

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 209 OF 2014
WITH
CRIMINAL APPLICATION NO. 35 OF 2018

Satish Mahadeo Kale,
Age: 39 years, Occ. Labour.
R/o. Chandani Chowk, Sangamwadi,
Dist. Pune. (At present at Yerwada Central
Prison, Yerwada, Pune. ... Appellant.

V/s.

The State of Maharashtra,
At the instance of Yerawada Police
Station, Pune. ... Respondent.

Mr. Ashish Satpute, advocate appointed for appellant.
Ms. M.M. Deshmukh, APP for State.

**CORAM : SMT. SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.**

RESERVED ON : MARCH 31, 2022.

PRONOUNCED ON : MAY 6, 2022.

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The appellant is convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer Imprisonment for life and to pay fine of Rs. 2000/- and in default thereof to suffer R.I. for 6 months by the Additional Sessions Judge,

Pune in Sessions Case No. 198 of 2010 vide Judgment and Order dated 31/1/2013. Hence, this appeal.

2 Such of the facts necessary for the decision of this appeal are as follows:

(i) The appellant was married to Manisha some time in the year 1996. The couple was blessed with two children and they were residing at Chandani Chowk, Pune. On 18/11/2009 Manisha was admitted in the Sassoon Hospital, Pune with history of burn injuries. Since it was a medico legal case her statement was recorded by Assistant Police Inspector of Yerwada Police Station, Pune. She disclosed to the police that she was married to the appellant 13 years ago and was blessed with one daughter aged about 11 years and a son aged about 9 years; that her husband is a alcoholic and is not gainfully employed; that in order to run the family she works in a public toilet in camp area and receives a salary of Rs. 4,000/-; that her husband is always under the influence of alcohol and insists upon her to pay money for the alcohol and if she refuses to oblige, he assaults and abuses her.

(ii) That on 18/11/2009 she had a weekly off and therefore,

she was at home. Both her children had been to school. Her husband insisted upon her to lend money to purchase liquor. At that time, he was already under the influence of alcohol. She refused to oblige. Hence, he started assaulting her. Being fed up of the violence meted out to her, she went to sleep. After about 20 minutes she felt some substance on her person. She was aghast to see that her husband was dowsing her with kerosene from a plastic canister. In order to rescue herself, she tried to flee from the house and at that juncture, her husband lit the match stick and threw at her, thereby setting her ablaze. She raised hue and cry and at that moment her husband fled from the house but her sister in law who was residing in the neighborhood rushed to rescue her. Her sister in law extinguished the flames by covering her with a blanket. Her husband returned and made a pretentious attempt to extinguish the flames. The statement was recorded by the police only after obtaining opinion of the doctor who had endorsed that she is conscious and had given the statement. On the basis of the statement of Manisha, Crime No. 616 of 2009 was registered against the accused for the offence punishable under section 307 of the Indian Penal Code. The investigation is completed and charge-sheet is filed on 1/2/2010. She succumbed to the burn injuries

on 23/11/2009 and hence, the charge-sheet was filed for the offence punishable under section 302 of the Indian Penal Code.

3 At the trial, the prosecution examined five witnesses to bring home the guilt of the accused. Whereas the defence examined one witness namely, Sudhir Chaptekar.

4 PW. 1 Chandrakala Kadam happens to be sister of the appellant. He has resiled from his earlier statement. She has admitted in the cross examination that at the time of incident, accused was near his house and had sustained burn to his left hand. She had denied to have stated so before the police.

5 PW. 2 Machhindra Dangade was attached to Yerwada police station as API. That on 18/11/2009 upon receipt of information from Sassoon Hospital that Manisha Kale is admitted in burnt condition he enquired with the doctor and recorded her statement in the presence of the medical officer. He has reiterated the contents of the said statement. He has proved the contents of the statement of Manisha Kale and the same is marked as Exh. 19. He has obtained her thumb

impression and had attested the same. He had conducted the scene of offence panchanama. He had admitted in cross examination that he required 30 to 40 minutes for recording the statement of the injured. And he had taken the endorsement from the doctor about the consciousness and fitness of the patient only after recording the statement and not before commencing to record the statement. It is further admitted by P.W. 2 that treatment of the patient had commenced even before recording of the statement. He has also admitted that when he went to record the statement, the patient was in pains and was murmuring. He was not aware as to whether she was under sedation.

6 P.W. 2 had conducted the scene of offence panchnama. He has admitted that while conducting scene of offence panchnama, he had noticed a wooden kitchen table with one LPG gas burner on it. He has admitted that there was smell of kerosene in the room.

7 P.W.3 Dr. Bhagwan Vetal had conducted autopsy on the dead body of Manisha. The post mortem notes are at Exh. 23. The cause of death was "shock due to burns". He could not identify the

name of the doctor who had signed the post mortem notes. He had alone conducted the said post mortem. There was no specific reference in the post mortem notes with respect to the burns on the fingers of the right hand of the deceased. It is pertinent to note that column no. 17 shows the marks of venesection wound above the left ankle medial aspect within two stitches in situ-therapeutic. This by itself would show that the veins could not be found on either of the hands for administering saline. The fifth injury in column no. 17 would show that the upper limbs, right and left had 9% each burn injuries.

8 PW. 4 Dr. Rajesh Dhake was working as resident medical officer at Sassoon hospital in the burns ward. At about 2.45 p.m. Manisha Kale was admitted in the ward. According to him, the police was accompanied by a Magistrate for recording the statement. He claims to have examined the patient before recording the statement. He has assertively stated that the patient was conscious, oriented and was in a position to give her statement and the same was recorded in his presence during the period 9.00 p.m. to 9.45 p.m. He has placed on record medical case papers which are collectively marked at Exh. 26.

9 A perusal of Exh. 26 would show that the patient was brought to the hospital by one Laxman Dattatray Bhapkar. The prosecution has not examined Mr. Bhapkar for the reasons best known to them. **The history was narrated by the patient herself and the history was to the effect that she had sustained accidental burns on 18/11/2009 at 2 p.m. at Sangamwadi, Pune due to oil(kerosene).** The endorsement in Exh. 26 at about 2.45 p.m. on 18/11/2009 reads as follows :

“Kindly arrange for magistrate statement for this patient of accidental burns 63%.”

The said remark is signed by Dr. Dhake(PW.4). On 18/11/2009 at about 5.00 p.m. there is a remark – “inform police”. The statement was recorded finally between 9.00 p.m. to 9.45 p.m.

10 PW.5 Vishnu Pawar was attached to Yerwada Police Station. Investigation was handed over to him on 19/11/2009. He has received the complaint (statement of the deceased), scene of offence panchnama etc. He has denied the suggestion that the concerned lady had sustained accidental burns.

11 The accused has examined Sunil Chaptekar as a defence witness. He has stated that he was working as an electrician in the office of Southern Command, Military. He was a good friend of the accused and according to him, the accused was gainfully employed and the accused used to consume alcohol occasionally. That on 18/11/2009 the accused had gone to school to fetch his children between 1.30 p.m. to 2.00 p.m. and by the time he had returned, people had gathered in front of his house. That sister of the accused and other neighbors shifted the wife of the accused to Sassoon hospital. In the cross examination he has stated that although it was the service rule to make a note in the office register about leaving the office, on the day of incident he had left in the afternoon after making entries in the office register, but he could not produce any documentary evidence to that effect. That the house of the accused is not visible from his house. He has admitted that at the time of the incident, the said lady was shouting “Wachava Wachava(Save Save)”. He had himself not attempted to save her. That he happens to be a childhood friend of the accused. He had not given any statement to the police on the day of the incident although the police had arrived at the

spot soon after the incident.

12 With the assistance of the learned APP and the learned counsel appointed for the appellant, we have gone through the records. The learned Counsel for the appellant has submitted that the dying declaration in the present case cannot be relied upon to convict the accused. It is submitted that although the magistrate had accompanied the police, the statement is not recorded by the magistrate. The injured was admitted in the afternoon at 2.45 p.m. by one Mr. Bhapkar who is not examined for the reasons best known to the prosecution. The injured herself had voluntarily given history of accidental burns. That the relatives of the injured had arrived only in the afternoon and thereafter at 9.45 p.m. the history of homicidal burn is given. In any case, the police constable P.W. 2 has also stated that the treatment had commenced before the statement was recorded and at that time she was murmuring something. In these circumstances, no reliance can be placed on the dying declaration and the accused deserves to be acquitted. It is also submitted that the upper limbs were burnt to the extent of 8% each and therefore, the thumb mark could not have been so clear and therefore, the entire recording of the dying

declaration is doubtful.

13 Per contra, learned APP has submitted that in the present case, the dying declaration itself is sufficient to convict the accused and the Judgment of the trial court calls for no interference. It is submitted that the statement of the deceased indicts the accused and therefore, the same can be relied upon and no corroboration is required.

14 We have meticulously gone through the records and we find that the learned trial court has not referred to the history given by the patient herself which is a part of Exh. 26. While considering Exh. 26, the trial court has only considered the line of treatment given to the patient and not the history given by the patient and also the fact, that she was admitted in the hospital by one Mr. Bhapkar.

15 The history narrated by the patient before the doctor creates a doubt in respect of the statement recorded between 9.00 p.m to 9.45 p.m. and which is held to be the dying declaration. A dying declaration is by itself sufficient to convict an accused for the accusation levelled against him provided the dying declaration is found to be voluntary, truthful and hence, could inspire the confidence of the

court. It is not necessary that a dying declaration shall necessarily be recorded in question and answer form or in any particular format. The deponent is not available for cross-examination and therefore, a heavy duty is cast upon the court to determine, in the facts of each case, as to whether the said allegation is not only just voluntary but should be necessarily truthful. In a catena of decisions, the Apex Court has held that in case of multiple dying declarations/statements of the deceased there shall be no variance whatsoever. The disclosure leading to the incident in which the deponent had died shall be consistent, cogent and corroborative. The prosecution has to pass this test by all means, as an onus is cast upon the prosecution to establish the guilt of the accused and authorship of the injury by the accused beyond reasonable doubt.

16 Reasonable doubt means an explanation or a fact which would appeal to the reason of a prudent mind and a judicially conscious court, since such a statement of a deceased must inspire the confidence of the court. Reasonable doubt as defined by the Black's Law Dictionary, 8th Edition is as follows :

“The doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real

possibility that the defendant is not guilty.”

17 In the present case, the accused had not accompanied the injured to the hospital. She was admitted by one Mr. Bhapkar whose identity is not brought forth. The statement to the doctor is also a kind of dying declaration. While giving history of accidental burns, there was no pressure or coercion either from the accused or his relatives upon the deponent to give a history of accidental burns. Exh. 26 is proved by P.W. 4 and hence, can be read in evidence.

18 The appellant has been in custody since 18/11/2009 till today. In view of the above discussion and findings, the accused deserves to be acquitted of all the charges levelled against him as the dying declaration would constrain us to take another possible view. Whenever there is another possible view, it would be incumbent upon the court to take a view in favour of the accused, provided there is contemporaneous records which is in the nature of admissible evidence. Hence, the appeal deserves to be allowed.

19 Before parting with the Judgment, we appreciate the efforts taken by the learned advocate Mr. Ashish Satpute, appointed to

espouse the cause of the appellant. The learned Counsel is entitled to the professional fees as per rule.

20 Hence following order is passed:

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The conviction and sentence imposed upon the appellant vide Judgment and Order dated 31/1/2013 passed by the Additional Sessions Judge, Pune in Sessions Case No. 198 of 2010 is hereby quashed and set aside. The appellant is acquitted of all the charges levelled against him.
- (iii) The appellant be released forthwith if not required in any other offence. Fine amount if paid be refunded.
- (iv) The appeal is disposed of accordingly.
- (v) In view of disposal of the appeal, nothing survives in the application, the same is disposed of accordingly.

(MILIND N. JADHAV, J)

(SMT. SADHANA S. JADHAV, J)