

Uday S. Jagtap

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

CRIMINAL APPEAL NO. 1173 OF 2003

The State of Maharashtra .. Appellant

Vs.

Nilkanth Sidram Gaikwad

Age : 26 years

R/at Anandnagar, Bholanagar,
in front of Mukund Company Gate,
Kalwa, Dist. Thane

.. Respondent

.....

Mr. S.S. Hulke, APP for the appellant – State

Mr. Machhindra Patil for the respondent – orig. accused

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**CORAM : S. S. SHINDE &
PRITHVIRAJ K. CHAVAN, J.J.**

DATED : 17th DECEMBER, 2021

JUDGEMENT : (Per Prithviraj K. Chavan, J.)

1. Feeling aggrieved with and dis-satisfied by the judgment and order of acquittal rendered by the Additional Sessions Judge, Thane in Sessions Case No. 145 of 2003 dated 31.07.2003, by which the respondent - accused came to be acquitted of the offences punishable under Sections 302, 342, 504 of the Indian Penal Code, the State has preferred this appeal.
2. Shorn of unnecessary details, the prosecution case is like this. The victim Kavita was the wife of respondent – accused.

On the fateful day of 14.01.2003 around 22.00 hrs. when the victim was in the house along with her husband, a quarrel erupted between them, which took a serious shape. It went to such an extent that the victim was drenched with kerosene oil and set ablaze resulting into serious burn injuries. The prosecution's case is that it was the respondent – accused who had, intentionally and knowingly poured kerosene on the person of his wife and set her ablaze. The victim was taken to the hospital soon after the incident and was subjected to medical treatment. Her statements also came to be recorded in the presence of a Special Executive Magistrate. However, she succumbed to the burn injuries on 20.01.2003.

3. The Investigating Officer visited the scene of occurrence. He recorded statements of the witnesses. He seized the muddemal articles. Panchanamas were drawn. After the investigation, a charge-sheet came to be filed in the Court of Judicial Magistrate First Class, which was ultimately committed to the Sessions Court as the offences were triable by the Court of Sessions.
4. A charge was framed against the respondent – accused by the learned Additional Sessions Judge, Thane on 25.06.2003 under Sections 302, 342, 323 and 504 of the Indian Penal Code. It was read over to the accused – respondent in vernacular, to which he pleaded not guilty and claimed a trial. The defence, as emerged from the line of cross-

examination is that the victim accidentally caught fire while cooking and ultimately succumbed to the injuries. The respondent – accused took a specific plea that, in fact he attempted to extinguish the fire by pouring water. According to him, when the victim caught fire, he was not in that room. No defence evidence has been adduced on his behalf.

5. In support of its case, the prosecution examined in all 8 witnesses. The learned Additional Sessions Judge, after evaluating the evidence and hearing both sides, by the impugned judgment acquitted the respondent – accused of the offences with which he was charged.
6. We heard Mr. Hulke, the learned APP and Mr. Patil, learned Counsel for the respondent – accused.
7. At the outset, the learned APP would argue that the trial Court has failed to appreciate the evidence in its correct perspective, more particularly, the statement of the victim in the form of dying declaration/s recorded by the Special Judicial Magistrate and the Police Officer. He also took us through the autopsy report which depicts that the probable cause of death was septicaemia shock due to infected 63% burns.
8. On the other hand, the learned Counsel appearing for the respondent – accused supported the impugned judgment of acquittal by contending that all the four dying declarations of

the deceased are so inconsistent that there can hardly be any substance to prove the offence against the respondent – accused.

9. This is a peculiar case wherein the prosecution has placed reliance not on one or two but four dying declarations which are indeed, so inconsistent and are at variance with each other that no sane man would accept those dying declarations as a solemn and last true words of the deceased. We say so for the reasons to follow.
10. The first statement in the form of dying declaration of deceased Kavita is dated 15.01.2003. It is at Exh.9. There is an endorsement of the Medical Officer, which reads that the patient was conscious. It was endorsed at 12.35 a.m. In the said statement, the deceased had stated that her husband returned from work at 8.30 hours. In order to make the food hot, the deceased lit the kerosene stove. However, kerosene accidentally got sprinkled upon her person and *Saree* caught fire resulting into burns to her breast, stomach, hands, thighs etc. The respondent – accused was watching TV in the next room. Having heard the shouts and screaming of the deceased, he rushed and immediately poured water on her person to extinguish the fire. He immediately called his parents and thereafter she was taken to Chattrapati Shivaji Maharaj Hospital, Kalwa, Thane. The deceased further states that when she was about to lit the stove, kerosene got sprinkled on her person resulting into the burn injuries. She

had specifically stated that neither her husband nor her in-laws were responsible for the said accident.

