

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

CRIMINAL APPEAL NO. 659 OF 2021

1. Iqbal Ahmed Kallan Khan
2. Shahin Iqbal Ahmed Kallan Khan ..Appellants

Versus

The State of Maharashtra ..Respondent

**WITH
INTERIM APPLICATION NO. 1999 OF 2021
IN
CRIMINAL APPEAL NO. 659 OF 2021**

Ms. Misbaah Solkar for Appellant.
Mr. Y. M. Nakhwa, APP for State/Respondent

CORAM : S. S. SHINDE AND
SARANG V. KOTWAL, JJ.
DATE : 29th APRIL 2022.

JUDGMENT: (Per Sarang V. Kotwal, J.)

1. The Appellants who are husband and wife have challenged the Judgment and order dated 17/06/2021 passed by the learned Additional Sessions Judge, Greater Bombay, in Sessions Case No.68 of 2016. By the impugned Judgment and order, both the appellants were convicted for commission of offence punishable under section 302 r/w. 34 of IPC and were

sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- each and in default to suffer further R.I. for two months. The Appellants were acquitted from the charges of commission of offence punishable under section 504 r/w. 34 of IPC. They are given set off under Section 428 of the Code of Criminal Procedure. The Appellants were the original accused Nos.1 and 2 respectively.

2. The prosecution case is that, there was a dispute between the Appellant No.1's family and his brother Anwar's family in respect of a room. The deceased Tasabirunissa was wife of Anwar. On 26/10/2015, after a quarrel between the Appellants on one hand and Tasabirunissa on the other, the Appellants poured kerosene on her and set her ablaze. She suffered 49% burns. The neighbours shifted her to Rajawadi hospital. On 27/10/2015 police officer recorded her statement which was treated as dying declaration; pursuant to which C.R.No.519 of 2015 was registered at Shivaji Nagar police station U/s.307 of IPC. The injured succumbed to her injuries in the midnight of 27 and 28/10/2015 and, therefore, the offence punishable U/s.302 of IPC was added

in the investigation. The Appellants were arrested during the course of investigation. The investigation was carried out, various panchanamas were conducted, statements of witnesses were recorded and at the conclusion of the investigation charge-sheet was filed. The case was committed to the court of Sessions. During the trial, the prosecution examined 13 witnesses. The defence of the appellants was of total denial. After recording the evidence, and the statements of the Appellants and after hearing the parties, learned trial Judge convicted and sentenced the Appellants, as mentioned above.

3. Heard Ms. Misbaah Solkar, learned counsel for the Appellants and Shri. Nakhwa, learned APP for the State.

4. Learned counsel for the Appellants submitted that, there were three written and two oral dying declarations. There is variance in all of them on major aspects. There is no consistent version of the deceased in all these dying declarations. The dying declaration made first in point of time which was written down by the Medical Officer shows that, it was a case of suicide and not the

case of murder. The dying declaration treated as an F.I.R. was not in the words of the deceased herself. The deceased had died within 7 to 8 hours after recording of that dying declaration. It was not even in her own language. The oral dying declarations are not reliable. PW-1 Anwar Hussein Kallan Khan was husband of the deceased, therefore, he was an interested witness. He was on inimical terms with the Appellants. Therefore, his evidence cannot be relied on. The other oral dying declaration made to PW-5 Sumitra Gupta does not inspire confidence. Her police statement was not even recorded.

5. The second written dying declaration which is recorded by the Medical Officer implicating the Appellants loses its significance because it was recorded after the deceased was tutored by her husband and her sister-in-law, which is clear from the record.

6. Learned counsel for the Appellants relied on a few Judgments in support of her contention. Those judgments will be referred to at an appropriate place in this Judgment.

7. Learned APP, on the other hand, submitted that, there are two oral and two written dying declarations implicating the appellants. Except for minor details, they are consistent. They cannot be completely ignored. These dying declarations are reliable. The police have recorded the dying declaration after due compliance of obtaining endorsement from the Doctor. One of the dying declarations is written by the Medical Officer in the case papers and, therefore, that dying declaration implicating the Appellants cannot be ignored.

REASONS

8. We have considered these submissions and we have perused the evidence on record. Before referring to the evidence of dying declarations, a brief reference can be made to the other witnesses; most of whom are formal in nature.

9. PW-2 Bandenawaz Pathan was a pancha for spot panchanama. In his presence the police seized a plastic can, burnt matchsticks and a matchbox. The spot panchanama is produced on record at Exhibit 20. He has admitted that, he had acted as a

pancha in 22 to 23 cases of Shivaji Nagar police station. Though, this particular admission is damaging to the prosecution case, it does not really make any difference because the situation at the spot is not seriously disputed.

10. PW-3 Riyadunissa Sayyed was a neighbour of the deceased, as well as, of the appellants. She has deposed that, there used to be frequent quarrels between the two families. She has stated that, she did not know how the deceased had suffered burns. She has made some reference to the quarrel between the Appellant No.2 and the deceased. She has stated that, both the appellants, as well as, the deceased were in the house.

In the cross-examination, she has reiterated that, she did not know how the deceased died. She has further deposed that, at the time of deposition the family of the deceased was residing in the house of the appellants.

11. PW-4 Johara Mohammed Latif Shaikh was another neighbour. She did not know how the incident took place, but she made a reference to a quarrel between the deceased and the

Appellant No.2. She has stated that, Appellant No.2 and the deceased were present in the house, but she did not know whether the Appellant No.1 was present in that house.

In the cross-examination, she has stated that, there was a door to the tin partition between the houses of the Appellants and deceased.

12. PW-6 A.S.I. - Narayan Turkunde had carried out some part of the investigation. He had drawn inquest panchanama, which is produced on record at Exhibit 38.

13. PW-7 Dr. Narendrakumar Shinde had conducted postmortem examination and he has deposed that the deceased had suffered 49% burn injuries. He conducted postmortem examination on 28/10/2015 at about 5.15p.m. The postmortem notes are produced on record at Exhibit 41. The cause of death mentioned in the Postmortem notes was "Septicemia due to superficial to deep 49% burn however blood was kept for accessory examination."

14. PW-11 Aniket Waghchoure had taken the photographs of

the dead body. PW-13 P. I. Ravindra Ovale had conducted major part of the investigation. He had arrested the Appellants and had filed the charge-sheet.

These are the witnesses who are more or less formal in nature. The main evidence, of course, is in respect of the dying declarations which we are considering chronologically as per the timing of those dying declarations.

15. The first witness in that behalf is the PW-5 Sumitra Gupta. She is examined on the point of oral dying declaration. She was residing in the vicinity of the deceased. On the day of incident she heard a lady shouting about catching fire. PW-5 wrapped a blanket around Tasbirunissa. PW-5 called an auto-rickshaw. The injured was conscious. PW-5 along with the injured and three others went to Rajawadi hospital by rickshaw. The relatives of the injured also accompanied them in the rickshaw. The injured was saying that she was burnt. She said that, wife of her brother in law poured kerosene on her and set her ablaze by lighting a matchstick. The victim did not tell PW-5 anything, but she told this

to her relative and at that time, PW-5 had heard that. According to this witness the victim had blamed only Appellant No.2 for this incident.

In her cross-examination, she admitted that, rickshaw was brought after 15 minutes and in those 15 minutes PW-5 did not ask the victim her name and how she was burnt. She also did not know which relative accompanied them to whom the victim told about the incident. On the next day, the police called her, but they did not record her statement. They only inquired with her and after that they never called her. This means, her police statement was not recorded at all, according to her. She has admitted that the police did not record her statement. They did not reduce into writing anything at the time of making inquiries with her.

16. The next important dying declaration is concerning PW-10 Dr. Nitiraj Mane. He has deposed that, on 26/10/2015, at about 4.31p.m. when he was on duty in casualty department of Rajawadi hospital, Tasbirunissa was brought to the hospital by her neighbour Mohsin. He inquired with the patient about the history of injury.

His deposition in his own words is thus - "She told me that she had quarrel with the wife of her brother in law one hour back due to which she self inflicted herself resulting wound on her person." PW-10 then made detailed entry about her admission in the Casualty Register maintained in the hospital after examining her. He produced the Casualty Register from Rajawadi hospital and identified his hand-writing. The document is produced on record collectively at Exhibit 55. These are different pages of Casualty Register. He has admitted that, as per the history, the victim had set herself on fire. The exhibited document i.e. page No.168 of Casualty Register mentions the relevant entry thus:

"self inflicted wound due to quarrel with
Deorani one hour back.

Patient was crying."

17. The third dying declaration is again a written dying declaration. The witness examined in that behalf is PW-9 Dr. Prasad Gole. He has deposed that on 26/10/2015, at about 5.05p.m. a female patient was admitted in the female burn ward in Rajawadi hospital. He attended that patient. At that time she was conscious, co-operative and oriented. PW-9 inquired with her

about the incident. At that time, she told him the history of burns. She told him that, she quarreled with her brother in law named Akbar and his wife named Shahim at her residence; following which they poured kerosene on her and set her ablaze resulting in the burns. PW-9 noted down her history in the original indoor treatment papers. The indoor treatment papers (page Nos.1 to 20) are produced on record and marked collectively at Exhibit 52. In his deposition he has stated that, he had obtained consent of her sister in law by name Zakira Khan. The victim's husband also made his signature on that consent in his presence.

In the cross-examination he has deposed that, he was on duty till 8.00a.m. of 27/10/2015, but during that period no police officer had made inquiry with him about the condition of the patient. The indoor treatment papers mention the name of brother in law as Akbar. The Appellant No.1 is Iqbal. The Appellant No.2 is named as Shahim in those indoor treatment papers. In this history two persons are blamed. The consent form showing the timing 5.15p.m. of 26/10/2015 bears the signatures of Zakira Khan – sister in law of the victim and that of Anwar – husband of

the victim.

18. PW-1 Anwar Hussein Kallan Khan was the husband of the victim. He has stated that, on the date of incident he returned from his job at 11.00p.m. in the night. At that time he came to know that his wife was burnt and that she was in the hospital. In the morning at about 6.00a.m. she regained conscious and told him that the Appellant No.1 had set her on fire. The police came to the hospital and made inquiry with him. On the next day his wife died. Police came to his house and made inquiries with him and recorded his statement.

In the cross-examination, he has deposed that, in the night itself police had recorded his statement. He has not spoken about his signature on the consent form which was taken earlier in the evening. In this oral dying declaration the deceased had implicated only the Appellant No.1.

19. The 5th dying declaration was the F.I.R. itself which was recorded by PW-12 WPSI Mrs. Rupali Gorad. She has deposed that, on 27/10/2015 she was on duty as Station House officer. She

received a telephonic message from Rajawadi hospital that a lady was admitted in burnt condition. PW-12 along with her staff went to the hospital. She met the doctor giving treatment. PW-12 asked the doctor whether the victim was in a fit condition to give statement. The doctor replied in affirmative. Then PW-12 recorded her statement as per her narration. At that time, the victim narrated everything in detail in respect of the incident. The victim told her that, between 3.30p.m. to 4.00p.m. she was present with her children in the hut; at that time she was talking with her another brother in law on phone. The Appellant No.1 misunderstood that she was saying something against him. He started abusing her. The Appellant No.2 also came there and abused her. The Appellant No.1 then took a plastic can and poured kerosene on her head. The Appellant No.2 set her on fire by using matchsticks. The victim started shouting. The neighbours gathered there and they took her to Rajawadi hospital. The dying declaration which is recorded as an F.I.R. is produced on record at Exhibit 48 collectively. It bears endorsement of the doctor.

In the cross-examination, she admitted that she had

recorded the statement of the victim in Marathi and explained it to her in Hindi. Perusal of F.I.R. shows that, it gives details of the family members, their address, her husband's shop details, his work timing, about her own parents, her sister, sister's family, about her father in law, about the ownership of the room, about the dispute regarding that property and then gives description of the incident. We find it quite strange. The victim had died within 7 to 8 hours after giving this statement. There are too many unnecessary details mentioned in this statement which could not have been given by a dying person in such serious condition. The F.I.R. and that dying declaration is quite doubtful. PW-8 Dr. Mayuresh Jaiswal has given his endorsement on this dying declaration that the victim was conscious, oriented and in condition to give valid consent/statement. He has deposed that, after he had examined the deceased, the police came there and they inquired about the condition of the victim. This witness again examined her and informed the police that she was in fit mental and physical condition to give the statement. Accordingly, the police recorded her statement. She signed on it. PW-8 made

endorsement and mentioned about her fit condition. He himself has not deposed what the victim stated before the police. His endorsement does not show whether it was given before or after recording the said statement. The endorsement is made at 5.00p.m. of 27/10/2015. According to PW-12, the Doctor had given endorsement on that statement itself. The document shows that the endorsement was given in the margin. PW-12's evidence indicates that it was taken afterwards. The prosecution has not proved that, throughout the recording of her statement patient was fit and as to when exactly the endorsement was given. The endorsement does not give any indication to that effect. It is not even clear whether it was given before or after recording of the dying declaration.

20. Thus, the evidence shows that, there are two oral and three written dying declarations. The first dying declaration was oral dying declaration given to PW-5, but as mentioned earlier, her evidence shows that her police statement was not recorded. She has not given satisfactory answers. The dying declaration was not even made directly to her, but it was made to a relative of the

victim. This witness had not even mentioned who was the relative. No such relative is examined during trial. Her evidence is quite vague. In absence of her police statement, it is difficult to believe her story deposed first time in the court.

