

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

CRIMINAL APPEAL NO.814 OF 2015

Kashinath S/o Potanna Pitlewad,
Age-35 years, Occu:Labour,
R/o-Indra Market, Modhadi (Bk),
Kinwat, Tq-Kinwat, Dist-Nanded.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Santosh C. Bhosle Advocate for Applicant.
Mr. R.V. Dasalkar, A.P.P. for Respondent-State.
...

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

DATE: 5th JANUARY 2023

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

1. The appellant is the original accused No.1 who was prosecuted in Sessions Case No.23 of 2013 before the learned Sessions Judge, Nanded. The appellant has been held guilty of committing offence punishable under Sections 302 and 498-A of the Indian Penal Code, by Judgment and order dated 14th August

2014 by the learned Sessions Judge, Nanded, hence this Appeal.

2. Heard learned Advocate Mr. Bhosle appearing for the appellant and learned APP Mr. Dasalkar appearing for the respondent – State.

3. It has been vehemently submitted on behalf of the appellant that the allegation against the appellant is that he has committed murder of his wife by pouring kerosene on her person. In fact, at the time of trial, the brother and mother of the appellant were also made an accused, however, they have been acquitted. The offence came to be registered on the basis of the First Information Report (for short "FIR") which was in fact a dying declaration given by the deceased and initially the offence came to be registered under Section 307 and other Sections, however, later on the informant succumbed to her injuries and therefore Section 302 of the Indian Penal Code came to be added. It is not in dispute that present appellant was married to informant Muktabai about four years prior to the incident i.e. 23rd August 2012. She was residing with appellant, brother-in-law, sister-in-law and mother-in-law. The case of the prosecution is based on two dying declarations which were recorded on 24th August 2012, almost consecutively. The dying

declaration Exhibit-51 is recorded by the police head constable on duty at the hospital and dying declaration Exhibit-52 is recorded by Special Judicial Magistrate. The learned trial Judge has given unnecessary weightage to these two dying declarations and failed to consider that in the medical evidence it has come on record that neck, head and upper part of the body of the deceased had received major burn injuries. The trunk – anterior and posterior had received 16% burns each. Head, neck and face had received 6% burn injuries and including the other burn injuries, the total injuries the deceased had received comes to 56%. The cause of death is “septicemia due to burns”. Muktabai expired on 30th August 2012. Further, on 24th August 2012 itself the relatives of the deceased had taken discharge of the patient against the medical advice and it has come on record that she was admitted to private hospital. However, the doctor at that place i.e. private hospital has not been examined by the prosecution. It ought not to have been therefore considered, taking into consideration the probable cause of death, that the death was homicidal in nature. Further, there were burn injuries to the accused also, which were not explained by the prosecution.

4. Learned Advocate for the appellant further submitted that PW-1 Nagorao Munde, who was the panch to the spot panchnama and PW-2 Arun Kamble, who is the neighbour of the accused, have turned hostile. PW-3 Govind Dantalwad is the panch to the disclosure and recovery panchnama and also the seizure panchnama of other articles, but independently his evidence cannot prove the offence. Discovery is stated to be of the clothes of the accused which showed the kerosene residue, however, when there is presence of the accused at the spot, it cannot be said that the accused is the culprit. PW-4 Panchfulabai is the sister of the deceased, who was admittedly not present at the spot. PW-5 Sanjiv Bhagat is the carrier who had taken the Muddemal articles to the Forensic Lab. PW-6 Dr. Vivek Jadhav is the medical officer who had given endorsement about the mental and health condition of the deceased on 24th August 2012 when the dying declarations Exhibit-51 and 52 were recorded. The admissions in his cross-examination were not considered by the learned trial Judge. PW-7 Dr. Maroti Dake is the medical officer who conducted the autopsy. PW-8 police head constable Gautam Kamble is the police official who had drawn the inquest panchnama. PW-9 Bhagwan Gonewar and PW-10 Prabhakar Kotgire were examined on the point of harassment or cruelty.

They are the parental uncle of the deceased and President of *Tanta Mukti Samiti*, respectively. PW-11 Datta Navghare is the Special Judicial Magistrate, who has recorded dying declaration Exhibit-52. PW-12 Subash Chopade is the police officer who has recorded dying declaration Exhibit-51. PW-13 is the Investigating Officer.

5. The learned Advocate appearing for the appellant has further submitted that learned trial Judge has failed to consider that the case falls within the scope of exception to Section 300 of the Indian Penal Code. In the dying declaration Exhibit-52 itself the deceased has contended that she had not considered the act of pouring kerosene on her person by the accused as serious immediately after the kerosene was poured. She has contended that she took it as the regular part of threat, the husband used to give her and therefore, it was not even in the dream of the deceased that her husband would commit her murder. Further, the cross-examination of PW-4 Panchfulabai would show that she has admitted that Muktabai was cooking her food on hearth and while cooking on hearth, one has to sit near the hearth. It is submitted that possibility of catching the flames to the polyester saree which deceased was wearing, accidentally, has not been ruled out. When the learned trial Judge has erred in appreciating

the evidence, interference is required and the appellant deserves to be acquitted.

6. Per contra, the learned APP strongly opposed the Appeal and relied on the reasons given by the learned trial Judge. It was submitted that though the spot panch and neighbour of the accused have turned hostile, yet PW-3 to PW-13, all have supported the prosecution story. The dying declarations in this case are proved by examining the writer as well as the medical officer who had given the endorsement about the fit state of mind of the deceased at the time of giving statement. Both the dying declarations are consistent to each other. It has not been specifically brought on record that when the dying declarations were recorded, the relatives of the deceased had come to the hospital and had prevailed upon the deceased to speak against the accused – appellant. A conviction can be based on a dying declaration if it inspires confidence. No major discrepancy or non-adherence of the rules in recording the dying declarations has been pointed out so as to discard those dying declarations. The testimony of the relatives of the deceased would show that there was illegal demand by the accused and in order to get fulfillment of that demand, deceased was subjected to cruelty.

Though the percentage of the burns as stated in the autopsy report is 56%, it is required to be noted that there are more burn injuries on the upper part and it corroborates to the statement in the dying declaration Exhibit-51 that deceased was sitting in the house when the kerosene bottle was poured on her person. It could have been from the height and therefore the lower extremity has not received much burns as compared to the upper part of the body. When the deceased has stated that accused had come under the influence of liquor and has done the said act, the accused cannot half-heartedly take a defence that he was not knowing the consequences of his own acts or was not in a physical condition due to the influence of the liquor that he could have understood the consequences of his acts and therefore, the learned trial Judge has rightly concluded that there was cruelty to the deceased and present appellant has committed her murder by pouring kerosene on her person and setting her to fire.

7. It is trite law that sole dying declaration can be made basis of conviction, if at all it qualifies the test of truthfulness, voluntariness and if it is free from suspicion and doubt. There are various rulings of Hon'ble Apex Court regarding evidentiary value of dying declaration. It has been held time and again that

accused being deprived of cross-examination, Court has to be very careful and cautious while assessing dying declaration. It is expected that Court should be on guard that the statement of deceased was not a result of either tutoring, prompting or product of imagination. It is further expected of the Court to satisfy itself that the deceased was in a fit state of mind to give dying declaration. In the case of ***Paniben vs. State of Gujarat; (1992) 2 SCC 474***, the Hon'ble Supreme Court has laid down the principles governing dying declaration, which are as follows :-

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.
- (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.
- (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.
- (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

8. The above principles are affirmed, relied, summarized and applied in various other rulings, namely ***Surinder Kumar vs. State of Punjab, (2012) 12 SCC 120, Madan vs. State of Maharashtra; (2019) 13 SCC 464.***

9. Similarly, very recently Hon'ble Apex Court in the case of ***Ganpat Bakaramji Lad vs. State of Maharashtra, 2018 ALL MR (Cri) 2249***, has also reiterated certain tests to be put to use before accepting that dying declaration. It has been held thus:-

“ In respect of the dying declaration, the general principles to be kept in mind are

(i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence,

and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :

(a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,

(b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and

(c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires confidence to such an extent that it can be the sole basis of conviction?

The absence of an endorsement in the dying declaration - (a) by a doctor regarding the fitness of mind of the declarant, or (b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining the declaration and the declarant confirming it to be

true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true

and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of ***Shaikh Bakshu 2007 ALL SCR 2407*** and ***Kantilal (2009) 12 SCC 498***, are based on the facts and would not, therefore, constitute a precedent or a *ratio decidendi* or even an *obiter dicta* to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials. "

10. After taking note of the law on the point of dying declaration, it can be seen that the present case is based on two dying declarations, i.e. Exhibit-51 and 52. As regards the offence under Section 498-A of the Indian Penal Code is concerned, the prosecution intends to rely on the testimony of PW-4 Panchfulabai, sister of the deceased, PW-9 Bhagwan, paternal uncle of the deceased and PW-10 Prabhakar, who was the President of *Tanta Mukti Samiti*. At this stage, before even considering whether the dying declarations Exhibit-51 and 52 can be said to have been proved properly, one fact will have to be put on record is that on the basis of the same evidence i.e. evidence of the aforesaid witnesses, the learned Sessions Judge has acquitted accused Nos.2 and 3 from the offence punishable

under Sections 498-A, 323 and 302 read with Section 34 of the Indian Penal Code. As regards the offence under Section 302 of the Indian Penal Code is concerned, the presence of accused Nos.2 and 3 is not even stated in Exhibit-51 and 52 by the deceased. Therefore, as regards subjecting the deceased to cruelty, when the same evidence results in acquittal of the accused Nos.2 and 3, whether it can be made use of against the appellant, husband of the deceased, would be a question. Unless it is shown by the prosecution that the acts of the accused – appellant independently also amounted to cruelty to the deceased, he could not have been convicted by the learned trial Judge under Section 498-A of the Indian Penal Code. The bare perusal of Exhibit-51 and 52 would show that there were no allegations about a specific amount to be brought by the deceased. Whatever Muktabai has stated is that she was treated properly for about a year by the husband and in-laws and thereafter they started harassing her. She does not give details about the same and thereafter she states about the story of the happenings that took place on 23rd August 2012. That means, it is of that day only deceased was stating that her husband asked her that she should bring amount from her parents and in order to force that demand he had slapped her. "Cruelty" cannot be

restricted or inferred on the basis of a day's behaviour. Section 498-A of the Indian Penal Code requires considerable acts for sufficient period to attract the ingredients and those ingredients are missing from dying declarations Exhibit-51 and 52. What has been held by the learned trial Judge was that the deceased was subjected to cruelty on the count of demand of Rs.1,50,000/- and this is on the basis of the statements made by PW-4 Panchfulabai. She has stated in her examination-in-chief that the appellant was harassing, beating deceased in order to impress the demand of Rs.1,50,000/- for purchasing plot. Important point to be noted is that when the said statement is not appearing in the FIR – cum – dying declaration Exhibit-51, not even in the dying declaration Exhibit-52; then the statements of the witnesses to that effect i.e. PW-4 Panchfulabai and PW-9 Bhagwan ought not to have been relied upon by the learned trial Judge. The learned trial Judge ought to have acquitted the appellant of the offence punishable under Section 498-A of the Indian Penal Code.

11. Now, turning towards the charge against the accused – appellant under Section 302 of the Indian Penal Code, the first and foremost fact is that the appellant in his statement under

Section 313 of the Code of Criminal Procedure has not stated as to how he suffered the burn injuries. No doubt, when there is injury to the accused, in the normal course the prosecution ought to have explained the said injury. However, in this case in dying declaration Exhibit-51 the deceased herself has stated that the accused was present and after she caught fire, the husband had put a quilt from the house on her person to extinguish the fire. So, there is an explanation in respect of the injury that might have been suffered by the accused, in the dying declaration Exhibit-51 itself. Then the turn comes that of the accused to explain as to how his wife suffered burn injuries, if he want to rely upon the fact that in the same incident he has also suffered the burn injuries. That explanation is missing from his statement under Section 313 of the Code of Criminal Procedure.

12. We will have to consider here, as to whether dying declarations Exhibit-51 and 52 are satisfying the above referred principles of law. In order to prove those dying declarations, the prosecution has examined PW-6 Dr. Vivek Jadhav, PW-11 Datta Navghare, Special Judicial Magistrate and PW-12 police head constable Subhash Chopade. Exhibit-51 started about 11.30 a.m. on 24th August 2012. It is to be noted that the incident is

stated to have occurred around 9.00 p.m. of 23rd August 2012 and then deceased was taken to civil hospital. PW-6 Dr. Vivek Jadhav was on duty and he states that Muktabai was admitted due to sustaining about 64% burn injuries. He had medically examined Muktabai before giving endorsement on Exhibit-51 as well as Exhibit-52. Exhibit-51 ended around 11.50 a.m. and Exhibit-52 started around 12.15 p.m. on the same day. Dr. Vivek Jadhav found Muktabai mentally fit and oriented to give statement on both the occasions. It is to be noted that he has given the endorsement at the beginning as well as end in both the dying declarations. The thumb mark on Exhibit-52 has even been attested by him. The postmortem report Exhibit-57 gives the percentage of burns to upper limb, right – 8% and left – 7% and a specific remark that finger and palm creases intact. Therefore, no objection can be taken in respect of the thumb mark. As regards Exhibit-52 is concerned, it is stated by PW-11 Datta Navghare, Special Judicial Magistrate that the said dying declaration was read over to the deceased and she accepted the contents of the same as true and correct. Considering all these aspects, the said dying declaration cannot be doubted.

