

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

CRIMINAL APPEAL NO. 225 OF 2016

Gopal S/o Ramesh Barwal,
Age-25 years, Occu:Business,
R/o Lane No.3, Vitthal Nagar,
Naregaon, Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Rupesh Jaiswal Advocate appointed for Appellant.
Mr. R.D. Sanap, A.P.P. for Respondent – State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.**

DATE : 20th MARCH, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the original accused challenging his conviction by the learned Additional Sessions Judge, Aurangabad in Sessions Case No.133 of 2013 on 26th October 2015, after holding him guilty of committing offence punishable under Section 302 of the Indian Penal Code and

sentencing him to suffer imprisonment for life and to pay fine of Rs.5000/-, in default, to suffer rigorous imprisonment for four months.

2. Heard learned Advocate Mr. Jaiswal appointed to represent the appellant and learned APP Mr. Sanap appearing for the State.

3. Learned Advocate appointed to represent the appellant has vehemently submitted that deceased Sunita was wife of the accused and it is the contention of the prosecution that only the husband and wife were residing at Naregaon, Taluka and District-Aurangabad. It is stated that incident had taken place around 8.00 p.m. on 5th January 2013 in rented premises. It is alleged that the appellant had poured diesel on the person of his wife and set her to fire. It is alleged that the appellant used to come home under the influence of liquor and used to assault the deceased. The prosecution has relied upon two dying declarations. In fact dying declaration Exhibit-28 came to be recorded first between 9.10 a.m. to 9.34 a.m. on 6th January 2013, however offence has not been registered on the basis of the same. The First Information Report (for short "FIR") Exhibit-38 is recorded by PW-3 P.S.I. Anil Wagh, however, he has not stated at what time he had recorded the said dying

declaration. Further, the learned trial Judge failed to consider that there were interpolations / corrections on the requisition letter Exhibit-27. PW-1 Gangadhar Aynalwar is the Naib Tahsildar – cum Executive Magistrate who has recorded the dying declaration Exhibit-28, however, he has taken two thumb impressions on Exhibit-28 and he has not explained of which thumb the impressions are and why there was necessity to take two thumb impressions. It is also stated in the said dying declaration that the accused was in drunken state and therefore, it cannot be stated that the accused had motive to commit murder of his wife. PW-3 P.S.I. Anil Wagh had taken dying declaration – cum FIR Exhibit-38, however, the endorsement of the medical officer regarding the fitness is not on Exhibit-38 but it is on Exhibit-51 and therefore, the possibility of taking the said endorsement at a convenient time cannot be ruled out. If the contents of the dying declaration Exhibit-38 are considered, then deceased has stated that husband used to raise suspicion over her character. This is not the fact which was told by Sunita in dying declaration Exhibit-28 and therefore, there is inconsistency in two dying declarations. Those dying declarations could not have been used against the accused. The accused has taken defence of blast of stove and there was no investigation from

that angle. In the cross-examination of PW-2 Dr. Vikas Rathod, who had conducted the autopsy, he has admitted that the injuries mentioned in Column No.17 of the postmortem report are possible by blast of stove while cooking. PW-4 Balu Daund is the panch witness to the panchnama of arrest of the accused and seizure of clothes on his person. Nothing incriminating was found with the accused. PW-5 Kailas Pardeshi is father of the deceased Sunita. He has stated about the ill-treatment by the accused by raising illegal demand of Rs.15,000/- for acquiring agricultural land on contract basis. However, the accused has been acquitted of the offence punishable under Section 498-A of the Indian Penal Code. PW-6 Ganesh Bhokre is the landlord in whose house deceased and accused were staying on rent. He had shown house of the accused to the police and he has been taken as panch to the spot panchnama. He has also stated that certain articles were seized from the spot. The situation stated in the spot panchnama supports the defence. PW-7 Dr. Sunil Bombale is the medical officer who had given the endorsement Exhibit-51 which was to the dying declaration Exhibit-38. He was unable to say who has brought the patient to the hospital. He is also the medical officer who had given endorsement of Exhibit-52 i.e. to the dying declaration Exhibit-28. He had not

brought the medical papers on the basis of which he has given the endorsement and in his examination-in-chief he has stated that Sunita had suffered 87% burns. Possibility of administering sedative to Sunita was not ruled out by the prosecution. PW-8 P.S.I. Hemant Todkar and PW-9 P.I. Dr. Ganpat Darade are the investigating officers. On the basis of the evidence that was adduced before the trial Court, the trial Court ought not to have come to the conclusion that the offence has been proved beyond reasonable doubt. The two dying declarations are inconsistent and therefore, the same cannot be considered against the accused. Learned Advocate therefore, prayed for setting aside the conviction and allowing the Appeal.

