

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 389 OF 2015
WITH
CRIMINAL APPLICATION NO. 2125 OF 2018

1. Bhausahab Waman Shinde,
Age 60 years, Occu. Labour,
(Appeal abated as against
appellant No. 1 as per Hon'ble
Court's order dated 31/8/2017)
2. Nirmalabai Bhausahab Shinde,
Age 51 years, Occu. Household,
3. Vijay @ Nilesh Bhausahab Shinde,
Age 27 years, Occu. Hawker,

All R/o. Padhegaon, Tq. Shrirampur,
Dist. Ahmednagar.

....Appellants.

Versus

The State of Maharashtra

....Respondent.

Mr. N.V. Gaware h/f. N.R. Avhad, Advocate for appellants.

Mr. D.R. Kale, APP for respondent/State.

**CORAM : T.V. NALAWADE AND
M.G. SEWLIKAR, JJ.**

DATED : 13/01/2020

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed to challenge the judgment and order of Sessions Case No. 5/2013 which was pending in the Court of learned Additional Sessions Judge, Shrirampur, District Ahmednagar. The Trial Court has convicted all the appellants for the offences

punishable under sections 302, 498-A read with section 34 of Indian Penal Code (hereinafter referred to as 'I.P.C.' for short). The sentence of imprisonment of life is given. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

Deceased Pallavi was sister of Vikas Gaikwad and her parents were residents of Hanumantgaon, Tahsil Rahata, District Ahmednagar. The appellants are residents of Shindewadi, Padhegaon, Tahsil Shrirampur, District Ahmednagar. About one year prior to the date of incident she was given in marriage to accused No. 3 Vijay. Accused Nos. 1 and 2 are parents of Vijay and accused No. 4 Jyoti is real sister of Vijay. During pendency of the appeal, appellant No. 1 Bhausahab Shinde, father of the husband of deceased died and his appeal is abated.

3) It is the case of prosecution that there was no problem for about three months of the marriage, but after that the accused started asking the deceased to bring Rs.15,000/- for household expenses as their financial condition had come down. To force Pallavi to bring money they used to give abuses and beating to her and she used to disclose about the illtreatment to her relatives on parents' side.

4) Accused No. 4 Jyoti was married and she was living in the matrimonial house. Deceased used to disclose about the illtreatment and due to illtreatment she had stayed in the house of her parents for about two months. About 10-15 days prior to the date of incident she had returned to the matrimonial house. After returning to matrimonial house, illtreatment was again started as demand of Rs.15,000/- was not met with by the relatives of the deceased on parents' side. Jyoti had just delivered a child and so she was living in Shindewadi with her parents.

5) The incident in question took place on 1.10.2012 at about 7.00 p.m. The deceased sustained burn injuries when she was cohabiting with husband in Shindewadi. Information about the incident was given to the relatives of the deceased on parents' side and it was informed that she had sustained burn injuries due to explosion of kerosene fired stove. The relatives of the deceased rushed to the hospital where the deceased was admitted. She disclosed to the relatives including her brother Vikas (PW 1) that on the day of incident, accused No. 1 held her, accused No. 2 fetched kerosene from the house and accused No. 3, her husband set fire to her in front of the matrimonial house. She disclosed that when she shouted, the neighbours rushed to the spot and then she was shifted to the hospital after extinguishing the fire. In the hospital, the first dying declaration came to be recorded by the police and second

dying declaration came to be recorded by the Executive Magistrate. In both the dying declarations, she blamed accused Nos. 1 to 3 by disclosing that they had set fire to her. In the second dying declaration she blamed Jyoti (accused No. 4) also for burn injuries.

6) During the course of investigation, the panchanama of the spot of offence was prepared and articles which were found on the spot of offence like partly burnt clothes of the deceased were collected. The can of the kerosene was collected from the kitchen portion of the house. The statements of the witnesses came to be recorded. All the four accused came to be arrested and chargesheet came to be filed against them for aforesaid offences and for the offences punishable under sections 323, 504, 506, 34 of I.P.C. When the charge was framed, all the accused pleaded not guilty.

7) Prosecution examined in all 10 witnesses. The accused took the defence of total denial when their statements were recorded under section 313 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.' for short). No defence evidence is given. The Trial Court has believed the witnesses examined and on the basis of dying declarations, the Trial Court has given conviction to accused Nos. 1 to 3 for offence of murder but accused No. 4 is acquitted of all the offences.

8) The accused persons have not disputed that the death took place due to burn injuries. They have denied that it is homicide. In the statement given under section 313 of Cr.P.C., appellants have contended that on that day the only wrong which was committed by them was that they had refused to send the deceased to her parents' house.

9) The submissions made and the record show that on 1.10.2012 itself the deceased was admitted in Gangadhar Ogale Hospital which was also known as Sakhar Kamgar Hospital, a trust hospital of Shrirampur. The intimation given by this hospital to police is on the record at Exh. 29. This document shows that history of sustaining burn injuries due to explosion of stove at about 7.30 p.m. was given and request was made by hospital to police to see that her statement is recorded. The evidence of Suryabhan (PW 7), Assistant P.S.I. shows that this intimation was received by police station on 1.10.2012 itself. He has deposed that he went to the hospital on next day i.e. on 2.10.2012 at about 2.00 p.m. There is no explanation as to why police did not rush to the hospital on 1.10.2012 itself when such intimation was given on 1.10.2012 and Pallavi was admitted in that hospital at about 8.00 p.m., within 30 minutes of the incident as mentioned in Exh. 29. This circumstance need to be kept in mind as the first dying declaration which was recorded by the police officer Suryabhan (PW 7) is dated 2.10.2012 and its time is given as 2.30

p.m.

10) The evidence of Vikas (PW 1), brother of the deceased shows that on 2.10.2012 he received phone call that the deceased had sustained burn injuries due to blast of stove and so he rushed to the Sakhar Kamgar Hospital where she was admitted. It can be gathered from other evidence and circumstances that on the same day, immediately after the incident the news was given to the relatives of deceased on parents' side by the accused about the incident. His evidence shows that he reached the hospital at about 8.30 to 9.00 a.m. of 2.10.2012 and then the incident was disclosed to them by the deceased in the hospital and the deceased blamed accused Nos. 1 to 3 for the incident. In the evidence, Vikas (PW 1) has tried to say that the news was given to him on 2.10.2012 in the morning, when it is the case of prosecution that the news was given on 1.10.2012 itself. His police statement was confronted to him in which he had stated before police that news was given to him at 7.45 p.m. of 1.10.2012. This portion of the previous statement of Vikas (PW 1) is not duly proved in the evidence of Bharat (PW 6), who had recorded the statement of Vikas. Other circumstances are sufficient to infer that prior to recording of the first dying declaration, the relatives of the deceased on parents' side were present in the hospital. Even in the substantive evidence, Vikas (PW 1) has stated that prior to recording of the statement by the police, disclosure was

made to him by the deceased. These circumstances need to be kept in mind as the initial disclosure was of accidental burns and dying declaration came to be recorded after reaching of the relatives of the deceased on parents' side to the hospital and that was done after they had talk with the deceased. Due to these circumstances, the possibility of tutoring cannot be ruled out. For removal of the suspicion about the voluntariness of the dying declaration, it becomes the duty of the Court to see as to whether there are circumstances corroborating the dying declaration.

11) In the evidence of Suryabhan (PW 7), Assistant P.S.I., the first dying declaration of the deceased is proved. He has deposed that first he obtained the certificate of Dr. Jagdhane about the fitness of Pallavi for giving such statement and then he recorded the statement of the deceased at 2.00 p.m. of 2.10.2012. In this dying declaration at Exh. 30 following things were disclosed :-

(i) She was living in the joint family of her husband and with her husband, his parents were living and from about two months accused No. 4 Jyoti was there for delivering the first child.