13. In the cross-examination of PW-6 Dr. Vivek Jadhav it was tried to be brought on record that Muktabai was not in a position to speak but the witness denied the said suggestion. There is nothing in his cross-examination which will destroy whatever he has stated in his examination-in-chief. PW-11 Datta Navghare and PW-12 Subash Chopade have stated as to what the deceased had told to them. In the nut-shell, in presence of both these witnesses Muktabai had told that she had gone for labour work on 23rd August 2012. She came back in the evening and finished cooking. She was waiting for the husband, who came around 9.00 p.m. under the influence of liquor. By going near her, husband asked her to bring amount from her parents and then he started giving slaps to her. When Muktabai told that he should not assault her, he said alright and went inside the house, brought a kerosene bottle. Muktabai was sitting and then appellant poured kerosene on her person. In Exhibit-51 Muktabai has stated that after the match stick ignited and the flame was put near the Pallu of her saree and when she caught fire, she started shouting and then the husband took quilt from the house and extinguished the fire. It is rather stated in Exhibit-51 that mother-in-law was outside the house who came inside after hearing shouts of Muktabai and mother-in-law helped the

husband in extinguishing the fire. Muktabai has stated that in the meantime due to fire she had received burn injuries to various parts of her body. Exhibit-52 is consistent as regards the role of the appellant is concerned. The only fact which has been further narrated or more than the contents of Exhibit-51 is that husband had asked amount for consuming liquor and when he had not given the amount, he had picked up quarrel but she did not pay attention to the same. Till the kerosene was poured on her person, she took it as a part of joke and felt that as usual, under the influence of liquor, husband was threatening. When Muktabai was put to fire and she sustained burn injuries, she was brought to the hospital. Thus, it is to be noted that both the dying declarations are consistent with each other and inspiring confidence and therefore, the learned trial Judge was justified in relying upon those dying declarations.

14. Much has been stated about the intention and that the case ought to have been considered under the exceptions to Section 300 of the Indian Penal Code. It can be said in this respect that the knowledge of the act or consequences of the act should be known to a person and that is also ingredient of the offence. Pouring kerosene upon a person and then setting that person to fire would attribute knowledge to the person doing

such act of the consequences that the person against whom such act is done, would die. Consumption of liquor or a person under the influence of liquor cannot be an exception to the same. If appellant wants to take such defence that he was incapacitated, due to consumption of liquor, of the knowledge about the acts or consequences of his acts, then that defence should be put and proved specifically. Here, in his statement under Section 313 of the Code of Criminal Procedure, the appellant has not stated that he had come home under the influence of liquor and he has consumed so much liquor that it incapacitated him from knowing the consequences of his own acts.

15. Another fact that is required to be noted is that though the relatives of the deceased had taken discharge from the civil hospital on 24th August 2012 against the medical advice, it has come on record that immediately thereafter Muktabai was admitted to private hospital. Thus, it is not the fact on record that after taking discharge against the medical advice, deceased was taken home and some different treatment was given which ought not to have been given, resulted in septicemia. Septicemia was the result of the burn injuries and therefore, the ingredients of the offence are proved as against accused No.1 i.e. present appellant.

16. Hostility of the witnesses has not caused any damage to the prosecution story.

17. The learned trial Judge has passed the reasoned Judgment and order considering all the points involved, on the point of offence under Section 302 of the Indian Penal Code and therefore, that finding need not be interfered with.

18. The learned trial Judge erred in convicting the appellant under Section 498-A of the Indian Penal Code also when there were no allegations about the same in the FIR as well as dying declarations Exhibit-51 and 52. The said dying declarations could not have been used for said offence. The said conviction, therefore, deserves to be set aside by allowing the Appeal partly, but at the same time maintaining the conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code. Hence the following order:

ORDER

(I) The Appeal stands partly allowed.

(II) The conviction of the appellant - Kashinath S/o Potanna Pitlewad under Section 302 of the Indian Penal Code awarded by the learned Sessions Judge, Nanded in Sessions Case No.23 of 2013 on 14th August 2014 stands confirmed, however, the conviction of the appellant under Section 498-A of the Indian Penal Code in the same Judgment and order stands set aside.

(III) Fine amount, if any, paid in respect of offence under Section 498-A of the Indian Penal Code, be refunded to the appellant after the statutory period.

(IV) We make it clear that there is no change in the order passed by the learned Sessions Judge, Nanded, regarding disposal of Muddemal.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE