

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.145 OF 2015

1. Sainath s/o.Vishwanath Rokade,
Age- 33 Years, Occ-Labour.

2. Babanbai w/o.Vishwanath Rokade,
Age-60 Years, Occ-Household.

Both R/o. Ashoknagar, Nipani Wadgaon,
Tq. Shingnapur, Dist.Ahmednagar

.. APPELLANTS.

VERSUS

The State of Maharashtra,
Through Police Inspector,
City Police Station, Shrirampur.

.. RESPONDENT.

...
Mr.Govind A.Kulkarni, Advocate holding for Mr.Arvind S. Kale and
Mr.Kunal A.Kale, Advocate for the appellants.

Ms.R.P.Gaur, APP for the respondent-State.

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

DATE : 17.03.2022

JUDGMENT [Per : Smt.Sadhana S. Jadhav, J.] :

1] The appellants are convicted for the offences punishable under Sections 302, 498-A r/w. 34 of the Indian Penal Code in Sessions Case No. 48 of 2012 by the Additional Sessions Judge,

Shrirampur, District Ahmednagar vide judgment and order dated 5th February, 2015. The appellants are sentenced to suffer Imprisonment for Life and to pay fine of Rs. 5,000/- each i.d. to suffer R.I. for one month each for the offence punishable under section 302 r/w. 34 of the Indian Penal Code. The appellants are sentenced to suffer R.I. for one year and to pay fine of Rs. 5,000/- each i.d. to suffer R.I. for one month each for the offence punishable under section 498A r/w. 34 of the Indian Penal Code. Hence, this appeal.

2] The brief facts necessary for decision of this Appeal are as follows :

On 3rd March, 2012, one Chhaya Sainath Rokade was admitted in Sakhar Kamgar Hospital at Shrirampur with burn injuries. Upon admission, her statement was recorded by a Head Constable of Shrirampur City Police Station. She disclosed that she was working in Ashoknagar Sugar Factory on daily wages. That her husband is working as Sweeper in one Department of the Sugar Factory. That on 3rd March, 2022 at about 12.00 noon she returned home. She was trying to ignite the matchstick to burn the stove for cooking food and at that time, her saree caught fire. She rushed out of the house. Her mother-in-law wrapped her with a blanket, she also

poured water on her person to extinguish flames. Thereafter, her husband, her mother-in-law and husband of her sister-in-law had admitted her in Sakhar Kamgar Hospital at Shrirampur. She had sustained burn injuries on her chest, face, both hands, abdomen and other parts of the body. That she did not suspect anybody muchless the members of her family. She had signed the statement as Chhaya Rokade in her own handwriting. The Constable had also taken her thumb mark.

3] On 4th March, 2012, the supplementary statement of the injured Chhaya was recorded by Dy.S.P. Bharat Balayya i.e. PW-6. She disclosed to the police that she was aware that her statement was recorded on 3rd March, 2012, however, she desires to add to the previous statement. She then narrated the following facts :

She disclosed that she had studied up to 7th Standard. She is married to appellant in the year 2005. The couple is blessed with two sons, namely, Suraj and Mayur. That she was working in the sugar factory on daily wages. Every day when she returned home from work, her husband abused her as he suspected her character. She had complained about it to her parents. That on 3rd March, 2012 at

about 1.00 p.m. when she returned home from work, her husband had expressed that he had doubts whether she would shun her bad habits. Saying so, he poured kerosene on her person and her mother-in-law Babanbai ignited matchstick and set her ablaze. She was admitted in the hospital by her mother-in-law. She also alleged about sexual harassment at the hands of her husband and that she wanted her husband and her mother-in-law to be punished in accordance with law. She is conscious and she is being treated in Sakhar Kamgar Hospital. She had reiterated that her husband had poured kerosene on her person from a bottle. She signed the said statement as "Sunanda Rokade". Her thumb mark was also obtained on the said statement. The injured was shifted to Tholar Hospital on 14th March, 2012.

4] It is pertinent to note that since the injured had stated in her first statement that she had sustained accidental burns, no cognizable offence was registered against any one much less the appellants. On 4th March, 2012 the supplementary statement of the injured was recorded by PSI of Shrirampur City Police Station, on the basis of which, Crime No.I-80 of 2012 was registered at Shrirampur City Police Station for the offences punishable under Section 307,

498-A r/w. 34 of the Indian Penal Code. The cause of death was shown as septicemic shock due to 97% burn injuries. The accused were arrested on 4th March, 2012 itself. The doctor had endorsed on the said statement that "patient is in a state of giving the statement." The said statement is signed as "Sunanda Rokade".

5] On 14th March, 2012, the statement of the injured was recorded in the hospital by Executive Magistrate Mr. Anil Pawar (P.W.5). The said statement was recorded in Krupa Tholar Hospital at Tarakpur, Ahmednagar. The said statement is marked at Exh. 44. Dr. Kamble had given the endorsement in respect of consciousness of the patient at about 6.15 p.m. The date of incident is shown as 2nd March, 2012 as stated by the injured. The deponent has further stated that she was taken to the hospital by her sister-in-law, husband of sister-in-law and neighbour. The deponent has specifically stated that since the fingers of both her hands were burnt, she has consented to the Magistrate taking the impression of her big toe. The said thumb mark is not attested. There is overwriting in respect of the time of commencement of the recording of statement.

6] Chhayabai @ Sunanda succumbed to the injuries on

5/4/2012. The cause of death was shown as septicemic shock due to 97% burn injuries. Hence, Section 302 of the Indian Penal Code was added.

7] At the trial, the prosecution examined 6 witnesses to bring home the guilt of the accused. PW-1 Balasaheb Sadashiv Londhe, father of deceased resiled from his previous statement and hence was declared hostile. Similarly, PW-2 Laxmibai Balasaheb Londhe, mother of the deceased had also resiled from her earlier statement and was declared hostile.

8] PW-4 Dr.Ashok Shankar Kamble had deposed before the Court that he was working as Medical Officer in Tholar Hospital, Ahmednagar. On 14th March, 2012, the Special Judicial Magistrate Anil Pawar had visited the hospital and requested him to examine the injured. Since her statement was to be recorded, he had given an endorsement to the effect that she was able to give statement. The endorsement is marked as Exh.44-A. PW-4 claims to be present when her statement was being recorded. He had examined the injured even after her dying declaration was recorded and endorsed that she was fit to give the statement and the said endorsement is marked as Exh.44-B. PW-4 had deposed before the Court that Sunanda had

stated in his presence that she was set ablaze by her husband and mother-in-law by pouring kerosene on her person. In the cross examination, P.W.4 has admitted that there is no endorsement to the effect that the patient was well oriented. That the thumb mark is not attested. That he had administered painkillers to the patient since 6th March, 2012. It is also not stated in the case papers that her dying declaration was recorded. There is no endorsement of time when dying declaration was recorded.

9] PW-5 Anil Pawar has deposed before the Court that he had received a letter from Tophkhana Police Station, Ahmednagar for recording the statement of Chhaya who was admitted in Tholar Hospital. The said letter is at Exh.46. He had recorded the statement of Chhaya on the written instructions of the Tahsildar of Ahmednagar. The said letter is at Exh.47. That he had recorded her statement after she was examined by the Doctor. He has deposed about the contents of the statement. He has specifically stated that the deceased had disclosed to him that on 2nd March, 2012 her husband had returned home under the influence of alcohol. On 2nd March, 2012, he poured kerosene on her person and her mother-in-law ignited matchstick and set her ablaze. Since her both hands were

burnt, he had taken thumb mark of her toe on the said statement. It is elicited in the cross examination that there is overwriting in respect of the time on the dying declaration which bears his signature. The time is written in Marathi as well as English. The thumb impression of the patient is not attested. There is no clarification whether the thumb mark is of her leg or hand or which specific leg. The difference in ink used for writing the date 2nd March 2012 is also admitted. That there is no signature or thumb mark of the patient on the first page of Exh.44.

10] PW-6 Bharat Balayya was officiating as API in Shrirampur City Police Station. He has deposed before the court that on 4th March, 2012, he had recorded the supplementary statement of Chhaya in Sakhar Kamgar Hospital. He had requested Medical Officer to examine her and state whether she was able to give statement. After receiving the answer in affirmative from the Doctor, he had recorded her statement wherein she stated that on 3rd March, 2012, her husband had suspected her character, abused her, poured kerosene on her person from a bottle and her mother in law set her ablaze. The said statement is at Exh.49. He had taken investigation upon himself as per the directions of the superior Officer. He had

deposed about the steps taken by him in the course of the investigation. He has proved the omissions and contradictions of PW-1 and PW-2. He had arrested the accused on 4th March, 2012. That he had obtained thumb impression of her right hand on the supplementary statement.

11] PW-3 Dr.Shrikant Chandrakant Pathak had performed autopsy on the dead body of Chayya @ Sunanda Rokade. Post mortem notes are at Exh.42. He has deposed before the Court that he had noticed 97% infected burn injuries. Cause of death was "septicemic shock due to 97% burn injuries [infected]".

12] Learned counsel for the appellants has submitted that this is a case of multiple dying declarations. There is inconsistency in the dying declarations. That the first history given by the injured is to the effect that she had sustained accidental burns. On 4th March, 2012, she has not denied that she had stated that she had sustained accidental burns, but has supplemented the said statement only by levelling allegations against the accused and in view of the said inconsistency, it cannot be said that the dying declaration is voluntary and truthful and therefore, should inspire the confidence of the Court.

13] Per contra, Learned APP has vehemently submitted that there is no inconsistency in the statement of the injured. She is consistent about the fact that her husband had poured kerosene from a bottle and her mother-in-law had set her ablaze. She was admitted in the Hospital by her husband and mother-in-law. Learned APP has submitted that as far as first statement of the injured is concerned, she has stated about accidental burns only because she was accompanied by the accused and the other relatives and therefore, Exh.36 cannot be taken into consideration. The statement at Exh. 36 is admitted by the accused under Section 294 of the Criminal Procedure Code and therefore, the prosecution has not recorded the statement of scribe of the said statement. It is further urged that statement marked at Exh.44 was also taken by the Executive Magistrate only after obtaining the opinion of the Medical Officer and hence, there can be no doubt about her consciousness at the time of recording the statement. Similarly, Exhibit-44 also finds the endorsement of the Doctor to the effect that the patient was conscious and able to give statement.

14] With the help of respective counsel, we have perused the record and proceedings. The facts that evolved from the evidence

adduced by the prosecution and admitted by both sides is as follows :

- (i) The deceased was admitted in Sakhar Kamgar Hospital on 3rd March, 2012 with history of accidental burns.
- (ii) Her statement was recorded by the police officer wherein she specifically disclosed that she had sustained accidental burns due to blast of stove and that she has no complaints against any one.
- (iii) She had signed the said statement as Chhaya Rokade. She had not given her name as Chhaya @ Sunanda.
- (iv) On 3rd March, 2012, her parents visited her in the hospital.
- (v) On 4th March, 2012, the supplementary statement of the injured was recorded wherein, for the first time, she had made allegations against her husband alleging therein that he used to suspect her character and on the day of the incident also he abused her and then poured kerosene, after which her mother-in-law set her ablaze. She also alleged sexual harassment at the hands of her husband. The said statement is recorded as a supplementary statement. The said statement supplements her earlier statement. But she has not denied to have made the statement regarding accidental burns on 3rd March, 2012.

(vi) The said statement at Exh. 49 is signed by the injured as Sunanda Rokade. The said signature is not attested. It also shows that there is thumb mark of the thumb of her right hand.

(vii) On 14th March, 2012 she was admitted in Krupa Tholar Hospital at Tarakpur Ahmednagar. On the requisition of Tophkhana Police Station, her statement was recorded in a printed proforma issued by the Government of Maharashtra. She has disclosed her name as Chhaya @ Sunanda Rokade. She had deposed that she had returned from her job. Her husband returned under the influence of alcohol. He abused her and then poured kerosene on her person from a bottle and her mother-in-law set her ablaze. The incident had occurred on 2nd March, 2012 at 1 p.m. She has specifically stated that she was admitted in the hospital by her sister-in-law, husband of her sister-in-law and the neighbour had helped her. That she was brought to the hospital in an ambulance. That both her hands were fully burnt and therefore, impression of her toe was taken with her consent. The recording of the said statement had begun at 6.20(18.20) and ended at 6.35 (18.35). The opinion of the doctor was taken at 6.15 p.m. regarding her fitness to give the statement.

(viii) That P.W. 1 father of the deceased and P.W. 2 mother of the deceased have resiled from their earlier statement and have been declared hostile by the prosecution.

(ix) It appears from the record that both the hands and fingers of the injured were burnt. Despite that the first statement at Exh. 48 and supplementary statement at Exh. 49 are signed by the injured. The first statement is signed in the name of "Chhaya", whereas the second statement is signed as "Sunanda", although first line of the supplementary statement shows the name Chhaya. On both the statements thumb marks are obtained. It is only in the statement before the Magistrate that she has disclosed her name as Chhaya @ Sunanda. The fact that fingers of both hands were burnt is corroborated by the statement of the injured, which is reflected in Exh. 44 which is recorded by the Executive Magistrate.

15] In view of this, an inference can be drawn that the prosecution is not sure as to whether the statement at Exh. 49 can be relied upon in view of the fact that injured had signed the said statement in the name of Sunanda. There are inconsistent dying declarations. Exh. 36 cannot be simply ignored and in such circumstances, where there are multiple dying declaration, theory of

"pick and choose" cannot be adopted.

16] In the dying declaration at Exh. 44, there is a clear overwriting where the time of the recording of the dying declaration has commenced. It is apparent that the figure "18" is converted to "16.20". One cannot pick and choose the contents of the dying declaration and convict on the basis of only incriminating material. There has to be consistency in all the three dying declarations.

17] The Apex Court in the case of **State of Maharashtra v/s. Sanjay s/o Digambar Rajhans**¹ has held that -

"the version of homicide set up by the prosecution as well as the version of suicide set up by the accused appear to be highly improbable and do not inspire confidence in the mind of the Court to believe either version. In this state of things, when two incredible versions confront the Court, the Court has to give benefit of doubt to the accused and it is not safe to sustain the conviction."

18] The Bombay High Court in the case of **Tukaram Dasharath Padhen and ors. v/s. State of Maharashtra**² (to which one of us is a party) has observed thus :

1 2004 (9) Scale 50

2 2013(1) Crimes 326 (Bom.)

“When the Court is called upon to appreciate the evidence of written dying declaration the Court has to be extremely cautious and examine with meticulous care the evidence regarding recording of the dying declaration. Merely because witnesses came forward and depose about the recording of the dying declaration, it should not impel the Court to immediately accept the dying declaration. It has to be remembered that the declarant is not available for cross examination and, therefore, the prosecution must prove, apart from the truthfulness of the contents, the factum of the recording of the dying declaration as well as the fact that the declarant was in a fit mental condition to give the statement. Once suspicious circumstances are found in the evidence, the Court should be extremely slow in placing implicit reliance on the dying declaration. It is to be remembered that the conviction can be recorded on the dying declaration alone if the court finds the dying declaration to be wholly reliable. It is, therefore, necessary for the Court to scrutinize the evidence and place reliance on the dying declaration only if the evidence in respect of the recording of the dying declaration is of 'sterling' quality. If there are suspicious circumstances the Court should reject the dying declaration and look for other evidences if it is available. Mechanical acceptance of the dying declaration de hors a meticulous scrutiny of the evidence relating to the recording of the dying declaration must be deprecated in the present case as we have pointed out in the light of circumstances stated by us, we do not find the dying declarations to be pieces of evidence which would inspire the confidence of the Court for implicit acceptance. The aforesaid

dying declaration, therefore, will have to be left out of consideration.”

19] In the present case, the history given by the injured at different stages and on different dates are inconsistent with each other. The statement first in point of time shows history of accidental burns. It appears that second statement implicating the accused could be an after thought or a tutored statement since there is no plausible explanation as to why history of accidental burns were there. Neither does the deponent say that the said statement at Exh. 36 was given under influence and coercion. The signatures of the deponent on Exh. 36 and 49 also cannot be accepted in view of the explanation given by the deponent in Exh. 44.

20] For the reasons stated above, and in view of the glaring inconsistencies in the dying declarations at Exh. 36, 44, and 49, we are of the opinion that this is a fit case for extending benefit of doubt to the accused and accordingly, criminal appeal deserves to be allowed. Hence, following order is passed :

ORDER

I] Criminal Appeal is allowed.

II] The judgment and order of conviction of the appellants for the offences punishable under Sections 302, 498-A r/w. 34 of IPC in Sessions Case No. 48 of 2012 passed by the Additional Sessions Judge, Shrirampur, is hereby quashed and set aside.

III] The appellants 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.]

DDC.