(ii) Her marriage with accused Vijay had taken place about one year prior to the date of incident and after three months of the marriage, father in law and mother in law had started saying that she had proved to be unlucky for

their family as they were not able to get sufficient money even for household expenses.

(iii) When the in laws were teasing her, the husband was taking the side of his parents.

(iv) Due to the illtreatment of the accused Nos. 1 to 3, she had shifted to the house of her parents and there she had lived for about two months.

(v) She had returned to the matrimonial house about 15 days prior to the date of incident and after that the in laws had taken her ornaments from her and they had said that she should bring Rs.10,000/- to Rs.15,000/- for the household expenses.

(vi) The in laws and husband had started giving threats to her and Jyoti had also started harassing her and occasionally they used to assault her.

(vii) On 1.10.2012 her in laws and husband had quarreled with her.

(viii) On 1.10.2012 after the quarrel with in laws and husband, at 7.00 p.m. she was sitting near the Ota portion of their house, in front of the house. There, accused Nos. 1 to 3 came. Accused No. 1 Bhausahab held her hands, accused No. 2 Nirmalabai fetched can of kerosene from the house and poured kerosene on her person and then accused No. 3 Vijay ignited match stick and by throwing the

match stick on her person, set fire to her.

(ix) She started shouting and after that the persons living in the neighbourhood came there and extinguished the fire.

(x) After extinguishing the fire, her husband Vijay and her father in law Bhausahab shifted her to Sakhar Kamgar Hospital, Shrirampur.

12) The second dying declaration was recorded by the Executive Magistrate Badve (PW 5) on 2.10.2012 at about 4.15 p.m. He has deposed that on 2.10.2012 he received the requisition letter, Exh. 22, from police for recording the dying declaration. Exh. 22 shows that it was received at 12.05 p.m. and in that letter, it was informed that intimation was given to police that Pallavi had sustained burn injuries due to explosion of stove on 1.10.2012 and she was admitted in the hospital at about 8.00 p.m. of that day. The dying declaration at Exh. 23 is proved in the evidence of Badve (PW 5) and it's contents are as under :-

(i) She had three brothers and she had parents at native place of her parents.

(ii) In the house of husband, she was living with husband and his parents.

(iii) The incident took place at about 7.00 p.m. of 1.10.2012.

(iv) Her husband and her in laws were responsible for the

incident.

(v) Her husband and her in laws shifted her to the hospital.

(vi) She had quarrel with her in laws.

(vii) After three months of the marriage, illtreatment was started to her.

(viii) She wanted to go to the parents' house and so, she had called her brother to the matrimonial house.

(ix) Her in laws did not send her to the house of her parents.

(x) After cooking meal she had come out of the house and she was sitting there.

(xi) Her in law, her husband and her sister in law poured kerosene on her person and set fire to her and thus, she sustained burn injuries.

13) If the aforesaid two dying declarations are compared with each other, it can be said that in the dying declaration recorded by the Executive Magistrate, she did not disclose about the demand of money from in laws, she did not give particulars of the illtreatment or reason for the illtreatment. On the other hand, she disclosed that on the day of incident, there was quarrel and so, she had requested her brother to come to the matrimonial house to take her to the house of her parents. Her brother had come there, but she was not sent to the

house of her parents by her in laws and after that the incident took place. In the second dying declaration, she tried to blame even accused No. 4 Jyoti, sister in law by saying that she had participated in the incident. This lady had just delivered a child, within 6-7 days prior to the date of incident. The Trial Court has given the decision of acquittal in her favour though there is such disclosure against her in Exh. 23.

14) If both the dying declarations are considered together, it can be said that it is not the version of the deceased that she had disclosed about the illtreatment and illegal demand of the accused persons to her parents prior to the date of incident and even in the first dying declaration, it was not disclosed that specific amount was demanded from her prior to her return from the house of parents where she had stayed for about two months due to the so called illtreatment. In the first dying declaration, she has disclosed that her ornaments were taken away by the in laws, but in the second dying declaration there is no whisper about snatching or taking away of the ornaments.