21. So far as, husband of the victim is concerned, he has not given clear answers either. The medical papers show that, he was present in the hospital after 5.00p.m. of 26/10/2015 as his signature appears on the consent form and yet he has deposed that, he came to know about the incident only in the night and he had gone to the hospital after that. He was not very clear about exact time when his statement was recorded. He is, obviously, an interested witness and his evidence shows that, after arrest of the Appellants in this case, now this witness's family is residing in the room of the appellants. Therefore, both these oral dying declarations are not reliable.

22. As we have mentioned earlier, the dying declaration written by PW-12 suffers from many infirmities. First of all, it gives too many details, described earlier. We do not believe that it was

possible for the victim to give so many details. She had died within seven hours. There were too many unnecessary details. It was not even recorded in the language of the deceased. It was written in Marathi and then explained to her in Hindi. The endorsement on that dying declaration is not very clear. It is not conclusively proved as to whether that endorsement was given earlier or after recording of that statement. The Doctor's evidence is also not clear, whether he was present during recording of the statement. He has not stated about the story narrated by the victim.

23. Though, there is another dying declaration recorded by PW-9. As per that dying declaration, two persons were implicated; one of them was the Appellant No.2 and other person was described as brother in law Akbar. However, Appellant No.1 is not Akbar; he is Iqbal. Giving some concession to this difference in the name, even then, this dying declaration does not inspire confidence. It was made after the deceased had met her other sister in law Zakira Khan who had signed the consent form, as well as, her husband who had also signed the consent form. There is a strong possibility of tutoring her by them because the dying

declaration recorded before that by another doctor PW-10 Nitiraj gives a completely different story.

24. The story narrated by the victim to PW-10 which is taken down in the case papers as victim's version is destroying the entire prosecution story. In that narration the victim had clearly stated that, because of the quarrel with the Appellant No.2 she had inflicted those burn wounds on herself; meaning thereby she set herself on fire. According to this dying declaration, it is a clear case of commission of suicide in a fit of anger. There are multiple dying declarations and there are too many inconsistencies. The dying declaration made to PW-1 implicated only Appellant No.1. The dying declaration made to PW-5 implicated Applicant No.2. The dying declaration made to PW-12 mentions that the Appellant No.1 poured kerosene and the Appellant No.2 set her on fire. The dying declaration made to PW-9 mentions that one Akbar and the Appellant No.2 committed this offence. These inconsistencies are irreconcilable.

25. Learned counsel for the Appellants relied on the

Judgment of a division bench of this court in the case of *Vilas Vikramsingh Deshmukh & Ors. Vs. State of Maharashtra*¹, in which, a reference was made to the statement given by the victim in that case to the Doctor working as Casualty Medical Officer at Civil Hospital, Solapur. He had stated that the victim had given him history that the victim in that case sustained burns while cooking in kitchen as *pallu* of her saree caught fire. This statement was first in point of time and it was believed by the division bench.

26. Learned counsel for the Appellants relied on the Judgment of another division bench of this court in the case of *Prakash Pandurang Pawar Vs. The State of Maharashtra*².

In the present case the history given by the victim first in point of time to an independent medical officer which is recorded by him is found reliable and benefit of this will have to be given to the appellants.

27. The learned trial Judge has referred to the statement given to PW-10, but that statement was not given due weightage

1 2013 ALL MR (Cri.) 3145

2 Criminal Appeal No. 653 of 2000 decided on 22/04/2010.

it deserved. The dying declaration was recorded by the medical officer himself after asking the patient about the incident. There is no reason to disbelieve PW-10. Considering all the discussion above, the benefit of doubt must be given to the appellants and they deserve to be acquitted.

28. Hence, the following order:

O R D E R

- i) The Appeal is allowed.
- ii) The appellants / applicants - Iqbal Ahmed Kallan Khan and Shahin Iqbal Ahmed Kallan Khan are acquitted of all the charges. They shall be released forthwith, if not required in any other case.
- iii) The appellants / applicants shall execute bail bonds to the satisfaction of the trial Court within a period of four weeks from today in accordance with Section 437-A of the Code of Criminal Procedure, 1973.
- iv) With disposal of main Criminal Appeal, nothing

survives in the interim application and the same also stands disposed of accordingly.

(SARANG V. KOTWAL, J.)

(S. S. SHINDE, J.)

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