

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.13 OF 2003**

State of Maharashtra)Appellant/Complainant

V/s.

1. Pradeep Baburao Bhoite)
Age : 40 years, R/o. Hingangaon,)
Taluka – Phaltan, District – Satara)
2. Smt. Kamal Baburao Bhoite)
Age : 60 years, R/o. Hingangaon,)
Taluka – Phaltan, District – Satara)Respondents/Accused

Ms. Anamika Malhotra, APP for appellant.

Ms. Vilasini Balasubramanian a/w. Mr. S.P. Kadam for respondent nos.1 and 2.

**CORAM : K.R.SHRIRAM, J.
DATE : 7th JANUARY 2020**

ORAL JUDGMENT :

1 At the outset, Ms. Balasubramanian states that she will be filing joint Vakalatnama with Mr. Sanjeev Kadam for the accused/respondents. Statement accepted.

2 This is an appeal impugning an order and judgment dated 2nd September 2002 passed by the Asst. Sessions Judge, Satara, acquitting the respondents, who are the original accused, of offences punishable under Section 498 (A) (*Husband or relative of husband of a woman subjecting her to cruelty*) and Section 306 (*Abetment of suicide*), read with Section 34 (*Acts done by several persons in furtherance of common intention*) of the Indian Penal Code (IPC).

3 The facts in brief of the prosecution is that accused no.1 was the husband and accused no.2 was the mother-in-law of one Ratnabai, who

committed suicide. Ratnabai was married to accused no.1 for more than 16 years. Ratnabai was cohabiting with the accused in their house at Hingangaon, Taluka Phaltan. Ratnabai and accused no.1 had three children, a son is the oldest and then two daughters. On 29th December 2000, Ratnabai set herself on fire and suffered 84% burn injuries. Due to those injuries, Ratnabai expired on 2nd January 2001 in Civil Hospital, Satara. Accused no.1 was working in Mumbai and used to visit the family regularly. About a year before the incident, accused no.1 lost his job and went back to Hingangaon. Accused no.1 was unemployed since then. It is the prosecution's case that accused no.1 and accused no.2 used to suspect the character of Ratnabai and used to beat her and ill-treat her. It is the prosecution's case that fed up with such ill-treatment and cruelty and abuses, Ratnabai poured kerosene on herself at about 6.00 - 6.30 a.m. on 29th December 2000 and set herself ablaze. It is also prosecution's case that at that stage hearing her cry, accused no.1 rushed to her and tried to extinguish the fire. In the bid, accused no.1 himself also sustained injury. Doctor's certificate, which is at Exhibit 17, issued on 11th January 2001 by Shree Datta Hospital, Lonand, says accused no.1 suffered 17% burn injuries and the injuries are superficial to deep. It is also admitted position that accused no.1 rushed Ratnabai to the Hospital and got her admitted. On the day of admission itself, the Police, through PW-7, recorded the statement of Ratnabai. In the statement, it is recorded that Ratnabai was annoyed by the ill-treatment meted out by her husband, who was suspecting her character

and was beating her. Ratnabai also has stated that accused no.2 was abusing her and insulting her and fed up with all these, she set herself ablaze by pouring kerosene on her person. On the same day, at about 5.00 p.m., PW-6, who was appointed as Special Judicial Magistrate at Satara, has also recorded the statement of Ratnabai. It is recorded in the statement that Ratnabai informed PW-6 that she had set herself ablaze by pouring kerosene as she could not bear the ill-treatment meted out to her by her husband and mother-in-law.

4 The statement of their elder son (PW-3) was also recorded who, in the statement to the Police, stated that on the day of the incident there was a quarrel in the morning and Ratnabai poured kerosene on her person and set herself on fire. The first dying declaration that was recorded by PW-7 was treated as F.I.R. In due course of time, accused were arrested and charge sheeted before J.M.F.C., Phaltan. Since the offence punishable under Section 306 of IPC is exclusively triable by the Court of Sessions, the Learned Magistrate, by an order dated 30th March 2000, committed the matter to the Court of Sessions. The Charge was framed against both accused and their plea was recorded. Both pleaded not guilty and claimed to be tried.

5 After the prosecution led its evidence, statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded. Their defence is one of innocence. According to them, the incident occurred was sheer accident and they never ill-treated Ratnabai and she has not set herself ablaze.

6 In order to prove the prosecution's case, prosecution relied on the evidence of eye witness – Sameer Pradeep Bhoite (PW-3), the two dying declarations (Exhibit 34) recorded by P.H.C. Sayaji Dattu Shelar (PW-7) and the dying declaration (Exhibit 32) recorded by the Special Judicial Magistrate – Jayant Madhavrao Shete (PW-6). Besides the prosecution is coming with another oral dying declaration made by Ratnabai to Maruti Baburao Bhoite (PW-4).

