

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.173 OF 2019

The State of Maharashtra
Through Police Station, Sillod,
Tq. Sillod, Dist. Aurangabad.

... Applicant

... Versus ...

Shaikh Saleem Shaikh Yasin,
Age 33 yrs., Occ. Labour,
R/o Sillod, Tq. Sillod,
Dist. Aurangabad.

... Respondents

...

Mr. S.J. Salgare, APP for applicant

...

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

RESERVED ON : 21st SEPTEMBER, 2023

PRONOUNCED ON : 29th SEPTEMBER, 2023

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

1 Present application has been filed by the prosecution seeking
leave under Section 378 (1)(b) of the Code of Criminal Procedure, 1973 to

file appeal challenging the judgment of acquittal dated 19.11.2018 passed by learned Additional Sessions Judge, Aurangabad in Sessions Case No.336/2011, thereby acquitting respondent i.e. original accused from the offence punishable under Sections 302, 498-A, 307 of the Indian Penal Code, 1860.

2 Heard learned APP Mr. S.J. Salgare for the applicant and with his help we have gone through the record which was available before the learned trial Judge.

3 It is not in dispute that present respondent – original accused is the husband of deceased Firdos. They got married about six years prior to 17.05.2011. It is also not in dispute that Firdos had sustained burn injuries around 9.30 a.m. on 17.05.2011 and was admitted to Government Medical College and Hospital, Aurangabad. Accused and Firdos were the resident of Sillod, Dist. Aurangabad. They have son aged 04 and daughter aged 01. Accused has five brothers who are residing separately.

4 The prosecution has come with a case that after Firdos was admitted to G.M.C. & H., Aurangabad, her dying declaration was recorded by PW 2 Subhash Punjaji Kandoje, then police person attached to Sillod City Police Station. On the basis of the said dying declaration Exh.29 offence vide

Crime No.45/2011 came to be registered under Section 498-A, 307 of the Indian Penal Code. PW 1 Pralhad B. Ghule, the then Special Judicial Magistrate was requested to record her dying declaration. Accordingly, he recorded dying declaration Exh.25 on the same day i.e. 17.05.2011 between 4.00 to 4.30 p.m. Panchnama of the spot was carried out. It appears from the record that Firdos was discharged on 19.08.2011 but was again brought to Government Medical College and Hospital, Aurangabad on 19.09.2011. Thereupon she was declared dead. Inquest panchnama was carried out and the dead body was sent for the postmortem. Statements of witnesses have been recorded, postmortem report was collected, accused came to be arrested and after the completion of the investigation charge sheet was filed.

5 After the committal of the case to the Court of Sessions, prosecution has examined in all 08 witnesses to bring home the guilt of the accused. After considering the evidence of the witnesses and the material on record learned trial Judge has acquitted the accused from all the sections. Hence, the present application is filed by the prosecution seeking leave to file the appeal.

6 It has been vehemently submitted on behalf of the prosecution that the learned trial Judge has not appreciated the evidence properly. Both

the dying declarations have been proved by the prosecution by examining the Police Officer and the Special Judicial Magistrate, who had recorded the respective dying declarations, so also the prosecution has examined the Medical Officer, who had given the endorsement on both the dying declarations. The mental status of Firdos at the time of giving dying declaration was fit, proper and, therefore, the dying declarations ought to have been given importance. Conviction can be based on the dying declarations. Specific role was attributed to the accused. He had poured kerosene on the person of deceased and then had set her to fire. The postmortem report shows the probable cause of death as - "Septicaemic shock due to burns". Deceased was subjected to cruelty and then set to fire, therefore, prosecution had proved the offence beyond reasonable doubt. Matter, therefore, needs re-appreciation of evidence.

7 Here, principally, we agree to the submissions on behalf of the prosecution that dying declaration can form the basis of conviction, however, the said principle comes with a rider. Unless the dying declaration passes through the golden principles laid down by the Hon'ble Supreme Court in various decisions and it is trustworthy, it cannot form as a basis for conviction. The circumstances should be, therefore, brought on record in that way.

8 Here, in the present case, though prosecution has addressed Exhs.29 and 25 as dying declarations; yet, the learned trial Judge has held that those statements are not complying with the requirements under Section 32(1) of the Indian Evidence Act. Here, the important point to be noted is that alleged dying declarations were recorded on 17.05.2011; yet, the fact has come on record that deceased Firdos was discharged on 19.08.2011. Then, after a month she was again admitted to hospital on 19.09.2011 and then she was declared dead. PW 5 Dr. Husain Shabbir is the Medical Officer in GHATI, Aurangabad, who had given the remarks on the declarations and PW 6 Dr. Mahesh Jambure is the Medical Officer, who had conducted the autopsy. When the incident had taken place on 17.05.2011 and she was discharged on 19.08.2011, unless it would have been shown that the reason for the discharge was something different, there is scope to believe that as her health improved, she was discharged. Then, all of a sudden within a month what happened, so that she should be brought once again and within a day she would expire, has not been explained by both the medical experts. No Medical Officer, who had examined Firdos on 19.08.2011, has been examined. In order to attract the provisions of Section 32(1) of the Indian Evidence Act the prosecution should show the proximity between the incident and death. Here, that part itself is missing. In fact, there are various reasons for septicemia. PW 6 Dr. Mahesh has given the injuries those were

noted by him on the person of Firdos and then he says that all the injuries were antemortem in nature. In the cross-examination he has said that it depends on the condition of the patient, whether he becomes unconscious or not. His testimony is silent and it appears that he was not made aware about the discharge of Firdos a month earlier from the hospital. If in the house proper care has not been taken regarding the wounds, that may also lead to septicemia. None of the family members of the deceased have been examined, who were looking after deceased. PW 3 Syed Mobin Syed Usman Ali and PW 4 Hasina Begum Syed Usman Ali are the brother and mother of deceased Firdos. They both have turned hostile. They have denied the suggestions regarding the allegations of setting Firdos to fire was by accused or any oral dying declaration was given to them by deceased. Prosecution has not examined any other person on the point of oral dying declaration. Thus, those circumstances, which led death of Firdos, have not been established. Prosecution failed to bring the proximity on record and, therefore, those two statements cannot be termed as dying declarations as contemplated under Section 32(1) of the Indian Evidence Act.

9 When the two documents go out of the purview of Section 32(1) of the Indian Evidence Act, there is no importance to those documents though the persons who recorded those statements have been examined by

the prosecution.

10 Even if for the sake of argument we accept that those statements can be considered under Section 32(1) of the Indian Evidence Act and those documents i.e. Exhs.29 and 25 have been duly proved; yet, we can see the variance between those two documents. Exh.29, the Dying Declaration-cum-First Information Report tries to spell out as to what was the reason for the accused to commit the said crime. Exh.29 gives the reason but Exh.25 is silent on the point. In Exh.29 it is stated that when the deceased and the accused were at home, accused asked deceased that why she had not ironed his clothes when they were at Aurangabad (where the father of the deceased is residing) two days prior to 17.05.2011. Even if we take the said word as it is; yet, that reason or that act of not ironing the clothes had taken place two days prior to the incident, which cannot be then tagged to the incident. It is further stated that after saying so, accused had abused her and went outside. He returned around 9.30 a.m. and again started abusing in filthy language. Thereafter, he took out a plastic bottle containing kerosene and poured on her person. At that time, she thought that it is a joke and, therefore, did not raise hue and cry, but when he ignited the matchstick and threw on her, she realized that it was with a purpose to commit her murder. The details are absent in Exh.25, but it is said that accused came at home around 10.00 a.m.,

abused her (for what reason has not been stated), he poured kerosene on her person, which she found to be a joke and, therefore, did not raise voice, but when the burning matchstick was thrown and her clothes caught fire she raised hue and cry. She says that the reason behind setting her to fire was suspicion. As aforesaid, the brother and the mother of deceased have turned hostile. They have not stated that deceased used to share her sorrow with them whenever she used to visit their place. In their cross they admit that deceased was with them for a month after her discharge and still they have maintained that she has not disclosed anything to them. Under the said circumstance, we cannot place reliance on those two dying declarations.

11 At the cost of repetition, we would say that prosecution has not examined the treating Doctor to bring on record what was the state of health of deceased when she was discharged and also the prosecution has not examined the Medical Officer who examined her after she was again admitted to the hospital. Therefore, when the proximity is not coming on record the learned trial Judge was justified in acquitting the accused. The application is devoid of merits. Hence, rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)