15) The brother of the deceased did not give evidence in examination in chief about his visit to the matrimonial house of the deceased on 1.10.2012. During cross examination, he admitted that he had visited the matrimonial house of the deceased on 1.10.2012.

His evidence in cross examination shows that accused No. 3 Vijay was not at home when he had gone to the matrimonial house of deceased and Vijay had not returned to home till Vikas (PW 1) had left the matrimonial house of the deceased on 1.10.2012. The mother of the deceased Laxmibai (PW 2) admitted during cross examination that she had sent PW 1 to the matrimonial house of the deceased for bringing her to the parents' house. The reason for which they had gone there or they wanted to bring Pallavi to parents' house is not given by both of them. However, both of them have given evidence that accused persons had refused to send the deceased to parents house as accused No. 4 had come there for delivery purpose. Laxmibai (PW 2) has further admitted during cross examination that as Pallavi was not sent to parents house with PW 1, Pallavi was annoyed. This part of the evidence and inconsistencies in the two dying declarations need to be kept in mind while ascertaining as to whether the dying declarations were voluntary and truthful.

16) Prosecution has proved the spot panchanama in the evidence of Investigating Officer, though the panch witnesses of spot panchanama did not support the prosecution. Exh. 17, the spot panchanama proved in the evidence of police officer shows that the house of accused consist of two rooms. The incident took place outside of the house at some distance from Ota portion of the house.

Partly burnt pieces of Sari of the deceased were lying there and the space had become wet. Two rooms of house had doors opening towards the open space. Near one door of the room match box was lying and in the match box there were some match sticks. Inside of the kitchen of the house, there was gas stove, there was one can containing kerosene around four liters. There was no sign to show that any part of the incident had taken place inside of the house. Though some portion of one room was appeared to be cleaned by using cow dung, there was no smell of kerosene in the rooms. Smell of kerosene was present only outside of the house where the incident had taken place. The aforesaid articles were taken over under panchanama by the police.

17) There is map of spot of offence in the spot panchanama and it shows that at some distance from the spot of offence, there is the house of Damu Pathare. On one side, there is other house in dilapidated condition. On the backside of the house of accused, there is house of Digamber Shinde.

18) The prosecution has given evidence of the witnesses like Police Officer and Executive Magistrate to show that they had obtained the opinion of Medical Officer regarding fitness of the deceased to give statement and after that they had recorded the dying declarations. Nothing is brought on the record to create a

probability that these witnesses were not satisfied about the fitness of Pallavi at the time of recording of dying declarations. In view of this circumstance, it is not necessary to discuss the evidence from that angle of the two witnesses. Further, the incident took place on 1.10.2012 and Pallavi died on 8.10.2012. Unfortunately, the bed head ticket in respect of Pallavi, which must have been prepared by the hospital where she was admitted, was not produced. From that hospital, there is only aforesaid requisition letter given to police for recording the statement of the deceased, but in that communication also, it was mentioned that history of accidental burns was given. Ordinarily in such circumstances, the Court needs to go with the presumption that inquiry about the history was made by the doctors with the injured and history given by the injured was recorded by doctors in the record of the hospital. Thus, it can be said that there is clear probability that first disclosure of the deceased was that she had sustained burn injuries in accidental fire. It needs to be kept in mind that at that relevant time, the provision of section 309 of I.P.C. was used if there was an attempt of suicide, in those days, there was probability of giving such information to avoid the prosecution for offence punishable under section 309 of I.P.C. Such probability cannot be ruled out in the present matter in view of the facts and circumstances of the present matter.

19) The aforesaid spot panchanama and the contents of the

dying declarations show that the incident took place in front of the house, in open space which was visible to atleast surrounding neighbours and where the neighbours could have rushed immediately after hearing the shouts of the deceased. Even if it was an attempt of suicide, after starting of the fire the injured must have raised shouts and the neighbours must have rushed to the spot. In one dying declaration which is already mentioned, the deceased disclosed that neighbours had rushed to the spot and she was shifted to the hospital by the husband and the neighbours. When on one hand, there is evidence of brother of the deceased to the effect that when he left the matrimonial house of the deceased, the husband was not at home, on the other hand, there is the evidence of aforesaid nature to show that the deceased was shifted to the hospital by husband and neighbours. Considering the time of incident, which was around 7.00 p.m., it cannot be said that the male persons of the family like husband and his father had returned to home prior to 7.00 p.m. of that day. Husband was working as a hawker. There is no circumstantial check to the version given in the dying declaration by the deceased against any of the accused. In view of these circumstances and other circumstances which are already quoted, it was necessary for the prosecution to examine the neighbours who had rushed to the spot. They could have given evidence on the immediate disclosure made by the deceased and they could have given evidence as to whether the husband and his

father were present on the spot at the relevant time or whether they were called to the spot subsequently for shifting the deceased to the hospital. The absence of such evidence is a serious lacuna in the present case and that lacuna cannot be ignored as the accused persons can be convicted for the offence of murder if the dying declaration is taken as the base for conviction. Thus, the scrutiny of the entire evidence is necessary and the corroboration of surrounding circumstances is also necessary in the present matter for proving the incident disclosed in the dying declaration.

20) The evidence discussed creates a probability that the deceased had become angry as her in laws had refused to send her to the house of parents with her brother on that day. There is such admission from the mother of the deceased. In one dying declaration, there is mention about visiting of the brother of the deceased to the house on that day and the brother has also admitted this circumstance. The evidence on record shows that for substantial period of the married life, for more than two months, the deceased had continuously lived in the house of the parents. Though the reason is given that she had left the matrimonial house due to illtreatment, the evidence on the record does not show that any undertaking was obtained from the accused and only after that the deceased had returned to matrimonial home. It is clear that the deceased had returned to the matrimonial home on her own few

days prior to the date of incident. In the matrimonial house, there was a married sister in law of the deceased, who had just delivered a child and so, there was work in the house for the deceased. Probability is created that the deceased wanted to go to her parents house for some reason if not for the reason that she would have been asked to do work in respect of the sister in law atleast for few days. She was not sent to the house of parents and she had become angry due to that and it can be said that there was the possibility of intention to take revenge against the accused persons due to that circumstance. This probability cannot be ruled out in the present matter.

21) The learned APP placed reliance on observations made by this Court in following cases :-

(i) Ravindra s/o. Ganesh Bangar Vs. State of Maharashtra [2009 ALL MR (Cri) 847],

(ii) Janrao s/o. Khushalrao Bhute & Ors. Vs. State of Maharashtra [2010 ALL MR (Cri) 1474] and

(iii) Ganpat Bakaramji Lad Vs. The State of Maharashtra [2018 ALL MR (Cri) 2249 (F.B.)].

He submitted that the technicalities like not reading over the dying declaration before obtaining thumb impression of the deceased on dying declaration cannot be given over much importance if it is established by prosecution that the dying declaration was recorded

when the deceased was fit for giving statement. This court has already discussed the relevant circumstances including the requisition letter given by the hospital for recording the statement, medical evidence about the fitness of the patient, the evidence of two persons who recorded the dying declarations and the circumstance that she survived for atleast 8 days after the day of the incident. Due to all these circumstances, this Court has no hesitation to hold that the deceased could have given such statement.

22) In the cases of **Smt. Paniben Vs. State of Gujarat** reported as **AIR 1992 SUPREME COURT 1817** and **Uka Ram Vs. State of Rajasthan** reported as **(2001) 5 Supreme Court Cases 254**, the principles governing the dying declaration are given. The principles are as under :-

- (i) Dying declaration can be acted upon without corroboration.
- (ii) Before acting upon the dying declaration, the Court should get satisfied that the dying declaration is true and it was voluntary.
- (iii) Court should scrutinize the dying declaration to ensure that it is not result of tutoring, prompting or imagination.
- (iv) The Apex Court has further laid down that it needs to be ascertained as to whether the dying declaration was

vindictive, made with revengeful attitude.