11. The second dying declaration also came to be recorded on 15.01.2003 itself but at 2.35 a.m. by the Special Executive Magistrate at Thane Civil Hospital. It was in question and answer form. When a specific question was asked to the deceased as to how she sustained the burn injuries, she had answered that while warming pulses (*Dal*) over the stove, it got exploded resulting into the burn injuries. She specifically answered that she had a happy married life and there was no ill-treatment either at the hands of her husband or in-laws. She was taken to the hospital by her husband himself.
12. Thus, the first two dying declarations recorded on 15.01.2003, in a short intervals of two hours are consistent. However, it can be seen that at the time of second dying declaration recorded by PW-2 Surekha Patil, Special Executive Magistrate, there is no endorsement by the Medical Officer as to whether the deceased was well oriented with time, place and person. From the first dying declaration, it appears that the Medical Officer had certified that she was conscious. That also perhaps, must have been considered while recording her second dying declaration by the Special Executive Magistrate. She reiterates that she was brought to the hospital by her husband. Had her husband been the culprit in setting her on fire, normally, he would not have brought her to the hospital.

13. It would be interesting to see the third dying declaration, which came to be recorded on 16.01.2003 at 14.10 p.m. It was recorded by PSI – More of Kalwa Police Station. This time, the deceased had changed the entire narration by stating that 5 to 6 months after her marriage, which took place 6 years ago, they separated from the parents of her husband. Since 2002, her husband started consuming liquor and used to beat her under its influence. The motive attributed by the deceased for the offence is that her husband had a love affair with a girl by name Satya residing in the neighbourhood of his parents. Even her mother-in-law Kamalabai used to insist upon the deceased that she should leave her husband so that he could marry with Satya.
14. So far as the incident is concerned, the deceased had stated before the Police-Sub-Inspector that about 9.15 a.m. on 14.01.2003, she had been to the neighbours to offer *Tilgul* as it was the day of *Makar Sankrant*. At that time, her husband returned home. She was about to serve him food and, therefore, she lit the stove. Her husband threw away the plate. Her mother-in-law entered into the house and asked him not to pickup a quarrel and go to the bed. Her husband said that he would go somewhere else to sleep, upon which the deceased said that she would accompany him. The husband got annoyed and gave two feast blows over the stomach. Thereafter, he poured kerosene from the Can on her person. According to her, this was the second occasion

when her husband did like that. She thought that he might be trying to scare her. She, therefore, gave him a match box and said that he should set her on fire. The husband then closed the door from inside and immediately set her on fire. She rushed to the bathroom and poured water on her person. She sustained burn injuries on her face, breast, stomach, hands and legs. After hearing her shouts, neighbours and her in-laws came over there and thereafter she was taken to the hospital.

15. On this statement also, there is nothing to indicate as to whether, before recording her statement on the third time, she was examined by the Doctor certifying that she was fit and well oriented with time, place and person. This perhaps is the outcome of tutoring of the deceased by her parents because it has come in the evidence of her mother PW-3 Yamunabai that against the advice of the Doctor, the deceased was taken to their native place at Solapur by them. The inconsistency in her earlier dying declarations is bound to occur under such circumstances. It appears to be a new story concocted by the parents of the deceased and tutored her accordingly.
16. Evidence of PW-3 Yamunabai – mother of the deceased, indicates that they came to know about the incident on 15.01.2003 at 10.00 O'clock. According to this witness, the deceased had told her in the hospital that her husband poured kerosene on her person and then threatened to set

her on fire. He, in fact, lit the match stick and set her on fire. She raised shouts and, therefore, her in-laws entered into the room and took her to the hospital. When this witness was cross-examined, she categorically admitted that her daughter did not say that she was set on fire by her husband. However, it appears that she made an improvement in her evidence during the course of her examination-in-chief. PW-3 Yamunabai categorically admits that before recording the dying declaration of the deceased by the Special Executive Magistrate, her daughter had spoken to her. She also admits that the Doctor did not advise them to take her to Solapur. However, they took her to Solapur in a jeep against medical advice.

17. PW-4 Surekha Patil, Special Executive Magistrate, who recorded the second dying declaration on 15.01.2003 at 2.35 a.m. also does not say in so many words whether the deceased was in a fit state of mind before recording her statement. It appears from her evidence that she recorded the statement of the deceased twice i.e. Exh.12 and Exh.25. The statements recorded by this witness are also shrouded with doubts as it is quite apparent that she had not followed the settled position before recording the dying declarations of the deceased.
18. In cross-examination PW-4 Surekha Patil admits that there were visitors around the deceased on 16.01.2003. She did not know how many were there around the deceased at that

time. However, in the next breath, she states that there were 4 to 5 persons who were listening the statement when it was being recorded by this witness. In Exh.25, which is the statement recorded by the Special Executive Magistrate on 16.01.2003, the deceased appears to have stated that her husband used to ill-treat her, who had poured kerosene on her person however, there is nothing in the said statement as to how she sustained burn injuries. Whether it was due to explosion of the kerosene stove or it was her husband who set her on fire? What she had stated in one word that “भाजले”. The reason which she gave for the said incident is that her husband wanted to perform second marriage.

19. Her last statement appears to have been recorded on 17.01.2003 at Solapur by the Head Constable (Buckle No. 634). Before recording her statement, she was examined by one Dr. Velnekar, who certified that the patient was in a conscious state to give statement, which in fact, is not sufficient. In her last statement also, the deceased had reiterated the story of love affair of her husband with one Satya, residing in the neighbourhood. Even her in-laws were insisting upon her to give divorce to her husband so that her husband would marry Satya. So far as the incident is concerned, she reiterated the same thing as to how when she was about to serve food to her husband, he poured kerosene on her person and set on fire.

20. PW-5 Hanumant Jadhav is the father of the victim and

perhaps the tutor along with his wife PW-3 Yamunabai, after whose indulgence, it appears that the deceased had changed her statement by stating that it was the husband who had poured kerosene and set her on fire. Neither PW-3 Yamunabai nor PW-5 Hanumant, the parents of the deceased, were present at the time of incident and, therefore, their statement would not be of much importance in view of the earlier two dying declarations of the deceased.

21. There is no doubt that in view of the post mortem report, the cause of death of the deceased was septicaemia shock due to infected 63% burns. The cause of death is not directly attributable to burn injuries but the subsequent septicaemia. Column no. 17 of the autopsy report depicts the percentage of the wounds suffered by the deceased :-

(1)	Head, neck and face	09%
(2)	Rt. Upper Limb	06%
(3)	Lt. Upper Limb	09%
(4)	Chest & Abdomen	09%
(5)	Rt. Lower Limb	04%
(6)	Lt. Lower Limb	15%
(7)	Back and Trunk	11%
(8)	perineum	0%
Total		63%

Superficial to deep and infected burns”

22. The law on the aspect of dying declaration is no more *res integra*. It would be apposite to refer to a recent judgment of the Hon’ble Supreme Court in case of ***Purshottam Chopra & Anr. Vs. State (Govt. of NCT, Delhi) AIR 2020 SC 476***, after

taking survey of several similar decisions, the Hon'ble Supreme Court reiterated the salient features to be taken into consideration while appreciating the dying declarations and their evidentiary values. It would be apposite to refer to paragraph 21 of the judgment which is extracted below;

“21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability could be usefully summed up as under:-

i) A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the Court.

ii) The Court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

iii) Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

iv) When the eye-witnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

v) The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person recording dying declaration must be

satisfied that the maker is in a fit state of mind and is capable of making the statement.

vi) Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.

vii) As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

viii) If after careful scrutiny, the Court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration.

23. The dying declarations in the case at hand cannot be the sole basis of conviction since the deceased had changed her statement not once or twice but on four occasions, which does not inspire confidence at all. There is no evidence on record to indicate whether the deceased was in a fit state of mind, at any point of time, to give her statement. The subsequent two statements are not voluntarily as it is evident that after the arrival of her parents, she changed her statement and took a U-turn by implicating the respondent –

accused. Even, the Special Executive Magistrate PW-2 Surekha Patil had not followed the procedure, in the sense, to first get the patient examined by the Doctor as to whether she was in a fit state to give her statement. There is even no endorsement beneath the statement as to whether during the course of her statement, the patient was in a fit state to give rational answer. The quality of the evidence is so poor and shaky that it would not be safe to place implicit reliance upon the same in view of the settled legal position.

24. Last but not the least, the prosecution has examined PW-7 Dilip. It is not clear as to what was his occupation and in what capacity he visited Nirmal Hospital, Solapur and recorded the statement of the deceased. He even acted as a panch over inquest panchanama (Exh. 17). A Court question was asked to this witness, upon which he appears to have stated that he had recorded nearly one hundred such dying declarations. The evidence of this witness takes the case nowhere as neither there is any sanctity to his evidence nor there is anything from which it can be inferred that it was the respondent – accused who was responsible for causing homicidal death of the deceased.
25. It is surprising to note that the Investigating Officer PW-8 Shyamrao who had also recorded the statement of the deceased on 16.01.2003 after her first statement was recorded by the PW-4 Surekha Patil, Special Executive Magistrate on 15.01.2003, stated that he recorded the

second statement of the deceased because it was necessary. This is something quite strange as to how the Investigating Officer can again record a second dying declaration when first was already recorded by the Special Executive Magistrate? The investigation is so perfunctory and casual that it affects the entire prosecution case. He admits that till the offence was registered against the respondent – accused, all were under the impression that deceased had suffered injuries accidentally, due to explosion of the kerosene stove.

26. Having taken into consideration the aforesaid discussion, we are of the firm view that the prosecution has miserably failed to prove the charge against the respondent - accused beyond all reasonable doubts in view of the enormous inconsistencies, lacunae and irregularities in its case.
27. Consequently, we do not find any merit in the appeal preferred by the State, which deserves to be dismissed and hence, it stands dismissed.

(PRITHVIRAJ K. CHAVAN, J.)

(S. S. SHINDE, J.)