

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 440 of 2016

Salim Kasam Shaikh }
Age : 28 Years, Occu. : Labourer, }
R/o. : Tuljapur Peth, Tisgaon, }
Taluka : Pathardi, }
District : Ahmednagar } ... **Appellant.**
(Orig. Accused)

Versus

The State of Maharashtra } ... **Respondent**
(Orig. Complainant)

.....
Mr. Soheli E. Siddiqui, Advocate for Appellant.
Mr. R. D. Sanap, APP for Respondent - State.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 11th JANUARY, 2023.

JUDGEMENT (ABHAY S. WAGHWASE, J.) :

1. By invoking section 374 of the Code of Criminal Procedure (Cr.P.C.), original accused – appellant is questioning the Judgment and order dated 22.07.2014 passed by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No. 33 of 2013, by which appellant is convicted for offence under section 302 of Indian Penal Code (IPC).

2. The facts giving rise to the case are as under :-

Deceased Parveen was married to accused six months prior to the

incident. According to prosecution, accused was involved in scrap business and was in the habit of consuming liquor. After consuming liquor, he used to beat Parveen raising suspicion about her character. He also demanded Rs.20,000/- and on such count there was cruelty and harassment to Parveen. On 27.10.2012, in above backdrop, accused-appellant poured kerosene on her person and incinerated her. In the said episode, Parveen suffered more than 91% burn and was therefore shifted to hospital, where PW-3 Gorakshanath – a Special Judicial Magistrate visited the hospital and after seeking opinion of Doctor about fitness of patient, he recorded dying declaration at Exhibit-29. On the strength of which, crime bearing No.349 of 2012 was registered.

3. PW-9 Indrabhan who was posted at Pathardi Police Station was entrusted with the investigation, during which he gathered dying declaration (Exh.29) and other papers, visited the spot and drew its panchanama. On the spot, he also seized match-box, bottle of kerosene and clothes of lady. Seizure was deposited in Malkhana by drawing receipt. He gathered hospital papers and after death of Parveen, her body was sent for autopsy. Post-mortem report was collected, seizure was sent to analysis and after completing the investigation, charge-sheet came to be filed.

4. After recording statement of accused under section 313 of Cr.PC., learned trial judge heard both sides and on evaluating the oral and documentary evidence, reached to the finding that prosecution has succeeded

in establishing charge under section 302 of IPC. However, learned trial Judge further held that the prosecution failed to bring home charge against the accused for commission of offence under Sections 498-A, 323, 504 and 506 of IPC and thereby acquitted them for the same.

Therefore, feeling aggrieved by the order of conviction under section 302 of IPC, appellant – accused has now approached this Court by filing instant appeal.

5. In view of the Judgment of Hon'ble Apex Court in the case of *Ishvarbhai Fujibhai Patni Vs. State of Gujarat; (1995) 1 SCC (Cri.) 222*, this Court by entertaining the appeal under section 374, being first appellate court, is required to re-evaluate, reanalyze and re-appreciate the evidence on record and therefore, we proceed to do so.

6. Prosecution has relied on following witnesses:-

PW-1 Dr. Ashok is the autopsy Doctor who conducted post-mortem and issued PM Report (Exhibit-24). **PW-2** Satish is the spot panch, who identified panchanama (Exhibit-26) and the articles seized in his presence. **PW-3** Gorakshanath is the Special Judicial Magistrate, who recorded dying declaration of deceased Parveen (Exhibit-29). **PW-4** Dr. Surekha Gaulkar is the Doctor, who certified the fitness of deceased Parveen for statement. **PW-5** Abdul Karim Ibrahim Raje is the ASI of Topkhana Police

Station, who issued communication addressed to Doctor to examine and issued certificate. **PW-6** Halima Shaikh is the mother of deceased, **PW-7** Mukhtar is the brother-in-law and **PW-8** is the sister of deceased. **PW-9** Indrabhan is the Investigation Officer.

SUBMISSIONS

On behalf of Appellant that :

7. Learned counsel for appellant would point out that there is no eye witness in this case. Case of prosecution is based on dying declaration. However, according to him, the said dying declaration (Exhibit-29) does not inspire confidence. Taking us through the dying declaration, it is pointed out that dying declaration is cryptic and ambiguous. According to him, what triggered the incident has not been narrated by deceased. According to him, it is fairly settled that dying declaration is weak type of evidence and should not be accepted and acted upon unless there is sufficient corroboration from independent corners and according to him, precisely the same is missing from the prosecution case. He further submits that on going through the evidence of the Special Judicial Magistrate, it is clearly seen that necessary care and precaution has not been taken while recording dying declaration. That, care has not been taken to see that there is no tutoring to the deceased wife. There is no inward and outward number over the dying declaration and it is his submission that dying declaration is fabricated one drawn merely to suit the story of prosecution. It is his further submission that there was no previous

complaint of any harassment against accused-appellant. It is emphasized that accused himself had suffered burns after he found his wife had suffered accidental burns. That, his such conduct itself shows that there was no intention to commit murder. He further submitted that taking into consideration the degree of burns, it is doubtful that deceased was able at all to give any dying declaration. He pointed out that it is pertinent to note that there is no material about ill treatment and demand in the said dying declaration, but in spite of that charges to that extent are also levelled and as such it is false implication.

