

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

908 APPLICATION FOR LEAVE TO APPEAL BY STATE NO.53 OF 2018

THE STATE OF MAHARASHTRA

VERSUS

RAJU KHAN S/O KHUDUS KHAN

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Mr. R.V. Dasalkar, APP for applicant

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

DATE : 23rd MARCH, 2023

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed seeking leave to appeal under Section 378(1)(B) of the Code of Criminal Procedure, 1973 challenging the Judgment and order dated 04.12.2017 passed by learned Additional Sessions Judge, Parbhani in Sessions Trial No.137/2010, thereby acquitting the respondent from the offence punishable under Section 302 of the Indian Penal Code, 1860.

2 Heard learned APP Mr. R.V. Dasalkar for the limited purpose as to whether case is made out for grant of leave. We have perused the

documents and depositions of the witnesses which were before the Trial Court.

3 The prosecution story, in short, is that the deceased Yasmin Begum was the wife of present respondent/accused and their marriage had taken place about six years prior to the incident. They have two children. There was quarrel between accused and deceased since about three days prior to the incident on domestic issue. Yasmin was of the opinion that as the accused was remaining out of the house and he was not taking care of herself and children, she used to ask him about the same and, therefore, on that count accused used to beat her. This information was given in the Dying Declaration that was recorded by Police Head Constable Mr. Kalapad. On the basis of said Dying Declaration initially offence under Section 307 of the Indian Penal Code vide Crime No.32/2009 came to be lodged on 28.02.2009, however, after Yasmin's death Section 302 of the Indian Penal Code came to be added. In her Dying Declaration, Yasmin had stated that she had prepared food in the evening on 19.02.2009, thereafter, all took dinner and went to sleep. Around 12.00 mid-night accused came in her room and, therefore, she woke up. At that time, she found that accused was holding kerosene bottle in his hand. He asked her, as to why she is quarreling with him on flimsy ground and then poured kerosene on her person. Some kerosene fell on the

oven, due to which the flames raised and her sari caught fire. In that process she received burn injury to her chest, left hand, stomach, back and thighs. She states that she then shouted and after hearing voice her parents-in-law came there, extinguished the fire and shifted her to Rural Hospital, Sailu. Thereafter, she was referred to Civil Hospital, Parbhani.

4 After the completion of investigation charge sheet came to be filed and in order to bring home the guilt of accused prosecution has examined in all eight witnesses. After considering the evidence on record the learned Additional Sessions Judge, Parbhani acquitted the accused.

5 PW 6 PHC Mr. Kalapad is the writer of Dying Declaration Exh.42, which has been treated as First Information Report, PW 5 Mohd. Khwaja Hashi Mohd Yusuf is the Special Judicial Magistrate, who had recorded the Dying Declaration Exh.33 and PW 8 Dr. Mohd. Zafar Iqbal Mohd Gous is the Medical Officer, who has been examined to identify signature of one Dr. Anjum, who had given the endorsement about the mental condition of deceased Yasmin. Thus, it is to be noted that the concerned Doctor who had examined and gave endorsement on both the Dying Declarations has not been examined and it is stated that she is not in service. However, PW 8 Dr. Gous has not stated as to where Dr. Anjum has gone and it appears that

conclusively it was not proved that Dr. Anjum could not be brought for evidence either physically or by way of video conferencing. Prosecution has tried to take help of **Section 67 of the Indian Evidence Act**, which states that -

“If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting”.

Here, it is to be noted that the person who had signed or wrote a particular endorsement is not denying that it is not in his handwriting or under his signature. If the presence of the witness cannot be procured within a reasonable time, then, the alternate mode of proof can be resorted to but it should be brought on record conclusively that it is impossible or next to impossible that presence of such witness cannot be secured within a reasonable time. Herein this case, it was the remark of a Medical Officer who had examined the mental state of a lady. It cannot be proved through PW 8 Dr. Gous, who was merely knowing the signature and handwriting of his colleague.

6 Though PW 6 PHC Mr. Kalapad has deposed as to how he has recorded the Dying Declaration Exh.42, important point to be noted is that

the thumb mark on Exh.42 is not attested at all. PW 5 Mohd. Khwaja, the Special Judicial Magistrate, who recorded Dying Declaration Exh.33 has stated that he recorded the said DD between 4.50 p.m. to 5.25 p.m., whereas DD Exh.42 is said to have recorded on 20.02.2009 at about 6.00 p.m. That means, Exh.33 was recorded prior in time. Still it was not considered as First Information Report. Investigating Officer has not explained as to why Exh.33 was not considered as First Information Report. PW 5 Dr. Mohd. Khwaja has also not stated that after recording the DD when he tendered it to the Police Station. In the cross-examination he has stated that after recording the statement he did not seal it with wax. He handed over copy of Dying Declaration to Police Officer in the Police Chowky, Civil Hospital, Parbhani, however, he does not know the name of this person. This would be done by him before he left Civil Hospital. Till 6.00 p.m. no action was taken. Another glaring fact is that Exh.33 is in Hindi, whereas Exh.42 is in Marathi. This difference in language speaks for itself. The DD will have to be taken in the language of the maker. If Exh.42 is the translation made by PHC Mr. Kalapad of the statements which were stated by deceased Yasmin in Hindi, then, Exh.42 cannot be considered at all. Another fact to be noted is that in Exh.33 it has been mentioned that she had given one more earlier Dying Declaration and it is stated by her that it was under the threat given by the accused she had said like that. Here, there is total suppression of that first Dying

Declaration by the prosecution. Exh.33 states that there is right thumb mark of deceased Yasmin. Why the right thumb mark was taken is not explained by PW 5 Mohd. Khwaja. With these discrepancies the learned Trial Judge was justified in discarding the Dying Declarations.

7 PW 1 Zakerabi Shaikh appears to be the aunt of deceased Yasmin. She has not supported her statement under Section 161 of the Code of Criminal Procedure. Permission must be granted to the prosecution to put questions in the nature of cross, however, nothing favourable has been extracted. PW 2 Farzanabi Shaikh is the mother of deceased Yasmin. She has also turned hostile. She rather says that when she went to see Yasmin in hospital and asked her about the incident, Yasmin replied that as her husband came late night she has ablazed herself.

8 Though we have discarded Exh.42, we can alternatively consider the contents of it, as to whether it was the case under Section 302 of the Indian Penal Code or not. In the said Dying Declaration it has been stated that when accused came to the room holding kerosene bottle he started asking deceased, as to why she is picking quarrels. He had then poured kerosene from the bottle on her person. At that time some amount of kerosene fell on hearth, which resulted in raising of flames and her clothes on

the person caught fire. If we consider together with these contents of the spot panchnama, then, the hearth is in another room and the place of offence i.e. room of the deceased is shown differently, therefore, taking into consideration this type of evidence the learned Trial Judge was justified in acquitting the accused. No case is made out to grant leave to appeal. Application stands dismissed, at the threshold.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)

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