

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.91 OF 2015

Rajendra S/o Shrihari Sarwade
Age – 33 years, Occ : Labour,
R/o Katgaon, Latur,
Tq. & Dist. Latur

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. S.D. Kaldate h/f Mr.V.D. Gunale,
Advocate for Appellant.
Mr. S.P. Deshmukh, A.P.P. for Respondent.
...

**CORAM: SMT.SADHANA.S. JADHAV AND
S.G. DIGE, JJ.**

**DATE OF RESERVING JUDGMENT : 16TH MARCH, 2022.
DATE OF PRONOUNCING JUDGMENT: 25TH APRIL, 2022.
(THROUGH V.C.)**

JUDGMENT [PER S.G. DIGE, J.]:

. The appellant impugns a judgment and
order dated 29th December, 2014 passed in Sessions

Case No.85 of 2013, whereby he is convicted for the offence punishable under sections 302 of the Indian Penal Code, 1860 (for short, "IPC"). The appellant is sentenced to suffer life imprisonment with fine of Rs.5000/-, in default, to suffer rigorous imprisonment for three months.

. **Brief facts are as under :**

2. The appellant and deceased Chhaya (for short, "Chhaya") was married 9 years prior to the incident. They were residing at Mauje Katgaon, Dist. Latur. On 5th April, 2013, at around 5.00 p.m., the appellant had poured kerosene on the person of Chhaya and set her ablaze. The appellant was alleged to have committed the said offence as he was suspecting her character. Chhaya in bid to save her life plunged into gutter in front of her house. On hearing Chhaya's shout, her mother-in-law Smt. Sitabai (PW-4) and grandmother Smt. Sunanda (DW-1) came to the spot and tried to

extinguish the fire, meanwhile villagers gathered at the spot and arranged vehicle and brought Chhaya to Civil Hospital, Latur. Chhaya was admitted in Civil Hospital, Latur. During treatment of Chhaya in Civil Hospital, she has given two dying declarations. Chhaya succumbed to the burn injuries on 12.04.2013. After her demise, crime under section 302 of IPC came to be registered against the appellant on the basis of dying declaration of Chhaya. The appellant was arrested on 19th April, 2013.

3. After completing the investigation, the charge-sheet was filed against the appellant. The case was committed to the Sessions Court. The case was tried before learned Additional Sessions Judge, Latur. The appellant abjured his guilt and desired to face the trial. The prosecution in support of its case examined twelve witnesses. After completion of the prosecution evidence, the statement of appellant under section 313 of the

Code of Criminal Procedure, 1973 (for short "Cr.P.C.") recorded. It is defence of the appellant that the said incident was happened due to inflammation of the stove and he was not present in the house at the time of incident. The defence has also examined one witness Smt. Sunanda Mahadhu Sarode as (DW-1).

. Considering the evidence on record and submissions made on behalf of both the parties, the learned Trial Court by Judgment and order convicted the appellant for the offence for which he was tried. Against the said Judgment and Order, this Appeal.

4. Heard learned Advocate for the appellant and learned A.P.P. for respondent-State.

5. It is the contention of learned counsel for the appellant Mr.S.D. Kaldate that the prosecution case is based on the dying declarations but these dying declarations are

suspicious. There is delay in lodging the First Information Report after recording the dying declarations. Doctor, who has put endorsement on the dying declarations, was not present while recording the dying declarations. He further submits that it has come on record that the deceased was not in a position to give dying declarations. There is no corroborative evidence in respect of dying declarations. At the time of admission, Chhaya had given history of her burn injuries and stated that it was accidental but said history is suppressed by prosecution. The learned trial Court has erred while considering the evidence on record. Hence requested to allow the appeal.