4. Per contra, the learned APP strongly supported the reasons given by the learned trial Judge. It was submitted that the accused was the person who admitted Sunita to hospital and it appears that at the time of her admission, he has intentionally given wrong name and therefore in the Medico Legal Case papers as well as requisition letter, the first name of the deceased is correctly mentioned, however, name and surname of husband is wrongly mentioned. PW-1 Gangadhar, while interacting with deceased came to know about the real name and then it is correctly mentioned in the dying declaration

Exhibit-28. Similar thing has been happened in respect of dying declaration Exhibit-38. But when dying declaration Exhibit-38 was recorded, name of the declarant / maker has been correctly stated. Accused cannot now raise a defence that the said dying declarations are of some other lady. Both the dying declarations are consistent in saying that around 8.00 p.m. on 5th January 2013 the accused came in the said rented premises where deceased and accused were staying, under the influence of liquor and he assaulted and abused deceased. He took out diesel from the can kept nearby, poured it on her person and then ignited the match stick and set the deceased on fire. Further, in the spot panchnama the can was seized which was having smell of diesel. Chemical Analyzer's Report (for short "C.A. Report") Exhibit-58 shows that Exhibit-3 was yellowish liquid in plastic can and the result of testing is the sample of diesel. The other articles i.e. shirt, pant of the accused had residues of diesel, so also the nail clippings, burnt blackish hair of deceased had residues of diesel. Therefore, there were corroborative pieces of evidence. The defence of the accused is that of bursting of stove. For that purpose, accused should admit that his wife had sustained burn injuries. Accused has not explained in his statement under Section 313 of the Code of Criminal Procedure, as to after the

alleged bursting of stove what course he adopted to take his wife to hospital. Therefore, the evidence that was adduced by the prosecution was sufficient to hold the accused guilty of committing murder of his wife; beyond reasonable doubt. There is no merit in the present Appeal. It deserves to be dismissed.

5. At the outset, we would like to say that from the entire evidence which has been produced by the prosecution, especially the testimony of PW-6 Ganesh as well as spot panchnama, it is clear that accused and his deceased wife Sunita were the only persons who were residing in the rented premises. From the testimony of PW-3 PSI Anil Wagh and PW-7 Dr. Sunil Bombale, who had given endorsement at Exhibit-51, it is evident that PSI Wagh was the first person to approach the hospital. The endorsement Exhibit-51 has been given at 10.40 p.m. of 5th January 2013. That means FIR Exhibit-38 is prior in time and after it was recorded, station diary entry was taken at 1.45 a.m. on 6th January 2013 and then offence was registered. The said dying declaration Exhibit-38 has been proved by these two witnesses i.e. PW-3 Anil Wagh and PW-7 Dr. Sunil. PW-7 Dr. Sunil had examined Sunita before Exhibit-38 was reduced into writing. He found Sunita to be in a fit state to give the statement. The cross-examination of PW-7 Dr. Sunil is very much

formal in nature and does not wipe out his findings. No doubt the words used by him that patient was conscious and oriented, are definitely different from the fitness of the mental status to give statement. We would like to rely upon ***Rambai vs. State of Chhattisgarh, (2002) 8 SCC 83***, wherein it has been held that:-

“6. So far as the position of law in regard to the admissibility of the dying declaration which is not certified by the doctor, the same is now settled by a Constitution Bench judgment of this Court reported in *Laxman v. State of Maharashtra, (2002) 6 SCC 710* wherein overruling the judgment of this Court in *Laxmi vs. Om Prakash, (2001) 6 SCC 118* it is held that a dying declaration which does not contain a certificate of the doctor cannot be rejected on that sole ground so long as the person recording the dying was aware of the fact as of the condition of the declarant to make such dying declaration. If the person recording such dying declaration is satisfied that the declarant is in a fit mental condition to make the dying declaration then such dying declaration will not be invalid solely on the ground that the same is not certified by the doctor as to the condition of the declarant to make the dying declaration.”

6. Further, it is also to be noted that PW-3 Anil Wagh, before recording dying declaration Exhibit-38, had asked Sunita about her name, address and in his deposition, in specific words he

deposed that he has verified, whether Sunita was in a condition to give a statement. It was his satisfaction that Sunita was talking properly and was in a condition to give statement, therefore, he has recorded dying declaration – cum FIR Exhibit-38. This satisfaction, of PW-3 Anil Wagh as per the decision in ***Rambai vs. State of Chhattisgarh*** (supra), was sufficient. It is to be noted that in FIR Exhibit-38, Sunita has clearly stated that accused had come under the influence of liquor, assaulted her by raising suspicion over character and poured diesel from the can on her person and set her on fire. Now, how the diesel was stored in a plastic can in the house and for what purpose, ought to have been then explained by the accused who was residing in that house. That explanation is absent. Thus, we do not find any suspicious circumstance around dying declaration Exhibit-38.

7. PW-1 Gangadhar, the Executive Magistrate has recorded dying declaration Exhibit-28 between 9.10 to 9.34 a.m. on 6th January 2013. He had given requisition letter to the medical officer, on the basis of requisition letter given to him by the police authorities. Now the objection has been raised that there is over-writing on his requisition letter Exhibit-27. It is to be noted that Exhibit-26 is the requisition letter by PW-3 PSI Anil Wagh. In his cross-examination, PW-3 Anil Wagh has explained

that accused had given wrong information and therefore, the entry about giving wrong information by the accused was also taken in the station diary at about 1.00 a.m. No doubt, that entry has not been produced by the prosecution, but explanation has been given. The landlord is also examined and taking into consideration the other contents it can be seen that the lady who had given the dying declaration was none other than the wife of the present appellant. Rather, giving wrong name shows the intention and conduct of the accused. Dying declaration Exhibit-28 is also alleging the same facts. No doubt, there are two thumb marks on dying declaration Exhibit-28 and it is not explained by PW-1 Gangadhar as to why two thumb marks were taken and it is also not mentioned of which thumb the same are. But we cannot say that only on that count Exhibit-28 needs to be discarded. Even if for the same of arguments we discard Exhibit-28, yet FIR, dying declaration Exhibit-38 has been proved beyond reasonable doubt. PW-7 Dr. Sunil has also proved the endorsement Exhibit-52 given on requisition letter Exhibit-27 and it is specifically stated by him that the patient was conscious, oriented and fit to give statement to Nayab Tahsildar. There is absolutely no inconsistency in both the dying

declarations. The learned trial Judge was justified in believing those dying declarations.

8. The evidence next in line is that of PW-2 Dr. Vikas Rathod who had conducted the autopsy. The fact that has come on record is that the incident has taken place on 5th January 2013 and Sunita died on 11th January 2013. The dead body was received around 7.00 p.m. on 11th January 2013, however, the postmortem has taken place between 10.00 to 11.00 a.m. on 12th January 2013. It is stated that Sunita has suffered 87% burns and the cause of death was "Septicemia due to burns". As aforesaid, the defence of the accused is that of bursting of stove. That means, accused is admitting that his wife Sunita had received burn injuries and she has succumbed to those injuries. In the cross-examination PW-2 Dr. Vikas has admitted that such injuries, which he has mentioned in Column No.17 of the postmortem report, are possible due to bursting of stove. However, mere suggestion is not sufficient. We will have to consider the testimony of PW-6 Ganesh, the landlord - cum panch to the spot panchnama. In his cross-examination there was absolutely no suggestion that there were indications at the spot regarding bursting of stove. Even the contents of spot panchnama Exhibit-49 would show that there was a stove in the

room but there were no signs in respect of bursting of stove. At the time of spot panchnama, it was noticed that there was a steel plate and there was *Khichadi* in it, so also the *Khichadi* had spilled on the floor. We can get the reference of the same in FIR Exhibit-38 wherein it is stated that after accused started assaulting Sunita, he had thrown the plate containing *Khichadi* towards her. Therefore, the contents of the spot panchnama does not support the defence.

9. At the cost of repetition, it can be said that the accused has not taken the plea of alibi. Under such circumstance, it will have to be presumed that accused was in his house (though it was rented) on 5th January 2013, around 8.00 p.m. and he was along with his wife. The wife sustained 87% burns in the said house. Under such circumstance, definitely it was for the accused to explain those circumstances in view of Section 106 of the Indian Evidence Act. The said explanation is not coming forward from the accused. The C.A. Reports, as stated earlier, support the dying declaration and the spot panchnama wherein diesel was found. Accused has also not explained as to how his clothes were having diesel residues. At the cost of repetition, once again it is to be noted that the accused has not explained as to whether he had called anybody to help and how he had

taken Sunita to hospital. Under such circumstance, whatever evidence that was adduced by the prosecution in this case, was sufficient to hold the accused guilty of committing murder of his wife, beyond reasonable doubt.

10. We would like to take help of the observations by the Hon'ble Supreme Court in ***Lakhan vs. State of Madhya Pradesh, (2010) 8 SCC 514***, wherein it has been observed that:-

“ The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/ duress/ prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance. ”

11. Thus, the prosecution has led cogent and consistent evidence. The learned trial Judge, after scrutinizing the same, has taken the probable and correct view. The appellant has failed to show perversity or illegality in the impugned Judgment. Hence there is merit in the present Appeal and it deserves to be dismissed.

12. Accordingly, the Appeal stands dismissed.

13. The fees of the learned Advocate Mr. Jaiswal, appointed to represent the appellant, is quantified at Rs.10,000/- (Rupees Ten Thousand), to be paid by the High Court Legal Services Sub Committee, Aurangabad.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE