

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 379 OF 2011

Ganesh Motiram Sangamneri, Age : 26 years, Occupation :- residing at Kherwadi, Taluka Niphad, District Nashik. [Presently lodged in Nashik Road Central Jail]	}	...Appellant (Orig. Accused no. 1)
Versus		
The State of Maharashtra, Through Niphad Police Station, District Nashik	}	Respondents (Orig. Complainant)

Mr. Niteen Pradhan i/by Ms. S.D. Khot and Ms. Ameeta Kuttikrishnan
for the Appellant.

Mrs. M.M. Deshmukh, APP for Respondent – State.

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

RESERVED ON: MARCH 10, 2021.
PRONOUNCED ON : APRIL 30, 2021.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Being aggrieved by the judgment and order passed by the Additional Sessions Judge-2, Niphad in Sessions Case No. 3/2009, dated 13.04.2011, whereby Appellant herein (Original Accused No.1) was convicted of the charge for committing offences punishable under

Sections 302 of Indian Penal Code (for short “**IPC**”), and sentenced to suffer imprisonment for life and to pay fine of Rs. 4,000/- in default to suffer further rigorous imprisonment for four months, the present Criminal Appeal is preferred by the Appellant – Original Accused no. 1.

2. At the outset, it can safely be state that the case of prosecution against the accused persons in general and present Appellant in particular rests on circumstantial evidence. Firstly, in the form of dying declarations and secondly in the form of surrounding circumstances such as postmortem report, inquest panchnama, spot panchnama etc.

3. The case of prosecution, in brief, can be summarized as under:

The relationship between the deceased and accused persons is not disputed i.e., deceased Ashwini was wife of Appellant – Ganesh whereas Accused no. 2 – Motiram is father-in-law, Accused No. 3 – Sanjay is brother-in-law, Accused no. 4 – Chandrabhagabai is mother-in-law and Accused No. 5 – Sangeeta is sister-in-law of Ashwini. Marriage between Ashwini and Ganesh was solemnized on 23.03.2006. After marriage as per the custom prevailing Ashwini proceeded to her

matrimonial home for cohabitation. For an initial period of one year the things were going smoothly and Ashwini received a good treatment from the accused persons. It is further the case of prosecution that after one year of the matrimonial life Ashwini was subjected to ill-treatment at the hands of accused person on account of demand of Rs. 50,000/- for purchasing motorcycle. Ashwini had expressed the inability to comply the demand on the ground that her parents are poor agriculturist having no other source of income. It is the case of prosecution that 8 to 10 days prior to the incident Ashwini and Ganesh had been to parental home of Ashwini. In the agricultural operation which was going on i.e. harvesting of soyabean crop Appellant Ganesh assisted his father-in-law. When Ganesh was in the parental home of Ashwini again asked for amount of Rs. 50,000/-. The parents of Ashwini expressed their inability and sent Ashwini to her matrimonial home. Now the incident which led the prosecution took place on 26.10.2008. At about 03.00 to 03.30 pm Ganesh and Ashwini were in the matrimonial of Ashwini, Ganesh again raised demand and asked Ashwini to bring Rs. 50,000/- from her parents. Ashwini had only one answer to the demand of Ganesh and that was the inability of her parents to fulfill the demand. It is further the case

of prosecution that Ganesh on refusal by Ashwini poured kerosene on her person and set her on fire by igniting matchstick. The other accused were present in the house and simply watched the act of accused. Then Accused nos. 2 and 4 father-in-law and mother-in-law of Ashwini poured water on person of Ashwini.

4. One Satish Sangamnere forwarded information to mother of Ashwini. Mother of Ashwini Sindhubai rushed to Ashwini's matrimonial home along with her sister-in-law Thakubai Jadhav. When she reached Ashwini's matrimonial home she found that Ashwini was lying in burn condition and accused persons were present. Ashwini initially was shifted to Public Health Center, Chandori where first aid was provided to Ashwini and thereafter she was shifted to Civil Hospital, Nashik. One head constable at Nashik Civil Hospital forwarded the intimation of Ashwini's admission in the Hospital to Niphad Police Station. Police station officer of Niphad Shri. Chandrasen Deshmukh deputed one of his associate Shri. Narayan Bachhav, ASI for recording the statement of Ashwini.

5. Shri. Bachhav took the necessary steps such as, seeking

assistance of Special Judicial Magistrate Shrikant Gholap for recording the dying declaration by issuing a letter to him. Special Judicial Magistrate rushed to the hospital and took necessary steps such as, seeking an opinion from the duty medical officer about the physical and mental condition of Ashwini so as to record the dying declaration. The Special Judicial Magistrate then recorded the dying declaration of Ashwini. ASI Bachhav also took steps of ascertaining the fitness of Ashwini so as to give statement and he recorded the second dying declaration of Ashwini. On the basis of second dying declaration, first information report came to be lodged against the accused person for commission of offences under Section 307, 498-A, 506, 504 read with 34 of IPC vide Crime No. I-114/2008.

6. Mr. Deshmukh took over the investigation in his hand on lodgment of the report and took necessary steps in the process of investigation such as drawing the panchnama, effecting arrest of the accused persons and recording the statements. Meantime, i.e. on 29.10.2008 Ashwini succumbed to the burn injuries at Civil Hospital, Nashik. Inquest panchnama was accordingly drawn. The necessary formalities in the process of investigation i.e. subjecting the dead body of

Ashwini for postmortem was also complied with. Dr. Gajanan Hole, Medical Officer attached to Civil Hospital, Nashik conducted the postmortem examination and issued postmortem notes giving his opinion to the cause of death as septicemia shock due to deep burn injuries of 80%.

In view of this fact, the offence under Section 302 of IPC was added. The material collected in the process of investigation such as the clothes were forwarded for chemical analysis and on completion of investigation charge-sheet was filed in the Court of JMFC, Niphad. As the offences being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions. Accused persons pleaded not guilty. The defence of the accused persons was of denial as well as accidental burns suffered by Ashwini.

7. As stated above, on appreciation of evidence, learned Trial Court passed the judgment and order of conviction of Appellant for commission of offence punishable under Section 302 of IPC and acquitted the accused and others for charges levelled against them.

8. Learned Counsel, Mr. Pradhan appearing for the Appellant

was fair enough to submit before this Court that the conviction can rest upon the circumstantial evidence in the nature of dying declaration and further submitted that though the prosecution comes before the trial Court with two dying declarations, none of these dying declarations inspires the confidence of the Court. It is submitted by the learned Counsel, Mr. Pradhan that there are serious lacunae and discrepancies in both these dying declarations. It is submitted that the medical officer whose endorsement sought on the dying declaration only certifies that the patient was well oriented and in fit state of mind to give statement but there is not other assurance from the medical officer supports the case of prosecution that the very statement was made by the deceased in presence of the medical officer. It was the submission of learned Counsel, Mr. Pradhan that the appellant is acquitted of the offence under Section 498-A of IPC. Mr. Pradhan, learned Counsel for Appellant submitted that the theory of prosecution that Ashwini was subjected to ill-treatment for the demand of Rs. 50,000/- was in support of a motive being attributed to the appellant. Mr. Pradhan further submitted that the acquittal of appellant for the offence under Section 498-A falsifies the case against the appellant of the alleged ill-treatment and as the

prosecution failed to establish the so called motive. The Trial Court ought not to have placed an implicit reliance on the dying declarations to hold the appellant guilty for offence under Section 302 of IPC and further to record the order of conviction and sentence is the submission of learned Counsel, Mr. Pradhan.

9. Mr. Pradhan invited our attention to the certain documents placed on record and more particularly, requisition letter. It was the submission of Mr. Pradhan that there is variance in so far as the time of incident is concerned. In the dying declaration the deceased refers to a time which is not tallying with the time referred to in the requisition letter. Thus, the submission of learned Counsel, Mr. Pradhan is, the patient (deceased) could not have been said to be well oriented on the contrary, it can be stated that the deceased was not in a fit mental condition when her statement was recorded. Therefore, the submission of learned Counsel, Mr. Pradhan is that the dying declaration of such a person fails to inspire the confidence of the Court, and learned Trial Court committed an error in accepting these dying declarations.

10. Mr. Pradhan, learned Counsel for the Appellant further

submitted that the appellant was not only resided in his in-laws house for nearly 10 days but also he provided his assistance to his father-in-law in agricultural operation i.e., harvesting of soyabean crop. Thus, learned Counsel, Mr. Pradhan submitted that as the appellant was providing assistance to his father-in-law and the appellant was aware of the financial condition, and as such, he could not have demanded an amount of Rs. 50,000/- for purchase of motorcycle. So this submission of Mr. Pradhan further points that as the appellant was acquitted of the offence under Section 498-A of IPC, learned Trial Court by not appreciating this fact in proper perspective committed an error in recording the order of conviction and sentence to the Appellant. It is submitted by Mr. Pradhan that the incident took place on 26.10.2008 at about 03.30 pm whereas first dying declaration was recorded on 27.10.2008 at about 19.30 pm and there is delay in recording the statement / dying declarations of victim. Mr. Pradhan in support of his submissions that dying declarations suffers from infirmities and ought not to have been accepted relied on the following judgments: Kushal Rao Vs. State of Bombay¹, Tapinder Singh Vs. State of Punjab and Another², Dandu Lakshmi Reddy Vs. State

1 A.I.R. 1958 SC 22

2 1970 (2) SCC 113

of A.P.³, Nallapati Sivalah Vs. Sub-Divisional Officer, Guntur, Andhra Pradesh⁴.

11. Per contra, learned APP vehemently submitted that both the dying declarations are proved by the prosecution and there is no discrepancy in the dying declarations in so far as the material aspects are concerned. It is submitted by learned APP that in both these dying declarations deceased stated that it was the appellant accused who set her on fire by igniting matchstick. Learned APP further submitted that authorship of the crime by the accused is clearly spellt-out in these dying declarations. Learned APP further submitted that in the dying declaration deceased herself stated that the other accused persons were only present on the spot and were watching the incident initially and subsequently father-in-law and mother-in-law poured water on her person. Learned APP then submitted that as there is no active role whatsoever played by the accused person in the actual commission of crime reflected in the dying declaration, the learned Trial Court was pleased to acquit the other persons and this cannot be a supporting factor for the Appellant. Learned APP further submitted that as all the accused

3 (1999) 7 SCC 69

4 (2007) 15 SCC 465

persons were acquitted for offence under Section 498-A the Appellant cannot take shelter of this fact. It is the submission of learned APP that ingredient for forming an offence under Sections 302 and 498-A of IPC are different and distinct. It is also submitted by learned APP that the witnesses who have recorded the dying declaration namely, Special Judicial Magistrate and Police Inspector have complied with all the necessary procedural aspects. Learned APP submitted that an assurance about the physical and mental fitness from the medical officer would be an additional factum and both these witnesses who have recorded the dying declaration have assured themselves by putting preliminary queries to the patient deceased that the patient deceased was in a fit state of mind so as to record the statement. Learned APP submitted that considering the sequence of events which are the part of record and more particularly, through the I.O. clearly show that the dying declaration was recorded as early as possible. The time consumed between the incident and recording of the statement was for initially providing medical aid to the patient and then for requisitioning the Special Judicial Magistrate for recording the statement as such time consumed could not have been said as act of delay. Learned APP in support of her submissions placed heavy reliance

on the of Hon'ble Apex Court judgment in the case of Laxman Vs. State of Maharashtra⁵ and Ramesh and Others Vs. State of Haryana⁶.

12. With the assistance of learned Counsel appearing for the respective parties, we have gone through the record.

13. Firstly, we may refer to the evidence of Shrikant Gholap (PW 3) – Special Judicial Magistrate at the relevant time who have recorded the first dying declaration of victim. Shrikant (PW 3) stated before the Court that on 27.10.2008 when he was at his house Shri. Bachhav ASI approached him at about 07.30 pm with a memo requisition for recording statement of Ashwini admitted in Civil Hospital, Nashik. He immediately rushed to Civil Hospital, Nashik, apprised the medical officer Pachpande who was on duty about his reason of visit to hospital by showing memo and then proceeded to the burn ward where Ashwini was admitted along with medical officer. Then he removed police person and other persons present in the burn ward. Then he obtained opinion of the medical officer about her consciousness and fitness for recording the statement. Then he obtained the endorsement of the medical officer and

5 (2002) 6 SCC 710

6 (2017) 1 SCC 529

recorded his opinion. Then he requested medical officer to leave burn ward. Then he stated that he himself got it confirmed that the patient was conscious and well oriented and introduced himself to patient. He also informed the patient that he is recording her statement. Then statement of Ashwini was recorded in question and answer form. He put preliminary questions to Ashwini. Then the witness asked her as to how the incident happened, she told that she was asked to bring Rs. 50,000/- from her parents otherwise she was subjected to burn and when she replied that she is poor and unable to arrange said amount her husband poured kerosene on her person and set her on fire by igniting matchstick. Then it was asked her as to who were present in the house when she was set on fire, she replied that her brother-in-law, sister-in-law were present but they simply witnessed the present while her mother-in-law and father-in-law poured water on her person. Then a query was made to Ashwini that who admitted her to hospital, she replied that a person from agricultural field came their made phone call to her father and mother and she was admitted in hospital through father and mother. Then the witness asked the patient that she is having grievance against anyone, to which she replied that she has grievance against her in-laws. She further

stated that her husband used to listen her father-in-law and mother-in-law. The witness further stated that on completing the statement, statement was read over to patient and it was asked to her as to whether the statement was correct as per her say and whether the statement was given under influence of anyone to which she replied that statement was correct and the same was given on her own will. Then this witness obtained left hand thumb impression of the victim on the statement. Then again he requested the medical officer to examine Ashwini. The medical officer on examination of Ashwini gave opinion that patient was conscious and able to speak. The endorsement of the medical officer was again obtained. Then the witness again got himself confirmed that the patient was conscious and well oriented. Then he made his own endorsement. This document marked as Exhibit – 66.

This witness was subjected to cross-examination. Certain suggestions were given to this witness in respect of his ability to put questions to the patient in respect of her education though the witness admitted that he had not made any inquiry to the education of the patient. In our opinion, this is not such a lacuna which would seriously affect the credibility of the dying declaration. An omission was also

brought on record to the effect that there was no reference in the statement about the person who came from the agricultural field and forwarded an information to her father and mother. There was also suggestion given to this witness that Ashiwini was kept on ventilator and certain painkillers were administered to her as such, she was lying unconscious, these suggestions were clearly denied by this witness. The witness has stated before the Court that when a question was put to Ashwini as to how the incident took place she replied that Yesterday at about 03.30 she was asked to bring Rs. 50,000/- from her parents. It was the submission of Mr. Pradhan, learned Counsel for Appellant that the said dying declaration was recorded on the very day as such, when the patient made statement that the incident took place yesterday it show that the patient was not fully conscious.

14. On going through the record it clearly revealed that on 26.10.2008 the incident took place and the patient was initially shifted to Primary Health Center and then was shifted to Civil Hospital on 27.10.2008. The requisition memo to the Special Judicial Magistrate i.e. Shrikant Gholap (PW 3) refers to the day of incident as 26.10.2008 at the matrimonial home of the victim and this requisition memo was

handed over to Shrikant Gholap (PW 3). On 27.10.2008 at 07.30 pm before recording the statement the opinion of the medical officer about the consciousness of the patient was obtained and the medical officer made his endorsement at 08.00 pm on 27.10.2008. Again on collecting the statement Shrikant Gholap (PW 3) obtained endorsement of the medical officer at 08.45 pm. Considering these aspects, we are unable to accept the submission of learned Counsel, Mr. Pradhan that the first dying declaration recorded by Shrikant Gholap (PW 3) fails to inspire the confidence of the Court. In our opinion, learned Trial Court by assigning the sound reasons in paragraphs 13 to 17 of the judgment rightly accepted the first dying declaration as the basis for recording the judgment and order of conviction.

15. The second dying declaration Exhibit 72 which was treated as basis for lodgment of the first information report was recorded by Narayan Bachhav – ASI (PW 5). Now we may refer to evidence of Narayan Bachhav (PW 5).

Narayan Bachhav (PW 5) in his testimony before the Court stated about the details of steps taken by him for recording the dying declaration of Ashwini. He firstly refers to formalities in so far as

requisition of Shrikant Gholap (PW 3) – Special Judicial Magistrate is concerned. Then he stated that after Special Judicial Magistrate recording the statement of Ashwini he went to burn ward Civil Hospital, Nashik for recording statement of Ashwini. He obtained opinion of medical officer in writing about the condition of Ashwini. Then he recorded the statement of Ashwini as per her say. When he asked Ashwini as to how the incident took place, she told that Ganesh was demanding Rs. 50,000/- for purchasing motorcycle and when she expressed inability because of poor economical condition of her father Ganesh got annoyed poured kerosene on her person and set her on fire. Then she stated that her father-in-law and mother-in-law were present their poured water on her person. Then she stated that he asked the patient as to whether she is educated and though she replied it in affirmative, considering her condition he obtained her left hand thumb impression on the statement. Then he made his counter signature on the statement. Then he obtained opinion of medical officer.

In the cross-examination, the witness though admits that saline was administered to Ashwini, he denied suggestion that Ashwini was on ventilator. A suggestion was also given in the cross-examination

that at the instance of father of Ashwini and relative Shri. Aware who happened to be the police patil of village Kherwadi this witness recorded the statement of Ashwini and it is not as per her say, this suggestion is denied.

16. On perusal of version of this witness and the dying declaration Exhibit 72, we are of the opinion, that there is no serious infirmity or discrepancy in this dying declaration which also spells-out the authorship of the crime by the Appellant – Ganesh. Learned Trial Judge while accepting this dying declaration discussed the same and assigned reasons in paragraphs 18 to 20 in the judgment.

17. Dr. Gajanan Hole (PW 6) is the Medical Officer, attached to Civil Hospital, Nashik who had conducted the autopsy. Dr. Hole refers to the injuries found on the person of Ashwini when her dead body was brought before him for conducting postmortem on 29.10.2008 at 06.15 pm. He found following deep burns injuries on the person of Ashwini:

1. Both upper limb – 18%
2. Chest and part of abdomen – 14%
3. Complete back – 18%
4. Both lower limb – 30%

Dr. Hole stated that Ashwini had sustained total 80% deep burn injuries. Those were ante mortem injuries and in his opinion the death was septic semi shock due to deep burn injuries.

In the cross-examination, this witness admitted that the kerosene is poured on the person and set on fire then he can sustained the burn injuries like above referred injuries. There were no burn injuries on the head and face of the dead body. The hair on the head of this deceased were intact. Though an attempt was made to submit that there was no damage on hair and as such the prosecution case cannot be accepted against Appellant accused, we are unable to accept these submissions for the reason that perusal of both the dying declaration nowhere show that the deceased stated in the statement that the Appellant poured kerosene on the head of the deceased but it is stated in the statement is the appellant poured kerosene on her person and set her on fire.

18. Hiralal Pardeshi (PW 4) is the panch to spot panchnama and recovery of articles from the place. In the examination this witness stated before the Court that when he went to the house where the incident took

place along with other panch witness he found the pieces of burn brassier and petticoat, one kerosene can, 8 to 10 burnt matchstick, one match box was lying in the house. There was smell of kerosene. He stated that he can identify those articles, i.e., clothes, matchstick, match box and can.

In the cross-examination this witness admitted that there was an oven and cooking utensils were lying at the said oven. An attempt was made to submit before the Court that as there is reference in the spot panchnama an oven on the spot and some cooking utensils found on the spot panchanama was subjected to an accidental burns. We are unable to accept this submission for the reason that merely because there was an oven in a kitchen and some cooking utensils one cannot jump to conclusion that the victim suffered an accidental burns and finding of oven in a kitchen or the utensils would not by *ipso facto* make the case of prosecution doubtful in absence of any other evidence supporting the theory raised by the defence of an accidental death.

19. Dr. Prafulla Pachpande (PW 8) is the medical officer attached to Civil Hospital, Nashik as the relevant time. He stated in the examination-in-chief that on 27.10.2008 he was on duty as Casualty Medical Officer. On that day Special Judicial Magistrate Shri Gholap

came to the hospital and told him that he has to record the statement of patient Ashwini and requested him to examine the patient and give his opinion. Then he went to the burn ward and examined the patient. On examination he found that Ashwini was conscious state of mind to give statement. Accordingly, he gave opinion in writing on the form of dying declaration produced by Special Judicial Magistrate. He further stated that after recording the declaration of the patient by Special Judicial Magistrate he was called by Shrikant Gholap to examine the patient. Therefore, he examined the Ashiwni and found that she was conscious, oriented to times, spaces and persons. Accordingly, he gave opinion in writing to the form of dying declaration of Ashwini.

In the cross-examination, a suggestion was given to this witness in respect of he had not wrote down about his opinion in regard tot he state of Ashwini on her case paper, this suggestion was denied. An attempt was made to suggest that at the instance of father of Ashiwni and ASI Shri. Bachhav he had given false evidence, this suggestion was also denied.

On perusal of evidence of this witness, it can safely be state that this witness supports the case of prosecution.

20. Sindhubai Aware (PW 1) is the mother of deceased Ashwini. As this witness is not supporting the case of prosecution, this witness declared as hostile and was of no help to the prosecution.

21. Sanjay Khapare (PW 2). This witness also turned hostile. It may not be necessary for us to refer to the version of this witness as this witness is of no help to the case of prosecution.

22. Chandrasen Deshmukh (PW 9) is the Police Inspector attached to Niphad Police Station at the relevant time. This witness states about the steps taken by him in the process of investigation and filing of charge-sheet by him.

23. Though, it was submitted before the Court that Sindhubai (PW 1) mother of victim turned hostile and failed to support the case of prosecution the same cannot be the decisive factor so as to out rightly reject the case of prosecution.

24. Considering the facts of the present case, the judgments relied on by Mr. Pradhan are of no help to the appellant. On the contrary, learned APP was justified in placing heavy reliance on the judgment of

Hon'ble the Apex Court in the case of Laxman Vs. State of Maharashtra (supra). The other submissions of learned Counsel that the person who gave information to father and mother is not examined by the prosecution or the another medical officer who gave first aid to the Ashiwni is not examined by the prosecution, in our opinion, non examination of these witnesses would not affect the case of prosecution when the prosecution has successfully established the evidence in the form of two dying declarations. Both these dying declarations inspires the confidence of the Court.

25. Considering all the above referred aspects, we are of the opinion that the learned Trial Judge committed no error in appreciating the evidence and recorded the judgment and order of conviction. On assessment of evidence, we are unable to find any illegality or perversity in the judgment. Appeal, thus, being devoid of any merit, deserves to be dismissed. Accordingly, Criminal Appeal is dismissed.

(S.M. MODAK, J.)

(PRASANNA B. VARALE, J.)