on the part of the Appellant and, therefore, there is no reference to it in the dying declaration. The whole dying declaration refers to the act of the Appellant on 20th July, 2007.

20. The Hon'ble Apex Court in the case of **Girdhar Shankar Tawade vs. State of Maharashtra [2002 (3) SCR 376]**, there were letters on record written by the deceased which depiction a reprehensible fact. The Hon'ble Apex Court has held as follows:

“In any event the willful act or conduct ought to be the proximate cause in order to bring home the charge under Section 498-A and not de-hors the same. To have an event sometime back cannot be termed to be a factum taken note of in the matter of a charge under Section 498-A. The legislative intent is clear enough to indicate in particular reference to explanation (b) that there shall have to be a series of acts in order to be a harassment within the meaning of explanation (b).”

“Acquittal of charge under Section 306 as noticed hereinbefore, though not by itself a ground for acquittal under Section 498-A, but, some cogent evidence is required

to bring home the charge of Section 498-A as well, without which the charge cannot be said to be maintained.”

In the present case, it appears that the accused had assaulted Kalpana intermittently through out the day and raised suspicion on her character by leveling false allegations and, therefore, she could not bear the same. Moreover, she was locked up in a room and the moment, she could free herself, she has set herself ablaze to avoid similar treatment in future and, therefore, the Appellant deserves to be convicted for the offence punishable under Section 323 of the Indian Penal Code.

21. The Hon'ble Apex Court in the case of **Laxman Vs. State of Maharashtra [(2002) 6 Supreme Court Cases 710]** has held that in order to place implicit reliance upon a dying declaration, all that is necessary to be seen is as to whether the statement is voluntary truthful and inspired confidence of the Court and no corroboration is necessary. In the present case, there is no doubt raised by the defence at the trial or the appeal as to veracity and the procedure of recording of dying declaration and, hence, the same is being accepted in totality. As observed earlier, it would not be necessary to again dwell into the issue as to whether an offence

under Section 498-A is made out and, therefore, the Appellant herein deserves to be acquitted for the charges leveled under Section 498-A of the IPC.

22. At this stage, it would be necessary to see as to what was the situation which led her to commit suicide.

23. It is pertinent to note that the injured was admitted in the hospital at Nashik by her husband. The information given to the Magistrate by the police is that she had sustained accidental burn due to fall of a *Chimni*. Whereas, the history recorded by the police shows that it is due to burst of flame of *Chulla*. Needless to state that the said declarations would be at the behest of the Appellant. At this stage, it would be pertinent to refer to the answer given to Question No.42 in respect of statement recorded under Section 313 of Cr.P.C. The answer given by the Appellant is as follows:

“I am falsely prosecuted. I have not demanded Rs.5,00,000/- to Kalpana for my transfer, nor I ill-treated her on that count. On that day, there was no electricity at our village. Therefore, at evening time, Kalpana tried to burn kerosene lamp. That lamp fell on her person and cloths caught fired. Thus, Kalpana burnt accidentally. I never took suspicion about the character of Kalpana and I never ill-treated her on that count.”

24. In fact false explanation by an accused would provide missing links in such a way as to draw an adverse inference against the accused. However, the present case is not of circumstantial evidence but it rests upon dying declaration. In fact Kalpana had died at home and, therefore, it was incumbent upon the Appellant to give an explanation for the reason for sustaining such burns.

25. It was further incumbent upon the Appellant to explain the circumstances in which his wife had sustained burn injuries. Since the incidence had occurred while the deceased was in custody of the Accused-Appellant. Section 106 of the Indian Evidence Act contemplates as follows:-

“106. Burden of proving fact especially within knowledge.- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

False explanation given by the accused would substantiate guilt of the accused since it is inconsistent with the circumstances put forth by the prosecution . He has given a false explanation. That too when she has specifically stated that she had poured kerosene on herself and set herself on fire.

26. In the case of **P.V. Radhakrishna Vs. State of Karnataka [2003 AIR SCW 3587]**, the Hon'ble Apex Court has held as

follows:

“The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirement of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the exclusion of the statement would leave the Court without a scrap of evidence. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath 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 fit state of mind after a 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 an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely

a rule of prudence.”

27. Needless to say that continuous physical assault and unwarranted allegations, suspecting the chastity of the deceased had led her to commit suicide. It is in these circumstances, the Appellant deserves to be convicted for the offence punishable under Section 323 of the Indian Penal Code.

28. The reason for committing suicide is the fact that the deceased was assaulted by the Appellant through out the day and that had triggered her will to end her life.

29. Upon accepting the dying declaration as a whole, the appeal deserves to be partly allowed. Hence, the following order.

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The conviction for the offence punishable under Section 304B and 498A by a judgment and order passed by the Additional Sessions Judge, Niphad vide judgment and order dated 22nd July, 2014 in Sessions Case No. 3 of 2008 is hereby quashed and set aside.
- (iii) The conviction and sentence for the offence punishable under Section 323 of the Indian Penal Code is upheld.

- (iv) The sentence of fine is maintained.
- (v) Bail bonds shall stand cancelled.

[SMT.SADHANA S. JADHAV, J.]

V.A. Tikam