Taking us through the evidence of autopsy Doctor, it is submitted that very medical expert has admitted that he is not in a position to tell whether death was homicidal, suicidal or accidental and as such it is submitted that with such version coming from medical expert, learned trial court ought not to have held death to be homicidal and further ought not to have convicted accused for charge of murder. While concluding his submission, it is submitted that, learned trial court has failed to consider and appreciate that prosecution had not brought cogent, reliable and trustworthy evidence on record. Only piece of evidence was dying declaration and it being doubtful in nature, ought not to have made basis for conviction. Consequently, he prays to allow the appeal by setting aside the judgment and order of conviction.

8. In answer to above, learned APP would submit that occurrence was of 27.10.2012. That, investigating machinery has collected evidence as to show that the accused was in the habit of consuming liquor and he used to not only suspect the character of his wife, but even to put up a demand of money. On such count, he used to beat her, harass her and subject her to cruelty. According to learned APP, mother and brother-in-law of the deceased have spoken about it into the witness box. Moreover, deceased person has given dying declaration, wherein she has clearly stated that accused poured kerosene and ignited her. That, only when the neighbours rushed to the spot, accused tried to douse the fire. In fact, he had set his wife on fire. Dying declaration was recorded after following due procedure, and as such the same cannot be doubted. It is free from doubt. Nothing adverse has been brought in cross-examination of PW-3 Gorakshanath , who recorded dying declaration. It is submitted that though deceased had suffered 91% burns, only after examination by doctor available on duty, dying declaration was allowed to be recorded, wherein she had named husband to be responsible for the burns suffered to her. Her such dying declaration inspires confidence. There is no reason to disbelieve it. Mother and brother-in-law of deceased have also stated in the witness box about the conduct and behaviour of accused regarding suspecting character of his wife, beating her and moreover, he used to demand money from her. In such backdrop, deceased was set to fire. Unfortunately, wife succumbed to the burn injuries. Death is only because of

homicidal burns and therefore, learned trial Judge has considered oral and documentary evidence in its proper prospective and has committed no error whatsoever in recording guilt and as such it is prayed that there being no merits in the appeal, the same be dismissed.

9. We have heard both sides.

10. We have also examined the evidence adduced by prosecution in the trial court and we have also carefully gone through the cross-examination conducted by defence. Admittedly, the case is solely based on dying declaration.

11. Law is fairly settled that when the case is based on dying declaration, court has to assess the dying declaration by circumspection and only if the dying declaration inspires confidence of the Court, and it is found to be truthful and voluntary, i.e. without any element of tutoring, only then it has to be accepted and acted upon. Such law on this point is time and again settled by various pronouncements and we would like to name few Judgments which are as under :-

- “(i) *Laxman Vs. State of Maharashtra; AIR 2002 SC 2973.*
- “(ii) *Ganpat Bakaramji Lad Vs. State of Maharashtra; 2018 ALL MR (Cri) 2249.*
- “(iii) *Balbir Vs. Vazir; (2014) 12 SCC 670*
- “(iv) *Paniben Vs. State of Gujarat; (1992) 2 SCC 474*
- “(v) *Bhajju Vs. State of M.P; (2012) 4 SCC 327*
- “(vi) *Puran Chand Vs. State of Haryana; (2010) 6 SCC 566”*

12. Dying declaration in question is at Exhibit-29. We have minutely gone through the same. This dying declaration is recorded by PW-3 Gorakshanath, the Special Judicial Magistrate, who has in his evidence before the Court at Exhibit-27 stated that he had received communication from Tophkhana Police Station to go to record dying declaration of Parveen Salim Shaikh, who was admitted in the hospital. He has stated that, initially he approached Doctor Gaulkar and after informing her about the purpose of recording dying declaration, he requested her to examine patient to ascertain whether the patient was in a position to give dying declaration. He stated that in his presence, Doctor examined the patient and certified that she is conscious and ready to give statement. Witness PW-3 Gorakshanath also claims in his evidence that, he also put some preliminary questions to the patient. He claims that when he asked patient Parveen as to how incident took place, according to him, she told him that on 27.10.2012 at 9.00 p.m., her husband gave abuses and beat her and thereafter poured half bottle of kerosene over her shoulders and ignited her. Her clothes caught fire and her husband had already locked the door from inside. Later on, he poured water on her and opened the latch of house and thereafter husband ran away. This witness had identified the dying declaration recorded by him at Exhibit-29.

13. On examining the dying declaration it seems to be in question answer form. Initially questions are regarding name, place of residence and

village, capability to speak and understand Marathi, who are residing with her, to which she answered that only she and her husband reside together. To the question as to how the incident occurred, answer is noted that on 27.10.2012, at night, around 9.00 p.m., her husband gave abuses and beat her and poured kerosene over her shoulders and then ignited her. She stated that hearing her shouts others came there and at that time only, her husband tried to douse the fire by throwing water. That, initially he had locked the door and subsequently, he opened. She stated that parents-in-law and brother-in-law took her to the hospital. She stated that her husband fled from there.

14. On careful consideration of the dying declaration, it appears that text material is tried to be squeezed by making insertions. Such inference gets drawn as initially certification / remark of the Doctor is obtained in the middle and at the foot of the dying declaration and available space is tried to be used for noting the alleged dying declaration. We have also come across that what preceded alleged episode of fire and burns has not been stated by the informant. What triggered the incident is also conspicuously not finding place in the dying declaration and there are direct allegations about husband coming, abusing, beating and pouring kerosene, but on what count is unfortunately not narrated by the deceased. Admittedly, deceased had suffered 91% burns, which are superficial to deep in nature. Alleged occurrence is of 27.10.2012 and dying declaration is shown to be recorded on 28.10.2012.

Thus, there is no attempt to record dying declaration promptly. What treatment was given to her by that time is not proved, to rule out administration of sedative, which is generally given in such serious cases of burn. PW-3 Gorakshanath seems to have admitted that he was not carrying any document to show that he was Special Judicial Magistrate at that relevant time. He further admitted that there is no inward and outward number over the dying declaration. He is unable to state whether relatives of Parveen were present when he went.

15. Allegations levelled by the mother and brother-in-law about suspicion of character, abusing and beating her after getting drunk, are not stated in the dying declaration. Statements of neighbors are also not recorded, who allegedly came to her rescue. Mother has admitted in cross that her statement was recorded by police after 20-25 days. Therefore, here except dying declaration which is cryptic and devoid of details about the occurrence, there is no support from independent corners. With such quality of dying declaration, learned trial court ought not to have held that deceased had died because of homicidal burns, more particularly, when autopsy Doctor himself was not in position to state as to whether death is homicidal, accidental or otherwise.

16. Here, it is pertinent to note that defence has come with a very specific case that burns were accidental one and her husband has tried to save

his wife and he too has suffered burns and therefore, his conduct ought to be taken note of. Though in dying declaration it is informed by deceased that husband set her on fire and after others came to the scene of occurrence, he tried to douse the fire by pouring water. Therefore, deceased also admits that husband tried to save her. The statement that only because neighbours had come, husband acted in such manner to show that he was saving her is mere inferential. Here, Very Investigating Officer in cross-examination has admitted that investigation revealed that in the alleged incident accused had also suffered burn on his right hand and right knee and the injury certificate at Exhibit-49 to that extent shows that accused had also suffered 16% burns. Therefore, it is clearly emerging that accused had also tried to douse the fire over his wife and he himself had become a victim of the burns to the extent of 16%. Therefore, defence has substantially demonstrated that accused tried to save his wife. It is also pertinent to note that non-explanation of injury to the accused by the prosecution requires to be viewed against the prosecution.

17. In the totality of above discussed circumstances, this case is solely based on dying declaration, however unfortunately it is failing to inspire confidence of this Court. Evidence of relatives are recorded at extremely belated stage. Accused has also suffered burns which signifies his conduct and behaviour that he tried to save her.

Resultantly, there was no material before the learned trial Judge to hold accused guilty for causing homicidal burns. After considering judgment under challenge, in our opinion, undue importance has been given to the sole dying declaration which in fact is devoid of details as to why she was incinerated and on what count. This Court is not taking the contrary view just because raised in appeal. We are aware of the position of law that merely because two views are possible, the appellate Court cannot take contrary view to the view taken by the learned Trial Court. In fact, the discussion above-said would demonstrate that learned Trial Judge had failed to appreciate the evidence on the settled position of law, hence, this Court is constrained to take the other view. For above reasons we are constrained to interfere and accordingly we proceed to pass the following order :

ORDER

- (i) Criminal Appeal stands allowed.
- (ii) The conviction of the appellant - Salim Kasam Shaikh in Sessions Case No. 33 of 2013 on 22.07.2014 by the learned Additional Sessions Judge, Ahmednagar by holding him guilty of committing offence punishable under section 302 of Indian Penal Code, stands set aside.
- (iii) The appellant be set at liberty, if not required in any other case.

- (iv) It is made clear that there is no change in the rest of the order passed by the learned Additional Sessions Judge, Ahmednagar.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)