

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.311 OF 2016

Swati w/o Parmeshwar Gaikwad,
Age 32 yrs., Occ. Labour/Household,
R/o Yenegur, Tq. Omerga,
Dist. Osmanabad.

... Appellant

... **Versus** ...

The State of Maharashtra
Through Police Station Officer,
Police Station, Murum,
Tq. Omerga, Dist. Osmanabad.

... Respondent

...

Mr. G.G. Kadam, Advocate for appellant

Mr. A.M. Phule, APP for respondent

...

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

RESERVED ON : 30th MARCH, 2023

PRONOUNCED ON : 19th APRIL, 2023

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

her conviction by learned Additional Sessions Judge, Omerga, Dist. Osmanabad in Sessions case No.43/2014 on 22.02.2016, thereby holding her guilty of committing offence punishable under Section 302 and 452 of the Indian Penal Code, 1860.

2 The prosecution story, in short, is – deceased Nilawati Suresh Gaikwad was residing with her husband and children at Yenegur (Rahul Nagar), Tq. Omerga, Dist. Osmanabad. She was admitted in Gangamai Hospital, Solapur in Burn Ward on 31.08.2014. Around 9.30 p.m. her Dying Declaration was recorded by PW 4 Police Head Constable Mr. Goroba Kadam of Yenegur Police Out Post under Murum Police Station. She disclosed that her husband is serving as Lineman with M.S.E.B. and his posting was at village Dalimb. Her cousin sister-in-law (wife of cousin brother of husband) i.e. accused had developed illicit relations with husband Suresh. She had also heard her husband talking with accused on phone and since then she had developed hate against accused. She had also quarreled with accused on phone. Accused had gone to her house on 08.08.2014. At that time, Nilawati had told accused that she should leave her house and should not be obstacle in their marital life. At that time, accused told her that she should go to her parental house, as she intend to cohabit with Suresh. Thereafter, again Nilawati had seen Suresh talking to accused and then accused and her

mother-in-law had threatened that they would implicate Suresh and see that he is removed from the service. Nilawati was in house around 8.00 to 8.15 a.m. on 30.08.2014. She was sitting near gas stove. Accused went there and started saying that she had given her limit of four days to leave the house, why she has not left. Nilawati asked her, as to why she should leave when she is legally married. Accused then told that she is the obstacle in the love and if she wants to stay there, she (accused) would kill Nilawati. Thereupon accused took the kerosene can from the house of Nilawati and poured the same on the person of Nilawati. She took the match stick from the kitchen, ignited a match stick and threw it on the person of Nilawati and ran away from the said place. Nilawati was wearing a polyester maxi (gown), which caught fire, she came outside the house and it was drizzling. She started shouting and fell down on the grass in front of gate. Her neighbour Mehraj Saipan Tamboli and Prabhavati Ambadas Igve extinguished the fire. Her husband had gone to purchase milk and he returned around 9.00 to 9.15 a.m. He made inquiry with her and made the arrangement for a vehicle. She was taken to Pofale Hospital, Omerga and then to Government Hospital, Omerga and then she was shifted to Gangamai Hospital, Solapur. She was conscious and then gave the Dying Declaration.

3 On the basis of aforesaid Dying Declaration, offence was

registered vide Crime No.86/2014 with Murum Police Station, for the offence punishable under Section 307, 452 of the Indian Penal Code and investigation was undertaken. The Executive Magistrate was also asked to take the Dying Declaration. Prior to that PW 7 Mr. Shrirang Madne, the Executive Magistrate recorded the Dying Declaration Exh.21. When Nilawati was admitted in Gangamai Hospital, MLC was given by the hospital authorities to Sadar Bazaar Police Station, Solapur.

4 During the course of the investigation panchnama of the spot was got executed, statements of witnesses were recorded, accused came to be arrested. While undergoing treatment Nilawati expired on 04.09.2014. After drawing the inquest panchnama, dead body was referred for postmortem. After the postmortem was conducted the Postmortem Report was collected by the Investigating Officer. The seized articles were sent for chemical analysis. After the completion of investigation charge sheet came to be filed.

5 After the committal of the case the trial was conducted. Prosecution has examined in all seven witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides the learned Trial Judge has held that the offence has been proved beyond reasonable doubt. The accused was convicted for the offence punishable

under Section 302 of the Indian Penal Code and was directed to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default to suffer rigorous imprisonment for two years. She was further held guilty of committing offence punishable under Section 452 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1,000/-, in default to suffer rigorous imprisonment for one month. Both the substantive sentences were directed to run concurrently and the set off has been granted under Section 428 of the Code of Criminal Procedure. Present appeal challenges the said conviction.

6 Heard learned Advocate Mr. G.G. Kadam for the appellant and learned APP Mr. A.M. Phule for the respondent and perused the evidence on record.

7 It has been vehemently submitted on behalf of the appellant that if the evidence is seen as it is, Exh.21 Dying Declaration recorded by Executive Magistrate was recorded prior in time. It is stated that it is recorded between 3.20 to 3.40 p.m. on 30.08.2014, whereas Exh.23 has been recorded around 9.30 p.m. on 31.08.2014 i.e. next day. Under such circumstance, offence ought to have been registered on the basis of Exh.21 and not Exh.23. Prosecution has not examined as to why the Dying

Declaration Exh.21 was not treated as First Information Report. In fact, prior to that, Gangamai Hospital had given MLC to Sadar Bazaar Police Station, Solapur, which is produced at Exh.20, in which also history was stated and name of the accused was written. MLC Exh.20 ought to have been treated as First Information Report, but prior to that as per the prosecution story and Exh.23 deceased was firstly taken to Pofale Hospital, Omerga and then to Sub District Hospital. What history was given at that place and who has given has not come on record. That means, there was suppression of fact. The family members got sufficient time to tutor Nilawati when they were taking her from Yenegur to Omerga and then from Omerga to Solapur. Reliance has been placed on the decision in **State of M.P. vs. Ratan Singh and others** reported in (2020) 12 SCC 630, wherein delay in lodging the First Information Report and willful suppression of actual first information received by the police were the points those were considered. Here, also there is delay in lodging the First Information Report and also suppression of what information was given at the two hospitals to which she was taken. In Exh.20 MLC and Exh.21 Dying Declaration there is no allegation that there was illicit relations between the accused and the husband PW 1 Suresh. However, such story appears to have been further developed when Dying Declaration Exh.23 was recorded on the next day. Under such circumstance, Exh.23 becomes doubtful. Exh.23 is silent on the point that if Nilawati was

suspecting the illicit relations since last about six months and then there was quarrel between her and the accused; yet, she has not lodged any complaint with the Police Station. Conviction cannot be based on doubtful Dying Declarations. The case of the prosecution, therefore, rests on circumstantial evidence, as there is no eye witness. Under such circumstance, those Dying Declarations should be proved by the prosecution beyond reasonable doubt. The postmortem report and the testimony of PW 5 Dr. Santosh Bhoi would show that deceased had received 73% burns. It would have been highly impossible to deceased to give the Dying Declaration. PW 6 Javed Tamboli is the panch to the spot panchnama, who has stated that about 4-5 match sticks were found at the spot. It is hard to believe that till igniting 4-5 match sticks deceased would not have done anything to save her. The prosecution failed to examine the Investigating Officer, who was one of the important witnesses, who could have thrown light on many aspects. Non examination of Investigating Officer is also fatal. Reliance has been placed on the decision in **Narayan Sadanand Rakshe vs. State of Maharashtra** [MANU/MH/0178/2022] decided by Single Bench of this Court on 20.01.2022 at Principal Seat, **Guna Mahto vs. State of Jharkhand** by Hon'ble Supreme Court reported in MANU/SC/0255/2023, **Munna Lal vs. The State of Uttar Pradesh** by Hon'ble Supreme Court in MANU/SC/0075/2023. In all these cases it has been held that the Investigating Officer ought to have been

examined. Relying upon the ratio in these decisions and for the above said reasons learned Advocate for the appellant prayed for setting aside the conviction of the appellant.

8 Per contra, the learned APP strongly opposed the appeal and supported the reasons given by the learned Trial Judge. It has been submitted that there is absolutely no suppression of material fact. PW 1 Suresh, who is the husband of deceased and accompanying Nilawati in both the hospitals at Omerga, has deposed that though she was taken there immediately, she was taken to Gangamai Hospital, Solapur. Rather he speaks about oral Dying Declaration given by Nilawati to him. No doubt, he has denied that there was illicit relations between him and accused; yet, the fact remains that even before him deceased Nilawati had disclosed that she was set to fire by accused. Prosecution has proved the MLC Exh.20, which was given around 12.00 noon on 30.08.2014, which was immediately after her admission. In the said MLC also name of the appellant is reflected. Thereafter Dying Declaration Exh.21 was taken. There also accused was blamed. At Exh.23 her Dying Declaration has been recorded by police, which is in detail. The Medical Officers, who had given endorsement on Exhs.21 and 23, are also examined and the Police Head Constable, who recorded the Dying Declaration Exh.23, has also been examined. Both the Dying

Declarations are consistent. There was motive for the accused to commit murder of deceased Nilawati as she wanted her to be eliminated as Nilawati was obstacle in the relationship between herself and PW 1 Suresh. The cause of death is burn injuries. The spot panch has supported the spot panchnama, which was inside the house. That means, accused had unauthorizedly entered the house of the deceased Nilawati. The evidence that has been produced by the prosecution was then sufficient to hold the accused guilty of committing murder. The learned Trial Judge has rightly convicted the accused.

9 Here, the prosecution case is based on two Dying Declarations. Admittedly, there is no eye witness. PW 1 Suresh is the person to whom the oral Dying Declaration was given immediately. According to PW 1 Suresh, he had gone for repairing work at Dalimb with the help of two labours around 8.30 a.m. on 30.08.2014. Phone call was received on the mobile of one Balaji Satpute, who was labour along with him, from the electricity office of Yenegur informing that his wife has received burn injuries. He states that he along with Balaji went to his house and found that his wife was lying to whom burn injuries were caused. He then took her to hospital. He says that at Dr. Pofale Hospital, Dr. Pofale was not available and, therefore, his wife was checked by Dr. Diggikar. Dr. Diggikar told him that condition of his wife

is serious and, therefore, he should take her to Government Hospital. He states that his wife was admitted to Sub District Hospital, Omerga, but after some time they asked her to be taken to Civil Hospital, Solapur. In the cross-examination there was a scope on behalf of the accused to ask him about the questions in respect of hospitals at Omerga. Only as regards the Dr. Pofale's hospital questions have been asked, but not in respect of Sub District Hospital, Omerga. When the opportunity was available it has not been taken; then, in that case now there cannot be an argument on behalf of the accused that the said material has not been brought on record. PW 1 Suresh has then stated about the oral Dying Declaration. No doubt, he has denied that there was any illicit relation between him and accused, but then he has stated that Nilawati had found him talking with accused and, therefore, there was suspicion in the mind of Nilawati about their affair. MLC Exh.20 has been proved through PW 2 Dr. Surekha Biradar, who was the Medical Officer in Gangamai Hospital, Solapur. She has specifically stated that one lady patient who had received burn injuries viz. Nilawati was brought about 12.00 noon on 30.08.2014. She found the patient conscious and she herself had given the history that when she was doing household work in her own house at village Yenegur, her cousin sister-in-law Swati Parmeshwar Gaikwad came in her house and raised quarrel and poured kerosene on her person and set her to fire. Accordingly, PW 2 Dr. Surekha recorded the said history and

prepared the MLC report and sent it to Sadar Bazaar Police Station, Solapur. Except the denial there is nothing in her cross-examination as regards the history that was taken in Exh.20. We agree that even MLC Exh.20 can be treated as First Information Report, but that should reach to Police Station. Exh.20 was given to Sadar Bazaar Police Station, Solapur, whereas the offence where it ought to have been registered i.e. Murum Police Station it has not been received. If we consider Exh.20, even in that also the condition of the patient has been stated to be conscious. There is no reason to disbelieve this piece of evidence.

10 Exh.21 Dying Declaration is the first in time (in respect of the written Dying Declarations are concerned which were recorded as per the narration). Exh.21 is stated to be recorded between 3.20 to 3.40 p.m. on 30.08.2014. The endorsement at Exh.20 has been proved through PW 2 Dr. Surekha. It can be seen from the said Dying Declaration that there is specific mention that as the accused had poured kerosene on the person of Nilawati and ablazed her, the Nilawati had sustained burn injuries. PW 7 Shrirang Madne, the then Naib Tahsildar had recorded Exh.21. Much objection has been raised, as to why Exh.21 has not treated as First Information Report. Important point to be noted that PW 7 Shrirang Madne was posted as Naib Tahsildar in the office of Collector, Solapur on that day. After recording the

said Dying Declaration he would have transmitted it to the Police Station who made request to him to record the Dying Declaration. In his examination-in-chief he has stated that police from Sadar Bazaar Police Station, Solapur had given him letter and requested him to record the Dying Declaration of one burnt lady, who was admitted in Gangamai Hospital, Solapur. In the examination-in-chief he has not stated when he forwarded the Dying Declaration recorded by him to Sadar Bazaar Police Station, but this fact has not been extracted in the cross-examination of this witness also. Again we would like to say that when the Dying Declaration was recorded in Solapur and the offence first committed within the jurisdiction of Murum Police Station, then unless Exh.21 would have reached the said Police Station, there would not have been registration of the First Information Report. We do not find much substance in the said point. The said Dying Declaration bears the thumb mark of deceased Nilawati and it has been properly attested by PW 7 Shrirang Madne.

11 PW 4 PHC Mr. Goroba Kadam has recorded Dying Declaration Exh.23, which was treated as First Information Report. PW 4 in his testimony has stated that around 5.00 p.m. on 31.08.2014 API Mr. Shirsat gave him oral direction that he should go to Gangamai Hospital, Solapur and record the Dying Declaration of Nilawati. He went to Solapur by S.T. Bus and reached

Gangamai Hospital around 9.00 p.m. He has thereafter recorded the said Dying Declaration Exh.23 and in this Dying Declaration Nilawati has stated all those details which have been narrated by us in paragraph No.2. Important point to be noted is that the endorsement at Exh.23 by PW 3 Dr. Santosh Gaikwad is only at the end. But in his testimony PW 3 Dr. Santosh had stated that even before starting of Exh.23 he had examined Nilawati and found her fit to give statement, conscious and oriented. No question was put to him in the cross, as to why he had not given endorsement in the beginning. Again, at the costs of repetition, we would like to say that when there was opportunity to extract the truth, no attempt has been made, then, advantage cannot be sought on the basis of that lacuna. As regards the Dying Declaration is concerned, it is settled law that there is no necessity of endorsement by a Medical Officer. It is rather a rule of caution. When the concerned Doctor, who was on duty, deposes that even in the beginning he had examined the patient and found the patient to be conscious, oriented and fit state to give statement, then, that is sufficient. PW 4 PHC Mr. Goroba Kadam in his examination-in-chief has also stated that though the Doctor orally asked him to proceed after examining Nilawati, he himself had also asked certain questions i.e. name, age, occupation, address etc. He found her to be in fit state to give statement. That satisfaction is also sufficient for the writer to take down the statement of the person on the death bed. Further, it

is to be noted that when Exh.23 was recorded, at that time, there was bandage to her hands and, therefore, the thumb mark of left toe has been taken. We do not find there was any reason to disbelieve Exh.23. PW 4 was the police person from Yenegur Out Post under Murum Police Station and, therefore, after going back to Police Station he has registered the Exh.23 as First Information Report. This is the reason as to why Exh.23 has registered as First Information Report and not Exh.21. Another aspect we would like to consider is that the Postmortem Report gives percentage of the burns which was found on the dead body. As regards head, neck and face is concerned, it is 00%, upper limb right was 6% and left was 6%. Therefore, when there was no burn injuries to the head, neck and face, there would not have hurdle for Nilawati to speak.

12 Unfortunately, Nilawati expired on 04.09.2014 and the death is due to burn injuries. Therefore, there is sufficient evidence to hold that her death was homicidal in nature. As per Exh.23 and the spot panchnama, which has been got proved through PW 6 Javed Tamboli, the incident has taken place in the kitchen. In Exh.23 it is stated that she was sitting near the gas stove and after the quarrel accused poured kerosene on her person. Possibility of use of certain match sticks prior to the arrival of accused by the deceased herself for preparing food cannot be ruled out. It cannot be

interpreted merely because there were 4-5 match sticks that accused would have tried to ignite them and there would have been some time to the deceased to escape. Such theory has also not been developed before the Trial Court and, therefore, it cannot be considered for the first time in appeal. When it is the act of pouring kerosene and then ablazing a person, then, definitely, there should be knowledge to the person doing such act that the person who has been set to fire would die and, therefore, it was the murder of Nilawati. We would like to consider an answer to question No.20, as to why the prosecution witnesses were deposing against her; accused has answered that a month prior to incident there was quarrel between herself and Nilawati, she has no concern with her husband (Suresh), she has been falsely implicated. It is to be noted that accused has not given the reason behind the quarrel between herself and Nilawati, which had allegedly taken place a month prior to the incident. If that quarrel would have been trifle, there would not have been reason for implicating her.

13 Much stress has been laid by the learned Advocate for the appellant that the Investigating Officer has not been examined in this case. No doubt, there cannot be a different opinion than the ratio that has been laid down in the above said authorities. However, in each and every case it will not be fatal to the prosecution. What prejudice has been caused to the

accused by non examination of the Investigating Officer has not been clarified by learned Advocate for the appellant. There is a pursis at Exh.34 filed on behalf of the prosecution. It was informed that API Mr. Shirsat, who had conducted the investigation and then transferred as Police Inspector to Sailu Police Station, Dist. Parbhani, has undergone bypass surgery. There are no omissions or contradictions in the evidence of PW 1 Suresh and, therefore, there is no necessity to examine the Investigating Officer. This reason appears to be proper. Even after the said pursis accused appears to have not insisted the learned Trial Judge that it should secure the presence of the Investigating Officer. Now, the accused cannot be allowed to raise the said point.

14 Thus, taking into consideration the evidence on record and the reasons above stated, we conclude that the prosecution had proved the guilt of the accused beyond reasonable doubt. We do not find the findings of the learned Trial Judge perverse or bad in law. There is no necessity to interfere as there is no merit in the present appeal. Appeal, therefore, stands dismissed.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)