7 Sameer Pradeep Bhoite (PW-3) has, in the examination in chief, stated that relations between his parents were good and when the father returned to Hingangaon after losing his job, his parents were not quarreling. PW-3 also says his father (accused no.1) or accused no.2, his grand mother, were not abusing his mother Ratnabai or insulting her. At the request of the prosecution, PW-3 was declared hostile. Thereafter, in his cross examination, PW-3 says his mother set herself on fire on 29th December 2000 and died due to burn injuries on 2nd January 2001. However, to a suggestion put on behalf of prosecution, PW-3 denies that Ratnabai poured kerosene from a can and set herself ablaze. PW-3 denies that Ratnabai set herself ablaze by pouring kerosene in the kitchen. PW-3 says it is true to say that his father, i.e., accused no.1, attempted to extinguish the fire and himself sustained burns. PW-3 has also denied that his mother set herself ablaze because she was fed up with the abuses and repeated insults by the accused. PW-3 has denied to have stated incriminating portions marked "C" and "D" in his statement dated 21st January 2001 recorded by the Investigating Officer. In his cross

examination on behalf of the accused, PW-3 says that Ratnabai sustained burns accidentally when the end of her Sari fell on the burning chula by the side of which he was sitting. I am unable to, simply on the basis of isolated admission extracted during the cross examination on behalf of the State, draw any conclusion. PW-3 was 15 years old at the time the statement was recorded and on the date of the incident or when his statement was recorded by the Police, he was about 13 and ½ years old. His evidence does not help the prosecution.

8 As regards oral dying declaration allegedly made to PW-4 – Maruti Baburao Bhoite, PW-4 has admitted that he rushed to the spot and attempted to extinguish fire. PW-4 has, however, denied that Ratnabai told him, when he asked her the cause, that she had set herself on fire by pouring kerosene. PW-4 was declared hostile by the prosecution and in his cross examination, PW-4 has denied to have stated incriminating portions marked “E” and “F”. PW-4 has also stated that alongwith accused no.1, PW-4 tried to put off the fire by using a blanket and the body of Ratnabai was not smelling of kerosene. PW-4 also has denied that Ratnabai told him that she was fed up with the ill-treatment meted out to her by the accused by suspecting her character and set herself ablaze by pouring kerosene.

9 Having considered the dying declaration (Exhibit 34), evidence of PW-7 – P.H.C. Sayaji Dattu Shelar, evidence of Dr. Umesh Sriram Pingale (PW-5), I would go alongwith the conclusions of the Trial Court that the

prosecution has duly proved this dying declaration (Exhibit 34). Similarly, as far as the second dying declaration (Exhibit 32) recorded by the Special Judicial Magistrate – Jayant Madhavrao Shete (PW-6) is concerned, considering the evidence of PW-6 and Dr. Satish Mahadev Barge (PW-9), I would agree with the conclusions of the Trial Court that this dying declaration also has been duly proved. Both the dying declarations (Exhibit 32 and Exhibit 34) clearly state the cause of death straight from the mouth of Ratnabai. On the basis of these dying declarations, one can safely conclude that Ratnabai set herself ablaze and having died of the burns thus committed suicide.

10 The next point, which requires determination is, has the prosecution proved that all necessary ingredients of Section 306 and Section 498 (A) of IPC have been met. My answer is no. PW-3, who is the son of Ratnabai and accused no.1, is the only eye witness. PW-3, who was the only witness on the point of alleged cruelty and abetment, has turned hostile. There is, therefore, no other oral evidence on record to make out the allegations and ingredients necessary to constitute an offence under Section 498 (A) and Section 306 of IPC. The matter, therefore, hinges on the two dying declarations. The Apex Court in *Bhajju alias Karan Singh V/s. State of Madhya Pradesh*¹ has summarised the principles governing the evaluation of a dying declaration. Paragraphs 23, 25, 26, 27 and 30 of the said judgment read as under :

1. 2012 (4) SCC 327

23. The “dying declaration” essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

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25. There is a clear distinction between the principles governing the evaluation of a dying declaration under the English law and the Indian law. Under the English law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declaration should have been made when in the actual danger of death and that the declarant should have had a full apprehension that his death would ensue. However, under the Indian law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration. The dying declaration is admissible not only in the case of homicide but also in civil suits. The admissibility of a dying declaration rests upon the principle of *nemo meritorious praesumuntur mentiri* (a man will not meet his maker with a lie in his mouth).

26. The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction.

27. Another consideration that may weigh with the Court, of course with reference to the facts of a given case, is whether the dying declaration has been able to bring a confidence thereupon or not, is it trust-worthy or is merely an attempt to cover up the latches of investigation. It must allure the satisfaction of the Court that reliance ought to be placed thereon rather than distrust.

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30. It will also be of some help to refer to the judgment of this Court in the case of *Muthu Kutty and Another v. State by Inspector of Police, T.N.*, (2005) 9 SCC 113 where the Court, in paragraph 15, held as under:-

"15. 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 the 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 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. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben v. State of Gujarat* [(1992) 2 SCC 474 : 1992 SCC (Cri) 403 : AIR 1992 SC 1817] (SCC pp. 480-81, paras 18-19)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) The Court has to scrutinise 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.

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(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.

(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 eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the

medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted."

11 In both these dying declarations, Ratnabai has stated that accused no.1 was suspecting her character and used to beat her and harass her. Ratnabai has also stated that accused no.2 also used to abuse and insult her and therefore, she set herself on fire as she could not tolerate the harassment. In the dying declaration (Exhibit 32), Ratnabai has further stated that on the date of the incident, at about 6 O'clock in the morning accused no.2 started abusing her and the day before, both the accused beat her. Ratnabai has also stated that accused no.1 also used to ill-treat her whenever he would come back from Mumbai and used to suspect her character. As such, Ratnabai was fed up by the harassment. This would generally indicate that the accused might have subjected her to cruelty or harassment. I would say that if one reads the dying declarations carefully, there is no nexus between the ill-treatment, about which Ratnabai has spoken and the suicide. There has to be a close connection between ill-treatment and the suicide. The statements in the dying declaration do not clear this close connection test. In the dying declarations, Ratnabai has narrated history in the first part and in the second part has stated about actual occurrence of the incident. Ratnabai has not stated that the accused were beating and ill-treating her in the morning on the date of the incident,

which led her to set herself ablaze. It is well settled law that all ill-treatments or harassments do not constitute cruelty as defined under explanation (a) and explanation (b) of Section 498 (A) of IPC. It is absolutely necessary that such ill-treatment or harassment must lead a women to commit suicide. Reading the dying declarations cannot make me conclude that the accused persons by subjecting her to ill-treatment either led her to commit suicide or willfully conducted themselves in such a manner as would have led her to commit suicide.

12 As regards Section 306 of IPC, there is no evidence to speak off. Here is the case of abetment by instigation. The word 'instigate' means to goad or urge or forward or to provoke, incite, or encourage to do an untoward act which that person would have otherwise not done. It is also well settled that in order to amount to abetment, there must be *mens rea*. Without knowledge or intention, there can be no abetment and the knowledge and intention must relate to the act said to be abetted, i.e., suicide, in this case. In order to constitute 'abetment by instigation', there must be a direct incitement to do the culpable act. The word 'instigate' denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite. Presence of *mens rea*, therefore, is the necessary concomitant of instigation. (*Sanju alias Sanjay Singh Sengar V/s. State of Madhya Pradesh*)². There is no evidence to suggest or indicate that the accused knew or had reason to believe that deceased would commit suicide.

2. (2002) 5 SCC 371

Even if any acts or words uttered by the accused or their conduct are sufficient to demean or humiliate the deceased and even to drive the deceased to suicide, such acts will not amount to instigation or abetment of commission of suicide, unless it is established that the accused intended by their acts that the deceased must commit suicide. It is not enough if the acts of the accused cause persuasion in the mind of the deceased to commit suicide. As held by the Kerala High Court in *Cyriac, S/o Devassia and another V/s. Sub-Inspector of Police, Kaduthuruthy and another*³, it is not what the deceased 'felt', but what the accused 'intended' by her act which is more important in this context.

13 In this context, we have to keep in mind that the admitted position is it was accused no.1 who went to save Ratnabai and also suffered 17% burn injuries. PW-4 has also corroborated the version that it was accused no.1 who tried to save Ratnabai by covering her with a blanket. PW-4 also states that he also rushed to save Ratnabai. Therefore, there is nothing to indicate even in the two dying declarations that the accused intended by their act that Ratnabai should commit suicide. It is not enough if the acts of the accused caused persuasion in the mind of the deceased to commit suicide. In this context, the defence as has been put to Sameer Pradeep Bhoite (PW-3) appears more probable. PW-3, who is the son of Ratnabai and accused no.1, has stated that his family used to starve since accused no.1 came to Hingangaon after losing his job and accused no.1 has

3. 2005 SCC Online Ker 346

been jobless since then. Even dying declaration (Exhibit 32) shows that accused no.1 used to beat Ratnabai on the ground of domestic expenses. PW-3, their son, has stated that his mother was disturbed due to such state of affairs. In this background, it is quite probable that Ratnabai after 15 years of marriage, when she had no issues with the accused, was not in a position to pull on with her happily married life as she was not able to even provide bare necessities to the family for no fault of her. This could have lead to frustration in her mind and driven her to commit suicide. Therefore, apart from the failure on the part of the prosecution to bring home necessary nexus between ill-treatment and suicide sufficient to constitute the cruelty, the accused have been successful in bringing on record the circumstances from which a reasonable doubt lingers as to the factors that led Ratnabai to commit suicide. Therefore, there is a fundamental defect in the prosecution's case itself and it does not spell out any offence punishable under Section 306 of IPC.

14 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***⁴ in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate

4. (2007) 4 SCC 415

Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

15 There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court observed that the prosecution had failed to prove its case.

16 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

17 Appeal dismissed.

(K.R. SHRIRAM, J.)