6. It is the contention of learned A.P.P. Mr.S.P. Deshmukh that two written dying declarations are consistent. These are recorded by the Police Constable and the Executive Magistrate who are independent witnesses. There is no reason

to them to depose against the appellant-accused. Both dying declarations are endorsed by the doctor that the deceased was in fit state of mind to give the dying declarations. There was burn injury on the leg of the appellant, which proves that the appellant was present at the time of incident. Considering the evidence on record, learned trial Judge has convicted the appellant. Hence, the judgment and order passed by the learned trial Judge is legal and valid.

7. We have considered the submissions of both the learned Advocates. Perused the Judgment and Order passed by the learned Trial Court.

8. Admittedly, prosecution case mainly hinges on two dying declarations, which are recorded by the PW-7- Bhagwan Bhaguram Kendre and PW-11-Saudagar Uttam Kamble. PW-10-Dr.Suboor Shakil Ahmed is the doctor, who has endorsed on these dying declarations. Firstly, we would see

evidence in respect of these dying declarations.

9. The first dying declaration is recorded by PW-7 – Bhagwan Bhaguram Kendre-Police Constable. He has deposed that on 5th April, 2013 from 8 am till 8 am of next day, he was on duty at Police Chowky at Civil Hospital, Latur. On that day, his predecessor Shri Ranjhunjare handed over Medicolegal Case (for short, "MLC") and letter of opinion of Dr.Waghmare to him. This witness gave letter to Dr.Shaikh – Medical Officer seeking opinion as to whether the patient was in a condition to give statement. It is at Exhibit-28. Dr.Shaikh (PW-10) examined Chhaya and made endorsement that Chhaya was in a position to give statement. This witness explained Chhaya that he was intending to record her statement. He had recorded the statement in his own handwriting as per say of Chhaya. He again requested doctor to examine patient Chhaya and Dr.Shaikh certified that the patient was in condition to give

statement. Accordingly, the doctor put his endorsement at the foot of said statement. The same is marked as Exhibit-29. At the time of recording statement, this witness, Dr.Shaikh and deceased Chhaya were present. Chhaya narrated before this witness that accused Rajendra used to suspect her character and oftenly used to beat her. She told this witness that the accused used to abuse her saying that she belongs to lower parentage family. She told this witness that accused (appellant) told her that accused intends to set her on fire and he brought kerosene Can and poured it on her person and set her on fire by igniting match-stick. She told that at the time of said incident, beside she herself and accused, nobody was present there. She told that she came outside the house and in order to save her life plunged into the gutter. On hearing Chhaya's shout, her mother-in-law Smt. Sitabai and grandmother Smt. Sunanda came to the spot and tried to extinguish the fire, meanwhile villagers

gathered at the spot and arranged vehicle and brought Chhaya to Civil Hospital, Latur. This witness further stated that he recorded the statement of Chhaya as per her say. It was read over to her and then obtained her right thumb impression on it. It is at Exhibit-29.

10. This witness further stated that on the same day, he immediately issued letter to the Executive Magistrate/ Tahsildar, Latur requesting to record statement of Chhaya as she was in a condition to give statement. This witness sent letter to Tahsildar through Police Constable Mr.V.S. Gaikwad. It is at Exhibit-30. Thereafter, this witness went to another ward for other work. On 12th April, 2013, after death of Chhaya, doctor issued another MLC, which is at Exhibit-31. This witness sent the MLC to Gandhi Chowk Police Station for recording Accidental Death. Accordingly, Accidental death was recorded and for preliminary inquiry it was handed over to this

witness. Thereafter, in the presence of one male and one female panch, he prepared inquest panchanama of Chhaya, which is at Exhibit-18. The dead body of deceased Chhaya was sent for postmortem along with letter. Said letter was accompanied with documents i.e. inquest panchanama, information form of dead body, which is at Exhibit-32. This witness collected documents and sent it with covering letter to Gandhi Chowk Police Station, which is at Exhibit-33. This witness was directed to make preliminary inquiry on registering Accidental Death. Accidental Death certificate is signed by Police Station Officer - Shri Shaikh, it is at Exhibit-34.

11. The second dying declaration is recorded by Naib Tahsildar. PW-11-Saudagar S/o Uttam Kamble deposed that on 6th April, 2013, he was working as Naib Tahsildar at Tahsil office, Latur. On that day, he received letter at 9.30 p.m. requesting to record the dying declaration of injured Chhaya

Rajendra Sarwade. It is at Exhibit-30. Thereafter, he went to Burn Ward in Civil hospital, Latur. He met Dr.Subur Shaikh (PW-10) and asked to examine the patient and give the opinion in respect of condition of the patient for recording the dying declaration. Accordingly, Dr. Shaikh examined injured Chhaya and opined that the patient was in position to give statement. Doctor put his signature by endorsing on the dying declaration form given by this witness. This witness introduced himself to injured Chhaya and told her that he wanted to record her statement. Accordingly, he put questions to the injured Chhaya and she answered the same and it was recorded accordingly. Chhaya stated before him that on 5th April, 2013, at about 5.00 p.m., her husband Rajendra Sarwade (appellant-accused) started beating her saying that she was bad in character, hence she was staying at her parental house. She further told that the accused poured kerosene from the plastic Can on her person saying

that he would set her on fire, then the accused lighted the matchstick and threw it on her person. In order to extinguish fire on her person, she herself roll over into the drainage. She further stated that accused Rajendra used to quarrel with her ofently prior to the incident. At the time of incident, she and accused were at their house. When this witness asked her, who is responsible for the incident, Chhaya stated that her husband Rajendra (appellant) is responsible for the incident. After recording the statement, it was read over to Chhaya and then obtained her thumb impression on the dying declaration. Thereafter, this witness also put his signature on the dying declaration and asked the Doctor to again examine Chhaya and opine about her condition. Accordingly, Dr. Shaikh (PW-10) examined Chhaya and put the endorsement at the bottom of the dying declaration that she was in a position to give the statement and also put his signature below it. The said dying declaration is at Exhibit 47. This witness

took the dying declaration to his office and sealed it. On receiving letter from the Police, this witness sent the sealed dying declaration to the Police Station.

12. In cross examination, this witness admitted that he did not issue any request letter to Dr. Shaikh to examine the patient and give opinion about condition of the patient. This witness further admits that there is no endorsement put by him on dying declaration Exhibit-47 to the effect that it was read over to Chhaya and she has admitted the contents of it.

13. The prosecution has examined Dr. Suboor Shaikil Ahmed to prove that at the time of recording dying declaration deceased Chhaya was in fit state of mind. The said dying declarations were recorded in presence of this witness.

14. PW-10-Dr. Suboor Shakil Ahmed deposed

that on 6th April, 2013, he was working as Medical Officer in Burn Ward, Civil Hospital, Latur. On that day, Police Constable Kendre from Gandhi Chowk Police Station, Latur came to the burn ward for recording the statement of patient Chhaya Rajendra Sarwade at 8.55 p.m. On that day, he examined Chhaya and gave the endorsement that she was physically and mentally fit for recording the statement. Accordingly, the Constable Kendre recorded the statement of Chhaya in his presence and he put his signature on the said statement. It is at Exhibit-29. He stated that on 6th April, 2013, the Naib Tahsildar, Latur came to Burn Ward at about 9.55 p.m., for recording the dying declaration of patient Chhaya. At 9.55 p.m., he examined patient Chhaya and put the endorsement at 10 p.m. on dying declaration form stating that Chhaya was physically and mentally fit for recording statement. Thereafter, Naib Tahsildar recorded the dying declaration of Chhaya in his presence. Thereafter also he examined Chhaya and

found that she was physically and mentally fit during recording of the statement. This witness put his endorsement on the said dying declaration. It is at Exhibit-47.

15. The relevant contents of the statement made by this witness in cross-examination are as under:-

"I treated Chhaya since 05.04.13 till 12.04.13. I had a talk with patient on 05.04.13 and her history was recorded at the time of admission. The patient has not stated about the homicidal burn injuries sustained by her. She has also not stated in history that her husband poured kerosene and set her on fire. It is true that without any request in writing from Police or the Tahasildar, we did not examine the patient regarding his/her capability to give statement. It is true that there is no letter on record issued by the Tahasildar. If the patient is not able to speak and is also not mentally sound, these can be the reasons for giving the opinion that the

patient is not fit for giving statement. Witness volunteers that there may be other reasons. It is true that before examining the patient, on 6th while recording the statement, the patient was examined by me and I gave the opinion in writing that the patient was not fit for recording statement. It is true that since 5th of April, 2013, till 12th of April, 2013, the relative of patient used to meet her. It is true that I cannot state the contents of the statement recorded Exhibit-29 and 47 as I did not listen the statement carefully."

16. It is contention of learned counsel for appellant that history given by Chhaya at the time of admission in respect of accidental burn injury is absent. Dying declarations are not corroborated by other circumstances.

17. It is settled principle of law that the conviction can be based on the sole dying

declaration of the deceased if the dying declaration found to be consistent, coherent and made in a conscious state of mind. Keeping this principle in mind, we would scrutinize the evidence came on record point wise.

18. (1) **History of Incident :-**

Generally victim or the person, who brought the victim to the hospital gives history of incident about injuries caused to the victim. The nature of injury can be classified into three classes namely homicidal, suicidal and accidental. In present case, it is prosecution's case that burn injuries of Chhaya were homicidal. Appellant poured kerosene on her person and set her ablaze. It has come in evidence of PW-10-Dr. Suboor, who has treated Chhaya. On 05.04.2013, he had recorded history of Chhaya regarding her burn injuries at the time of admission. This witness in cross-examination admitted that Chhaya has not stated about homicidal burn injuries sustained by her.

She has not stated in history that her husband (appellant) poured kerosene and set her on fire. Prosecution has not produced document of history given by Chhaya along with charge-sheet. The evidence of this witness creates doubt about prosecution's case about homicidal death of Chhaya. This witness is independent witness. The cases which are based upon evidence of dying declarations, what history is narrated by deceased to doctor is evidence of primary nature. The history given by victim at the time of admission in hospital can be used as corroborative evidence where dying declarations are suspicious.

(2) **Fit state of mind :-**

At the time of recording dying declaration fitness of that person i.e. state of health and mind is very important, whether a declarant is in fit state of mind is a question of fact. The fact is to be proved by the person who has given opinion of it. The opinion must be based

on a person having special skill or knowledge in the medical science. In present case, PW-10 Dr. Suboor made endorsement on both dying declarations stating that Chhaya is fit for giving statement. In cross-examination, this witness admitted that before examining the patient on 06.04.2013 while recording the statement the patient was examined by him and he gave opinion in writing that patient was not fit for recording the statement. The said report is not produced by prosecution. PW-12 – Investigating Officer Shri Vishnu Gapat in cross examination admitted that letter Exhibit-33 (letter given to Gategaon Police Station) was received by him. The annexure at Sr. No.10 of Exhibit-33 is opinion about condition of patient not in a position to give statement. The said opinion letter is not on record. This witness stated that he can not assign any reason as to why the said report is not submitted with charge-sheet. It has come on record that Chhaya gave two consecutive dying declarations spanning to one

hour i.e. Exhibit-29 - dying declaration before PW-7 Shri Kendre from 9 p.m. to 9.30 p.m. and PW-11 Shri Kamble from 10.00 p.m. to 10.30 p.m. PW-9- Dr.Dharmaraj Dudde, who has conducted postmortem of Chhaya's dead body in cross examination admitted that due to burn flames and super heated airs, the bronchioles and trachea were blacken due to carbon particles. He further admitted that soothing particles were seen in trachea. It is possible that vocal cord may damage due to soothing, if vocal cord is damaged the speaking capacity is impaired. The Chhaya was having 66% burn injuries. If cross-examination of PW-10 and PW-9, as well as not producing certificate given by PW-10 that Chhaya was not fit to give statement considered, it creates doubt about prosecution story that for one hour deceased Chhaya was giving dying declarations and she was in fit state of mind at the time of giving dying declarations.

(3) Consistency in dying declarations :-

When there are more dying declarations, consistency is a very relevant factor. In (Exhibit-47) second dying declaration, Chhaya has stated that prior to setting her on fire accused beated her whereas in first dying declaration (Exhibit-29) Chhaya has not stated about beating by accused prior to incident of setting her on fire.

(4) Corroboration to the dying declaration :-

There is no doubt in accepting evidence of dying declaration for conviction, if such dying declaration is not suspicious or needs no corroboration from other evidence. As prosecution case is that Chhaya was burnt alive by appellant as he was suspecting her character, it is necessary to see corroborative evidence. Deceased Chhaya in her dying declarations stated that

appellant would oftenly used to abuse and beat her, suspecting her character. Prosecution has examined, PW-3- Dhanaji Gaikwad (father of Chhaya), PW-4 Sitabai Sarode(mother-in-law of Chhaya), PW-5 – Smt. Vijayabai Gaikwad (mother of Chhaya) to prove that Chhaya was abused and beaten by appellant suspecting her character, but, these witnesses did not support prosecution case. There is no corroboration to dying declaration of Chhaya that appellant used to suspect her character and would abuse and beat her.

(5) Delay in lodging F.I.R. :-

Admittedly, the incident is happened on 05.04.2013 around 5.40 p.m. Two dying declarations are recorded on 06.04.2013. When these dying declarations are recorded on 06.04.2013 about homicidal burn injuries, F.I.R. is registered on 13.04.2013 at 2 p.m. at Gategaon Police Station. There is no explanation about 7 day's delay in

lodging F.I.R. The F.I.R. ought to have been registered under section 307 of the I.P.C. after recording of two dying declarations Exhibit-29 and Exhibit-47. PW-12 Shri Vishnu Gapat Investigating Officer in cross examination admitted that he did not make enquiry in respect of receiving the dying declarations after seven day's of recording it. The Officer's who recorded dying declarations of Chhaya did not intimate this witness about reason for sending dying declarations late. The learned trial Judge in judgment has observed that dying declarations were recorded at Civil hospital, Latur which falls under jurisdiction of Gandhi Chowk Police Station whereas incident was happened under the jurisdiction of Gategaon Police Station, Taluka Latur, hence delay was caused and it is justifiable. We are unable to understand the reason given by the learned trial Court for delay in lodging F.I.R. being different Police Stations, as these Police Stations are in same taluka, information could have been given to Gategoan

Police Station through mobile phone, E-mail or other method. The persons who have recorded dying declarations are not layman. They are aware about seriousness of incident. P.W.-7 is Police Constable whereas P.W-11 is Niab Tahsildar. Considering the seriousness of the act, Police ought to have registered offence immediately on the same day or next day, but there is seven day's delay and no explanation is given why these dying declarations were kept by PW-7 and PW-10 with themselves, when there were allegations of homicidal burn injuries. It is significant to note that after death of Chhaya, her death was recorded as accidental death and investigation of it was given to PW-7 Shri Kendre, who had recorded Chhaya's first dying declaration. Then also PW-7 remain silent about homicidal burn injuries of Chhaya, After death of Chhaya, MLC was given by Kendre to Gandhi Chowk Police Station, at that time he could have informed to Police Station that he had recorded dying declaration of Chhaya, but

it was not done and accidental death was recorded, it creates doubt about prosecution case. Though, F.I.R. is registered on 13.04.2013, it was sent to Magistrate on 17.04.2013, after gap of four days. It should have been sent immediately to the Magistrate as it was cognizable offence, but it was not done. There is no explanation of said delay is given by prosecution.

(6) Endorsement of reading over dying declaration to victim :-

. Before recording dying declaration Exhibit-47, PW-11 Shri Kamble has not given letter to PW-10 Dr.Suboor to specify mental condition of Chhaya for recording her dying declaration. P.W.-11 states that he had read over the dying declaration to Chhaya after recording it, but Exhibit-47 shows that there is no endorsement put by PW-11 that after recording the statement of deceased Chhaya, it was read over to deceased and

she had admitted that, it is written as per say. It proves that it was not read over to Chhaya.

(7) Presence of witnesses and sign or thumb impression of victim :-

It is prosecution case that both dying declarations are recorded in the presence of PW-10 Dr.Suboor, but in cross-examination this witness admitted that, he cannot state the contents of Exhibit-29 and Exhibit-47 as he did not listen the statements carefully. From version of this witness, it becomes doubtful that he was really present at the time of recording dying declarations Exhibit-29 and Exhibit-47. The thumb impression on Exhibit-47 is having dark ink impression. Whereas other dying declaration Exhibit-29, which was recorded prior to half an hour, thumb impression of Chhaya is not clearly visible on it. PW-9 — Dr. Dharmaraj Dattarao Dudde, who has done postmortem of deceased Chhaya, in cross examination admitted that he has not

noticed any colour on the palm of Chhaya, the question remains if deceased had given thumb impression then colour of ink must have been appeared on her thumb of right hand. It was not noticed at the time of postmortem. After recording dying declaration normally thumb impression is taken but on perusal of the Exhibit-47, it appears that thumb impression is adjusted while writing last questions answer. It shows thumb impression was taken first and then last question's answer is written.

(8) Evidence of defence witness :-

PW-12 – Investing Officer, Shri Gapat has deposed that he has recorded statement of one Smt.Sunanda. She has stated before this witness that she tried to extinguish fire on the person of Chhaya. From this evidence, it is clear that Smt.Sunanda Sarvade was present on day of incident, when Chhaya had caught fire, therefore,

her evidence is of material nature. She has not been examined by prosecution as witness but she has examined by defence as defence witness. Smt. Sunanda (DW-1) (Exh.64) deposed that deceased Chhaya was her grand daughter. She was residing near house of this witness. Chhaya died due to inflammation of stove, at the time of incident, this witness was sitting in front of her door, on hearing shouts she went to the spot and tried to extinguish fire on Chhaya. At that time, accused was not available at the spot. He was at bus stand, Chhaya told this witness that while preparing tea on the stove her sarree caught fire. Accused on returning home tried to extinguish fire on Chhaya. This witness and others took Chhaya to hospital. This witness stayed with Chhaya in hospital for three days. This witness further stated that only on first day of incident, Chhaya was conscious thereafter she was unconscious. Nothing elicited in cross examination of this witness to shake her evidence. Testimony of this

witness is not considered by learned trial Court as she is relative of appellant.

19. If we consider the evidence of defence witness and history given by Chhaya at the time of admission to PW-10, it proves that burn injuries caused to Chhaya were accidental and not homicidal. DW-1 was first person who met Chhaya after incident and taken her to hospital, so there is no reason to disbelieve her testimony.

20. Considering above reasons, we are of the view that the prosecution failed to prove beyond reasonable doubt that Chhaya's burn injuries were homicidal and appellant set her on fire. There is no corroboration to these dying declarations. History given by Chhaya at the time of admission to Civil Hospital is not produced with charge-sheet. There is unexplained delay of lodging FIR. Hence, we pass following order :

O R D E R

(I) Criminal Appeal is allowed.

(II) The judgment and order of conviction of the appellant for the offence punishable under section 302 of the Indian Penal Code in Sessions Case No.85 of 2013 passed by the learned Additional Sessions Judge-2, Latur is hereby set aside.

(III) The appellant be released forthwith, if not required in any other offence.

(IV) Fine amount, if paid, be refunded.

[S.G. DIGE, J.]

[SMT.SADHANA.S. JADHAV, J]