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

CRIMINAL APPEAL NO. 818 of 2003

The State of Maharashtra ... Appellant

V/s.

1. Jaideep Namdeo Gorad
2. Sandeep Namdeo Gorad
3. Sou. Shantabai Namdeo Gorad
4. Sou. Rohini Sandeep Gorad

All r/o. Shindewadi, Tal. Bhore,
Dist. Pune.

... Respondents
(Original Accused)
Nos. 1 to 4.

Mr. V.B.Konde Deshmukh, APP for the Appellant-State.
None for the respondent.

**CORAM : PRASANNA B. VARALE
& S.M. MODAK, JJ.**

23rd February 2021.

JUDGMENT (PER S.M.MODAK, J)

The 3rd Adhoc Additional Sessions Judge, Pune acquitted four

accused persons for the offence punishable under Section 498A, 302 read with Section 34 of IPC as per the judgment dt.25.3.2003. It was the case of homicidal death of one Radhabai who is the wife of accused no.1 Jaideep. The accused persons committed murder by pouring kerosene on her and setting herself on fire. The accused was having a different version. In fact it was not a homicidal death but it was an accidental death. The kerosene lamp was lit in the intervening night of 14th February 2002 and 15th February 2002 and when all were asleep, the lamp had fallen and accordingly the deceased engulfed into fire.

2. The trial Court accepted the defence version and concluded that homicidal death and involvement of any of the accused is not proved. The correctness of the said judgment is challenged on behalf of the State.

3. We have only heard learned APP. There was no one present on behalf of the original accused/respondents even though they have put in appearance. Considering the nature of findings, we deem it proper to decide the appeal only after hearing the State. We are fortified by our view when we have perused the record and decided to confirm the findings given by the trial Court.

4. During the trial the prosecution in all examined seven witnesses. It includes the first informant PW No.2 - Shalan Gade (mother of the

deceased Radhabai). There are two dying declarations relied upon by the prosecution. One was oral dying declaration given to PW No.2 and 2nd was made before PW No.1- API Bhilare in the presence of Medical Officer, PW No.4 - Dr.Chirmade on 23.02.2002. Both were examined as PW No.1 and PW No.4 respectively.

5. The husband-accused no.1 got the deceased admitted to Jahangir Hospital, Pune on 15th February 2002. To prove this fact the prosecution examined PW No.3 - Dr.Bhujbal attached to said hospital. PW No.7 - Dr. Suryawanshi is one who carried out autopsy on the dead body. The deceased died due to septicemia coupled with the shock. She took treatment in the Jahangir hospital for almost 11 days from 15.02.2002 upto 26.02.2002 and finally she succumbed to the burn injuries on 26.02.2002. PW No.5 - S.S. Mane and PW No.6 - B.P. Nimbalkar were the investigating officers.

6. Head Constable Mr.Hajam Sayyed attached to Bundgarden police station recorded the statement of deceased on 15.2.2002. It is considered as first dying declaration. She has not blamed anyone but stated about catching herself in fire due to falling of kerosene lamp in the midnight. The spot of the incident is situated in the matrimonial home at Shindewadi, Tal. Pune that comes within the jurisdiction of Shindewadi police station whereas accidental dying declaration is recorded by head constable Sayyed attached to Bundgarden police

station.

7. The learned Additional Public Prosecutor had taken us through the evidence and the judgment. He tried his level best to convince us that the findings and conclusion are erroneous and evidence suggest otherwise. His emphasis was on the oral dying declaration given to the first informant/mother and written dying declaration recorded on 23.2.2002. According to him the deceased has disclosed her mother, PW No.2 about ill treatment during her lifetime; by personally meeting her as well as on phone. He also submitted that the deceased has clarified the role played by every accused person in the act of setting her on fire.

8. We are not convinced by his arguments. We find that the Trial Court has appreciated the evidence properly and has dealt with every circumstance before coming to the conclusion. We find sound reasoning before arriving at that conclusion. We do not find that a different view could have been taken while appreciating the evidence. We are not inclined to interfere in the judgment. We will give the reasons hereinafter for our conclusion.

Evidence on the point of Cruelty:-

9. PW No.2 - Smt.Gade was the sole witness examined on this

point. Deceased during her lifetime had disclosed to her about the ill treatment meted out to her by the accused persons. Though the word cruelty is not defined in the Indian Penal Code, Section 498 A is appended by an explanation. The legislatures have recognized two forms of ill treatment as legal cruelty. The harassment may be for the purpose of non-fulfillment of demand of dowry or it may be for any other reason. The yardsticks for these two categories are different. If there is a willful conduct it falls within explanation (a). The degree of willful conduct is prescribed “the woman must think of putting an end or danger to her life’ is the test as per clause (a) whereas if there is harassment to meet unlawful demand of the dowry, it falls within explanation (b). There is no degree of harassment prescribed therein.

10. It is also true that for deciding the issue of cruelty, the totality of evidence is to be considered. In matrimonial life there are numerous instances which take place. Some may indicate smooth life and some may indicate discord in between the spouses and their relatives. Court has to consider all these factors and then have to form an opinion where legal cruelty is made out.

11. From the evidence of PW No.2 we can find few instances in the matrimonial life of the deceased Radhabai and the husband-accused no.1. The other accused are also staying in the same house. There was love marriage in between the deceased and accused no.1. Both co-

habited together for two years. Deceased gave birth to a son from that marriage. Both used to visit the house of PW No.2 and they have visited on 5-6 occasions. During those visits there was good interaction in between them. Husband of PW No.2 – father of the deceased was not traceable for 12 years. PW No.2 - mother, two sons and a daughter comprises their family. Their financial condition was poor. As against this the husband - accused no.1 and the brother-in-law - accused no.2 were both earning. Their financial condition seems to be more stronger than that of PW No.2 - mother.

12. PW No.2 - mother used to visit the matrimonial house. She sensed happy matrimonial life of her daughter. Deceased Radhabai was being harassed by accused nos.2, 3 and 4 and they used to say that if accused no.1 could have married with another girl, they could have fetched more dowry. It is pertinent to note that inspite of being told about this harassment, she did state about what steps she took i.e. to say talking to parents or the accused. Except her there is no evidence on this aspect.

Evidence on the point of death:-

13. We can ascertain the position on the spot by reading spot panchnama. The spot is in the house where all the accused were residing. Spot Panchnama was carried out on 24.02.2002 whereas the

FIR was registered on 23.2.2002 i.e. the date on which Radhabai succumbed to injuries. The police have seized one measuring can of plastic of one litre and one glass lamp. Except this nothing was seized. It is pertinent to note that the trial Court has emphasized on the fact of delay in carrying out the spot panchnama. In fact police ought to have carried out the spot panchnama earlier. It is not necessary that it can be carried out only when the offence is registered. An opportunity to collect the evidence from the spot has been lost. The PW No.7 - Dr. Suryawanshi attached to Sasoon Hospital carried out the post mortem on 26.2.2002. After examination, he opined the cause of death as septicemia shock due to burns. He was thoroughly cross-examined on the point of compliance of the various circulars and application of Rule-1. We can certainly infer that the death was unnatural. It is difficult to infer that it was accidental.

Evidence on the point of declaration:-

14. There are three dying declarations which have come in evidence. They are (a) written dying declaration dt.15.2.2002 recorded by defence witness Hajam Sayed (suggesting accidental injuries) (b) oral dying declaration given by the victim to her mother - PW No.2 on 23.2.2002 (suggesting homicidal injuries) and (iii) written dying declaration recorded by PW No.1 - API Bhilare in the presence of Dr. PW No.4 Chirmade.

15. The law on the point of dying declaration as a kind of evidence is well settled. This kind of evidence has already been recognized in Section 32 of the Indian Evidence Act. When the cause of death of the maker is in question, the statement made by the maker about cause of death is relevant. It is also admissible. When single or multiple dying declarations are consistent, there may not be a difficulty for the Court to appreciate it subject to compliance of the other procedure. However, when there are multiple dying declarations inconsistent with each other, the job of the Court is more difficult. The trial Court has referred to the judgments in case of *Smt. Kamla v/s. State of Punjab*¹. Hon'ble Supreme Court has emphasized on the difficult task being faced by the trial Court when there are multiple inconsistent dying declarations. How a Court can select one of them that is to say either favouring the prosecution or favouring the defence. The trial Court has faced with the similar situation. After scrutinizing the evidence of this issue, trial Court had chosen not to rely upon the two dying declarations suggesting homicidal death. We agree to the reasons and findings given by the trial Court.

16. Trial Court has emphasized on different lacunas in the theory of oral dying declaration given to PW No.2. First time she met her daughter(deceased) on 15.2.2002 at Jahangir Hospital. She has tried to

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give an explanation for not disclosing about the homicidal theory of the prosecution. She had tried to put up that explanation in the mouth of the deceased. The deceased had blamed the husband – accused no.1. The husband told the deceased not to take his name and he promised her to stay separately. Though the deceased has not said anything about the manner of receiving injuries to her, she has tried to justify why she has not said anything against the accused.

17. The incriminating oral dying declaration was given to PW No.2 2 days thereafter. The deceased has attributed different roles to different accused. Accused No.2 Sandeep poured kerosene whereas mother-in-law (accused no.3) and accused no.4 pushed the deceased on kerosene burning lamp.

18. The trial Court while doing the scrutiny has noted the variance in between this oral dying declaration and the written dying declaration by PW No.1. The deceased has stated about the harassment prior to 14.2.2002 to the PW No.1- PSI Bhilare and what happened on 14.2.2002. There are incidents that took place earlier to actual act of setting her on fire. It took place at 6.00 p.m. and thereafter 9.00p.m. the family members i.e. accused have returned home after their usual work and some of them have left the house. Accused No.2 - Sandeep poured kerosene on her and she shouted for help but the husband has not rescued her. Accused No.3 - mother in law and accused no.4 -

wife of Sandeep have hurled certain abuses at her. Both the lady members have pushed the deceased towards the burning lamp. Certain utterances were also attributed towards the husband.

19. The learned trial Judge has also compared it with the incidents narrated during the oral dying declaration. Learned trial Judge found the variances in between them. Learned trial Judge has emphasized on not securing services of Executive Magistrate for both the written dying declarations (i.e. 15.2.2002 and 23.2.2002). It is also true that though the oral dying declaration was given two days after 15.2.2002, police recorded the statement of the mother lately i.e. on 23.2.2002. Trial Court has rightly emphasized on this delay. The first informant has also admitted about a visit by the elected Counselor and instructions given by him to Bhore Police Station. Trial Court has suggested the suspicion in his theory of the prosecution.

20. There is no explanation for not recording the statement of PW No.2 earlier. There is a reason to believe that the police were initially acting on the theory of accidental death but the time when the theory of homicidal death had come to light, much of the time has been wasted. Learned trial Judge has also pointed out certain lacunas in the procedure adopted by the Medical Officer Shri Chirmade - PW No. 4. The condition of the patient at both the stages needs to be stable. It can only be certified by Medical Officer. The trial Court has rightly

appreciated the evidence on this aspect. We agree to them when multiple inconsistent dying declarations are there, Court has to scrupulously verify that the procedure has been followed. Such high standard of compliance may not be required if there is a single dying declaration suggesting of homicidal death. So it is difficult for us to disagree with the sound reasoning given by the trial Court and to arrive at a different conclusion. We agree that this is not the case wherein conviction can be based on solitary evidence of dying declaration. There are doubts in the prosecution evidence. It is true that death of the deceased was no doubt unnatural but certainly we cannot conclude that it was homicidal due to the acts attributed against the accused persons. So we find no merit in the appeal. Hence, the Appeal stands dismissed.

S.M.MODAK, J

PRASANNA B. VARALE, J