(v) When there are suspicious circumstances surrounding the dying declaration, the Court should look for the corroboration.

(vi) The dying declaration which suffers from infirmity cannot be acted upon.

(vii) When more than one dying declarations are available, ordinarily the first dying declaration is to be preferred. If the other dying declaration is trustworthy and reliable, the other dying declaration can be accepted.

23) As the rule in respect of the dying declaration is based on the principle of necessity if there is the possibility of eye witness, it is the duty of the prosecution to see that eye witness like neighbours are examined. In the present matter, the dying declaration itself shows that the neighbours had rushed to the spot and they had witnessed atleast some portion of the incident and they had extinguished the fire. When dying declaration is available and when version of eye witness is available, ordinarily more weight needs to be given to the evidence of eye witness as he is available for cross examination and Court can ascertain the truth from his version.

24) In the case of **State of Punjab Vs. Parveen Kumar** reported as **AIR 2005 SUPREME COURT 1277**, it is laid down by

the Apex Court that if there are many dying declarations and in one dying declaration some persons are named and in other dying declaration more persons are named, the scrutiny needs to be made more carefully and if probabilities like stated above are created, the evidence of dying declaration can be discarded. In the present matter, in one dying declaration the deceased had named accused No. 4, but in the first dying declaration the deceased had not named accused No. 4. This circumstance cannot be ignored. The inconsistencies also need to be considered and they may include the manner in which the incident took place. In the present matter, in one dying declaration specific description of the part played by the accused Nos. 1 to 3 is mentioned, but in the second dying declaration there is no such description of the part played by the accused persons. In the second dying declaration recorded by the Executive Magistrate, disclosure is vague and it is mentioned that all the accused poured kerosene on the person and set fire to her. She named the lady who had just delivered the child. In ordinary course, it was not possible that the said lady had come out of the house by keeping the baby inside of the house and she had taken part in the incident. In any case, it does not look probable that all the accused had dragged the deceased up to the open space, there they had poured kerosene on her person and there they had set fire to her. In ordinary course if they wanted to finish the deceased, the incident would have taken place inside of the house. Further, they had only

refused to send the deceased to the parent's house. If they did not want the deceased to live in their house, they would have allowed the brother of the deceased to take her to the house of her parents. Thus, the version given in the dying declaration by the deceased that the incident took place in the manner in which the deceased has disclosed in the dying declaration is not probable.

25) The aforesaid discussion shows that the evidence which could have said important things about the truthfulness is withheld by the prosecution by not examining the witnesses who were available. The benefit of this circumstance needs to be given to the accused. There are other probabilities created in the present matter which are already quoted. Due to all these circumstances, this Court holds that the prosecution has failed to prove the offences against the appellants beyond reasonable doubts. The benefit of doubt must go to the accused. It is not safe in the present matter to base the conviction on aforesaid dying declarations. In the result, following order :-

ORDER

(I) Appeal is allowed.

(II) The judgment and order passed by Trial Court in Sessions Case No. 5/2013 giving conviction to the appellants for the offences punishable under sections 302, 498-A r/w. 34 of I.P.C. is quashed and set aside.

(III) The appellants are in jail. They be released forthwith from jail. They shall execute P.R. bond of Rs.15,000/- each as per section 437-A of Cr.P.C. for the period of six months to face proceeding in case the judgment is challenged to Supreme Court.

(IV) The fine, if any, deposited by the appellants be refunded to them.

(V) Criminal Application No. 2125 OF 2018 filed for bail is disposed of.

[M.G. SEWLIKAR, J.]

[T.V. NALAWADE, J.]

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