

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

CRIMINAL APPEAL NO.76 OF 2023

Sow. Kewalbai W/o Shankar Shelhale,
R/o-Shekapur, Tq-Udgir, Dist-Latur.

...APPELLANT

VERSUS

1) Smt. Sunita Wd/o Narayan Shelhale,
Age-34 years, Occu:Household &
Grocery Shop,
R/o-C/o- Mr. Prashat Dagadu Pithale,
Kumarswamy Nagar, Near Canal,
Shirur-Anantpal, Tq-Shirur-Anantpal,
Dist-Latur,

2) The State of Maharashtra

...RESPONDENTS

...
Mr. S.S. Panale Advocate for Appellant.
Mr. A.V. Deshmukh, A.P.P. for Respondent No.2 - State.
...

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

DATE : 11th APRIL, 2023

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

1. Present Appeal has been filed by the legal representative of the deceased under Section 372 of the Code of Criminal Procedure to challenge the acquittal of respondent No.1 by the

learned Additional Sessions Judge-2 Udgir on 20th April 2022 in Sessions Case No.9 of 2021, from the offence punishable under Sections 302 and 504 of the Indian Penal Code. Present appellant is the mother of deceased Narayan Shelhale. Accused is the wife of deceased Narayan.

2. Prosecution story, in short, is that Narayan died on 8th June 2020 as a result of 90% burn injuries which he had suffered on 2nd June 2020 around 9.30 p.m., in his house situated at village Shekapur, Taluka-Udgir, District-Latur. When Narayan was admitted in Government Hospital, Latur around 2.00 p.m. on 3rd June 2020 his dying declaration has been recorded. In his dying declaration, he alleged that his wife had poured petrol on his person and set him to fire. Thereafter, his dying declaration was recorded by executive magistrate also on the same day i.e. 3rd June 2020. While undergoing treatment, he succumbed to those injuries on 8th June 2020, but in the meantime offence was registered under Section 307 of the Indian Penal Code and investigation was undertaken. During the course of investigation, panchnama of the spot was executed and statements of witnesses were recorded. After the death of Narayan, inquest panchnama was prepared and the dead body was forwarded for

postmortem. The cause of death was "septicemia in a treated case of burn". Thereafter, Section 302 of the Indian Penal Code came to be added. The seized articles were sent for chemical analysis. After the investigation was over, charge-sheet was filed and the case was committed for trial.

3. In all seven witnesses came to be examined by the prosecution to bring home the guilt of the accused, whereas the defence has examined son of the accused. After taking into consideration the evidence on record, the learned trial Judge has acquitted the accused.

4. Submissions on behalf of the appellant are that the learned trial Judge did not appreciate both the dying declarations which were clear enough in assigning role to the accused. Accused is the wife of the deceased and the incident had taken place inside the house at about 9.30 p.m. on 2nd June 2020. Therefore, in view of Section 106 of the Indian Evidence Act the burden is shifted on the accused to explain the circumstances in which her husband caught fire. Though DW-1 Yogesh was examined, his testimony is not trustworthy. As per the dying declaration which was recorded by the executive magistrate, DW-1 Yogesh had in

fact gone to the house of appellant, who is residing separately along with his brother Akshay. When Yogesh was not at all present in the house, his testimony cannot be relied upon. The bottle that was seized from the spot contained petrol, so also there were residues of petrol on the clothes of the deceased. The defence has tried to contend that the deceased was in the habit of drinking liquor and under the influence of liquor he had poured petrol on himself, from a bottle which was brought by him and then ablaze himself. The said story is unbelievable and therefore, detail scrutiny is required. Learned Advocate for the appellant, therefore, prayed for admitting the Appeal and taking action under Section 390 of the Code of Criminal Procedure against respondent No.1.

5. At the outset, it is to be noted that there are two dying declarations in this case and in order to prove both the dying declarations, prosecution has examined PW-3 Shahaji Shinde, Police Naik who recorded the dying declaration around 1.30 p.m. on 3rd June 2020 and completed it by 2.00 p.m. It has been treated as First Information Report (for short "FIR"). PW-5 Dr. Ashish is the medical officer who has given endorsement about the fitness of the deceased Narayan to give statement. Further,

though dying declaration was also recorded by the executive magistrate, he has not been examined, but PW-5 Dr. Ashish was the medical officer who has given endorsement on that dying declaration also. Then the prosecution has examined PW-1 Ranjana – sister of deceased and PW-2 Deelip – brother of deceased to whom Narayan is stated to have given oral dying declaration. Thus only Exhibit-25, the dying declaration recorded by the police appears to have been proved, however, bare perusal of the same would show that the thumb mark on the dying declaration has not been attested. The treating doctor was PW-5 Dr. Ashish but he has not produced the bed-head ticket. In his cross-examination, the medical officer has admitted that sister of Narayan was with him when the statement was recorded. That means, PW-3 had not taken care to see that the family members do not remain present near the injured while recording his statement. Further, in his cross-examination PW-5 Dr. Ashish has admitted that the lips of the patient had received burn injuries and the anterior portion of the patient was totally in burnt condition. It ought to have been brought on record that no sedative was given to Narayan when his statement was recorded.

6. Even if it is considered that dying declaration Exhibit-25 is proved, yet it has not been investigated by the investigating officer as to how the petrol was available in a bottle and from where accused had procured it. Exhibit-25 also shows that accused used to object to the habit of the deceased to drink liquor. It appears that much prior to the incident they were married and they had three children, but deceased got addicted to liquor six months prior to the incident, which was the reason for quarrel. Exhibit-25 further shows that accused had specifically told that if Narayan consumes liquor then he should not come to house. Further, on the day of incident Narayan had come to the house under the influence of liquor. Here, we will have to take note of the testimony of the son - Yogesh. The incident is stated to have taken place at about 10.30 p.m., and therefore, it was natural for DW-1 Yogesh to be in the house. At the time of incident, it appears that Yogesh was aged 11 years, which can be considered as an age of sufficient understanding. He has stated that his sister and brother were in the house of his maternal uncle but he was alone with his parents at Shekapur. He says that when his mother was cleaning utensils, suddenly the father took out petrol bottle from his bag, poured petrol on his person and set himself on fire. His mother was outside the

house, therefore, he ran towards mother and then he as well as his mother had tried to extinguish the fire. Of course, Yogesh says that his father had taken loan from various persons and therefore, father used to be under stress. But the fact remains is that, Yogesh has categorically stated that deceased had immolated himself.

7. Here, at this stage itself we would consider the contents of another dying declaration. In fact the writer of the same i.e. executive magistrate has not been examined by the prosecution for the reasons best known. The earlier dying declaration appears to have been recorded between 1.30 p.m. to 2.00 p.m. on 3rd June 2020, whereas the second dying declaration by the executive magistrate is said to have been recorded between 16.30 to 16.50 hours. In this second dying declaration, it is conveniently said that the children had gone to the house of present appellant i.e. mother of the deceased. This fact is missing in the first dying declaration. Another fact to be noted is that Exhibit-25 states that thumb mark of the right thumb was taken and PW-3 Police Naik Shinde has not explained as to why left thumb mark was not taken, which is usual practice. But then dying declaration recorded by executive magistrate states that

he has taken left hand thumb impression. Therefore, though the act assigned to the accused is same in both the dying declarations, yet the contents are different and with the presence of PW-1, the sister, the lacuna left has been tried to be patched up in the second dying declaration. The timings are also different in both the dying declarations. In first dying declaration Narayan states that he had come to house at 5.00 p.m. on 2nd June 2020 under the influence of liquor and after the quarrel he went asleep. He woke up at 10.30 p.m., after the wife poured petrol on him and set him to fire. However, in the dying declaration recorded by the executive magistrate, Narayan says that he came under the influence of liquor in the afternoon and there was a quarrel. Then he left the house around 3.30 p.m and came back around 6.30 p.m. Therefore, both the dying declarations are contradictory to each other and could not have been relied upon. Rather, the defence to the extent that Narayan might have set himself on fire under the influence of liquor, appears to be probable.

8. Though PW-1 Ranjana and PW-2 Deelip have stated that oral dying declaration was given to them, yet their cross-examination would show that it is all improvement that has been

made by them, as compared to their statement under Section 161 of the Code of Criminal Procedure. Therefore, PW-1 and PW-2 are also not trustworthy.

9. Though the postmortem report shows that Narayan died due to burn injuries, yet the prosecution failed to prove that it is homicidal death and therefore, the acquittal of the accused by the learned trial Judge was justifiable. No interference is required and the Appeal deserves to be dismissed.

10. The Appeal stands dismissed at the admission stage.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE