

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

CRIMINAL APPEAL NO. 271 OF 2016

Ajay s/o Prabhakar Dandge
Age: 30 yrs, Occ: Labour,
R/o Ramanagar Aurangabad
Tq and Dist: Aurangabad

... Appellant
(Ori Accused No.1)

VERSUS

The State of Maharashtra
Through Police Station Officer,
Osmanpura, Aurangabad

... Respondent
(Ori Prosecution)

....

Mr. V. B. Garud, Advocate (appointed through Legal Aid) for the
appellant

Mr. S. J. Salgare, APP for respondent - State

....

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

DATE : 29.03.2023.

JUDGMENT (PER Y. G. KHOBRAGADE, J.) :-

. The present appeal under Section 374 of the Code of Criminal Procedure is filed challenging the judgment and order dated 04.07.2012 passed by the learned Additional Sessions Judge-6, Aurangabad in Sessions Case No.215 of 2011, wherein the appellant / original accused No. 1 has been convicted for the

offence punishable under Sections 302, 304B, 498-A and 323 of the Indian Penal Code and sentenced him to suffer Rigorous Imprisonment for life.

2. In the nutshell, the case of the prosecution is that, six months prior to the incident, marriage of deceased Rekha was solemnized with the accused No. 1. At the time of incident, the deceased Rekha was cohabiting with accused No.1 in one room behind Milind Baudha Vihar, Ramanagar, Aurangabad. At the time of marriage, her mother had given domestic articles including golden ornaments and dowry of Rs.10,000/-. However, the amount of Rs.5,000/- towards dowry had remained unpaid. Therefore, accused No.2 her mother-in-law, Sou Sujata Prabhakar Dandge and her sister-in-law accused No.3 Anjali @ Shalini w/o Kailas Kharat were instigating accused No.1, for the demand of unpaid dowry and on said account, deceased was tortured mentally and physically. Parents of the deceased had convinced the accused Nos. 1 to 3 that after the arrangement of the money, they would pay the remaining dowry amount. Accused No.1 asked his wife Rekha at about 2.00 to 3.00 p.m. on 22.02.2011, that she should bring the remaining dowry amount of Rs.5,000/-. Rekha tried to convince accused No.1, but the accused abused and slapped her, due to which her bangles got broken and then

accused No.1 poured kerosene on her person from a Can and ignited matchstick and set her to fire. Thereafter, accused No.1 extinguished fire. But till then Rekha had sustained severe burn injuries, and therefore, she was hospitalized in Government Hospital. Her statement was recorded by PW-6 PSI Pandharinath Bolkar. The said statement has been treated as First Information Report and on the basis the same offence vide Crime No.I-45/2011 came to be registered with Osmanpura Police Station, Aurangabad for the offences punishable under Sections 498A, 323, 504, 307 read with 34 of the Indian Penal Code and under Sections 3 and 4 of the Dowry Prohibition Act.

3. The PW-6 had issued a request letter to the Special Judicial magistrate for recording dying declaration of injured Rekha. Accordingly, the Special Judicial Magistrate (PW-2) visited Ghati Hospital, Aurangabad and recorded statement of victim, after obtaining necessary endorsement from the Medical Officer about mental and physical status of deceased. The Investigation Officer visited to the spot of incident and recorded spot panchanama and seized one plastic Can, burn pieces of clothes, pieces of bangles, matchstick box from the spot of incident. He arrested the accused on 22.02.2011. However, injured Rekha succumbed due to burn injuries on 24.02.2011. Inquest

panchanama of the dead body of Rekha was drawn and dead body was sent for the postmortem. Therefore, offence under Section 302 of I.P.C. came to be added to Crime No.45/2011. The Investigating Officer recorded statement of the witnesses and sent all seized articles for Chemical Analysis. After completion of investigation, the Investigating Officer filed charge-sheet against the accused persons before the learned 7th Judicial Magistrate First Class, Aurangabad. On compliance of Section 207 of Cr.P.C., the learned Magistrate had passed the order under Section 209 of Cr.P.C. and committed the case for trial to the Court of Session.

4. Learned trial Court framed the charge at Exh.5 for the offences under Sections 302, 304B, 498A, 323, 504 read with Section 34 of I.P.C on 14.06.2011. The plea of the accused was recorded at Exh.6. The accused pleaded not guilty and claimed for trial.

5. In order to bring home guilt of the accused, the prosecution examined PW1 Raju Dharmaji Kirtishahi and proved spot panchanama Exh-17 and seized articles, viz; burnt pieces of clothes, match box and half burnt matchstick, broken pieces of bangles, half burnt lady's salwar, etc.

6. PW-2 Pralhad Ghule is the Special Judicial Magistrate

examined at Exh.20 and he has proved request letter dated 22.02.2011 (Exh.21) received from Osmanpura Police Station and dying declaration Exh.23. PW3 Laxmibai Raju Kirtishahi, is the landlord of appellant accused at Exh.24, PW-4 Tulsabai Bhanudas Pawar, is the mother of victim at Exh.28, PW-5 Smt. Jijabai w/o Narayan Kusale, is the neighbor of deceased, PW-6 Pandharinath Sanduji Bolkar, PSI at Exh.33 who recorded dying declaration of the victim at Exh.35, PW-7 Kailas Shankarrao Pawar, uncle of deceased, PW-8 Vilas Bhivaji Sawant PSI at Exh.40 to prove registration of crime No.45/2011 on the basis of Exh.35, PW-9 Dr. Pramod Karbhari Gangurde, medically treated the injured, PW-10 Ravindra Pandharinath Garbade, Investigating Officer. Appellant / accused has admitted certain documents under Section 294 of the Code of Criminal Procedure, viz; inquest panchanama postmortem report and arrest panchanama.

7. The statement of accused persons was recorded under Section 313 of Cr.P.C. at Exh.61. The defence of the accused persons is of total denial.

8. Learned trial Court passed the impugned judgment and order on 04.07.2012 and convicted the accused No. 1 for the offences punishable under Sections 302, 304B, 498-A and 323 of

the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for life. However, original accused No. 2 and 3 have been acquitted of all the charges. Hence, the original accused No. 1 has filed present appeal.

9. The learned Counsel for the appellant submitted that the prosecution had failed to bring substantial evidence against the accused. Learned trial Court ought to have considered the probable circumstances, so also dying declarations relied upon by the prosecution ought to have been disbelieved on the ground that the death of deceased Rekha Ajay Dandge is suicidal and there is no direct evidence against the appellant / accused. In absence of direct evidence, the learned trial Court ought to have given benefit of doubt and the appellant / accused could have been acquitted. However, the learned trial Court passed the impugned judgment and order and held accused guilty for the offences, which is perverse, illegal, bad in law and prayed to quash and set aside the same.

10. In support of these submissions, the learned Counsel for the appellant – accused placed reliance on the following case laws.

- (i) Shakuntalabai wd/o Khairuprasad Joshi & Anr. Vs. The State of Maharashtra – 2012 ALL MR (Cri) 1970;
- (ii) Ashok Pandurang Jadhav Vs. State of Maharashtra – 2011 ALL MR (Cri) 2105;
- (iii) Hanma @ Hanmanta Ishvarappa Budane Vs. State of Maharashtra – 2011 ALL MR (Cri) 2168;
- (iv) Kirtan Prasad Vs. State of M.P - 2005 Cri.L.J 69;
- (v) State (Delhi Administration) Vs. Gulzarilal Tandon – 1979 AIR (SC) 1382;
- (vi) State of H.P Vs. Yog Raj – 1997 Cri LJ 2033
- (vii) Praveen Vasant Deshmukh @ Guntant Anant Dhas Vs. State of Maharashtra – 2006 ALL MR (Cri) 1361;
- (viii) Dr. Sunil Kumar Sambhudayal Gupta & Ors Vs. State of Maharashtra – 2011 ALL MR (Cri) 288 (S.C.)

11. Per contra, the learned APP Mr. S. J. Salgare, contended that the prosecution has led substantial evidence on record to establish that, the appellant / accused poured kerosene on the person of Rekha and ignited matchstick and set her to fire. According to the learned APP, the prosecution examined the PW-2 Shri Pralhad Ghule, the Special Judicial Magistrate at Exh.20 and the PW-6 Shri Pandharinath Bolkar, the PSI who have recorded dying declaration Exh.23 and Exh.35 respectively and in both dying declarations the victim/injured Rekha stated that on 22.02.2011 at about 2.00 to 3.00 p.m., she and her husband accused No.1 were present in the house. At that time the accused No.1 said that her parents had agreed to pay Rs.15,000/- towards dowry, but paid only Rs.10,000/- and did not pay remaining

dowry of Rs.5,000/-. At that time, when she was convincing the accused, he slapped her. Her bangles were broken. Then he poured kerosene from Can on her person and set her to fire. Therefore, the accused played drama to extinguish the fire. The evidence of PW-9 Pramod Gangurde corroborates evidence of PW-2 Special Judicial Magistrate and PW-6 Dr. Pandharinath Polkar, PSI. It has come on record that while recording both dying declarations Exh.35 and 23, the victim Rekha was conscious, oriented and was able to give valid statement. The evidence of PW-3 Laxmibai, who is neighbour and landlord of accused No.1 and deceased, proves about occurrence of incident at about 2 to 3 p.m. in the room in which the accused No.1 and victim Rekha were residing. After hearing the shouts from the room of accused, she knocked the door of accused. The accused No.1 opened the door of said room and whereas burning victim Rekha was standing behind accused. The inquest panchanama and postmortem report are admitted by accused No.1. Therefore, it proves that the accused No.1 has committed homicidal death of Rekha by pouring kerosene on her person and setting her on fire. There is ample evidence available on record which would prove that except the accused, no other person is the author of burn injuries sustained to the deceased. The postmortem report Exh.38

would reveal that the death of deceased Rekha is homicidal and not suicidal. Learned trial Court has well considered evidence on record and held appellant/ accused is guilty, which is justifiable, hence prayed for dismissal of appeal.

12. Since the prosecution alleges about homicidal death of the deceased Rekha due to setting her to fire by pouring kerosene by the accused and the accused is pleading that his wife victim Rekha has committed suicide; it is necessary to ascertain whether death of deceased Rekha was homicidal or accidental. The learned Counsel appearing for the appellant submits that the prosecution has not examined the Medical Officer who conducted autopsy. His evidence could have thrown light on the point, whether the Rekha's death is homicidal or suicidal.

13. It can be said that the burn injuries received by the deceased might be accidental, suicidal or homicidal. The prosecution is, therefore, required to establish the homicidal death of the deceased by bringing positive evidence and those injuries must be attributed to the accused.

14. It is not out of place to mention here that soon after receipt of M.L.C. No.3882 from Osmanpura Police Station on

22.02.2011, the PW6 Pandharinath Bolkar, PSI visited Ghati Hospital. He gave letter Exh.34 to the Medical Officer and sought opinion about physical and mental condition of the victim Rekha for recording her statement. PW-6 has deposed that he obtained endorsement Exh.47 from the Medical Officer PW-9, who certified that the patient was in conscious oriented. Thereafter he recorded statement of victim at Exh.35 and after recording the same he again obtained endorsement Exh.45. The evidence of PW-6 is in corroboration with the Medical Officer PW-9 Dr. Pramod Karbhari Gangurde.

15. Thereafter, after receipt of request letter Exh.36 from the PSI PW-6, the PW-2 Shri Pralhad Ghule visited hospital and recorded dying declaration of Rekha [Exh.23], after obtaining opinion about her consciousness and orientation at Exh.49. After recording declaration Exh.23, he obtained 2nd endorsement Exh.50. The evidence of medical officer PW-9 Dr. Pramod Gangurde, duly corroborated. The cross-examination of these witnesses does not create any doubt about the procedure that has been adopted in recorded the dying declaration.

16. On perusal of the dying declaration Exh.35 given to the PW6 PSI, the victim has stated that six months prior to that

date, her marriage was solemnized with the accused No. 1. It was agreed by her parents that they would give amount of Rs.15000/- as dowry. An amount of Rs.10,000/- was paid by her parents to the accused at the time of marriage, however, an amount of Rs.5,000/- remained to be paid. Her husband was torturing her physically and mentally on account of the said remaining amount of dowry. Her husband asked her to bring the said remaining amount of dowry. When Rekha was pursuing her husband, at that time, the accused No. 1 abused her in filthy language and slapped her, due to which her bangles were broken. Her husband / accused then, poured kerosene from a Can on her person and set her to fire by igniting a matchstick. Thereafter, the accused played drama to drowse her. After recording the said statement, the PW6 obtained toe impression of the right leg of the deceased.

17. On perusal of dying declaration Exh.35 recorded by the PW-2 Special Judicial Magistrate, it appears that the present appellant accused poured kerosene on person of victim on 22.02.2011 at about 2.00 p.m. and set her on fire. The dying declaration Exh.35 recorded by PW-6 and the dying declaration Exh.23 recorded by PW2 Special Judicial Magistrate appears to be consistent. Deceased Rekha has attributed specific role to the appellant accused about pouring kerosene from Can on her person

and setting her to fire on account of non-payment of remaining dowry amount of Rs.5,000/- out of Rs.15,000/-. Though the victim alleges in her second dying declaration Exh.35 about instigating her husband/present appellant accused by her mother-in-law and sister-in-law i.e. original accused Nos. 2 and 3, however, the victim has specifically stated that her father-in-law never gave trouble to her. The appellant/accused did not raise plea of alibi and as per both the dying declarations Exh.23 and 35, at the time of incident the accused No. 1 and the victim were the only persons present at the spot of incident.

18. The Investigating Officer PW10 has drawn inquest panchanama Exh.18. It shows burn injuries were on the head, neck, face, chest, abdomen, back, upper and lower limbs, and perineum. Said inquest panchanama is admitted by the appellant accused. Thereafter, the dead body of deceased Rekha was referred for autopsy and after conducting postmortem, the Medical Officer issued postmortem report Exh.38, which has been admitted by the appellant accused. As per the postmortem report, the deceased had sustained 83% burn injuries on her head, neck, face, chest, abdomen, back, upper and lower limbs, and perineum. As per the opinion of the Medical Officer, the cause of death due to shock, due to burns. Though the learned counsel for the

appellant canvassed that the Medical Officer has not been examined by the prosecution, however, it can be seen that since the said document was admitted by the appellant accused under Section 294 of Cr.P.C., he was not examined. When document is so admitted, it does not require any formal proof. After admitting the document, accused cannot say that the author of the said document ought to have been examined.

19. It is evident from the evidence of Investigating Officer PW-6, PW-2 Special Judicial Magistrate and the Medical Officer PW-9 that Rekha was conscious, oriented and was able to give her statement at the time of giving both the dying declarations. No doubt, the learned Counsel appearing for the appellant / accused canvassed that PW-6 Pandharinath Bolkar, PSI, did not obtain endorsement of the Medical Officer at the bottom of dying declaration Exh.35. Therefore, the said dying declaration Exh.35 is not reliable. However, the PW-9 Medical Officer fortified about putting endorsement Exh.50 after recording dying declaration Exh.23 by the PW-2. At the cost of repetition, we would say that no such circumstance is brought on record by defence, to raise any doubt about the dying declarations.

20. The prosecution has examined PW-1 Raju and proved spot panchanama Exh.17 and seizure of plastic Can Article 1, burn pieces of clothes Article 2, match box Article 3, pieces of bangles Article 4, half burnt ladies salwar Article 5. It supports the story in the dying declarations.

21. PW-3 Laxmibai Kirtishahi has deposed at Exh.24 that, she was knowing the deceased Rekha and the appellant / accused and prior to 3 – 4 months of the incident. Accused and Rekha were inducted as tenant in the room i.e. spot of incident. PW-3 has deposed that there used to be frequent quarrel between the accused and deceased Rekha. The incident occurred in the tenanted room around 2 p. m. about nine months prior to her deposition. After hearing shouts, she had knocked the door of the room of the accused. Thereafter, the appellant/accused opened the door of room and then she found Rekha in burning condition. She had then shouted and thereafter with the help of other neighbors, she had poured water on the person of Rekha. The cross-examination of PW3 by the appellant/accused did not yield any material to discard her testimony. The testimony of PW 3 proves presence of accused in the room which was closed from inside and Rekha receiving burn injuries to the extent of 95%. Accused has not explained as to why Rekha had then committed suicide.

22. In the case of *Laxman Vs. State of Maharashtra*, 2002 Mh.L.J. Online (Cri.) (S.C.) 2 = 2002 (Supp 1) SCR 697 a five-member Bench of the Supreme Court held thus;

“A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite.

In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die.

There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.

Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

23. In the case of *Lakhan vs. State of Madhya Pradesh* - 2010 Mh.L.J. Online (Cri) (S.C.)23 = 2010 (9) SCR 705, the Hon'ble Supreme Court considered and indicated the approach

which may be adopted, where the evidence includes multiple dying declarations, that may contain inconsistent facts:

"In view of the above, the law on the issue of dying declaration can be summarised to the effect that in case the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances, wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

24. In the case of ***Jagbir Singh vs. State of NCT Delhi - 2019 Mh.L.J. Online (Cri) (S.C.) 36 = (2019) 8 SCC 779*** the Hon'ble Supreme Court reviewed several previous decisions involving multiple dying declarations and re-stated the law in these terms:

"30. A survey of the decisions would show that the principles can be culled out as follows:

a. Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the Court;

b. If there is nothing suspicious about the declaration, no corroboration may be necessary;

c. No doubt, the Court must be satisfied that there is no tutoring or prompting;

d. The Court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the Court must look to the entirety of the language of the dying declaration;

e. Considering material before it, both in the form of oral and documentary evidence, the Court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

f. However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the Court. The inconsistencies may turn out to be reconcilable.

g. In such cases, where the inconsistencies go to some matter of detail or description but is inculpatory in nature as far as the Accused is concerned, the Court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

h. The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the Accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not

be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

i. In the third scenario, what is the duty of the Court? Should the Court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the Court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the Court and still conclude that the incriminatory dying declaration is capable of being relied upon?"

25. It is well settled principle of law that, if the dying declarations are consistent, they cannot be discarded. There is no inconsistency in both the dying declarations as regards the role attributed to appellant. Those dying declarations were sufficient to convict the appellant.

26. On perusal of the impugned judgment and order, it appears that the learned trial Court has relied on the testimony of PW2 Special Judicial Magistrate who recorded dying declaration Exh.23 and dying declaration Exh.35 recorded by PW-6 PSI, as well as postmortem report, presence of residue of kerosene on seized articles as per the CA report, CA report Exhs. 58 in respect of examination of partially burnt bunch of hair and burnt tissues of the deceased Rekha and the accused as well as CA report

Exh.59 in respect of examination of seized articles. As per the CA report Exh.58, kerosene residues found on burnt bunch of hairs of the victim and tissues. As per the CA report Exh.59, the blue colour liquid found kerosene and residue of kerosene found on seized clothes of the accused as well as clothes of deceased, salwar, bangle pieces.

27. Though the explanation of the accused solicited under Section 313 of Cr.PC., but the accused failed to give any explanation. Rekha was in his custody at the relevant time. Hence, he was bound to offer explanation in view of Section 106 of Indian Evidence Act as to how she received the burn injuries. The alleged theory of suicide is unbelievable. No reason has been assigned for alleged suicide, if that is to be believed. Though the remaining amount of dowry was only Rs.5,000/-, yet it can be seen that the poor financial condition parents of Rekha led the said situation. It appears that the financial condition of accused is also not good and therefore, the said amount of Rs.5,000/- was given importance. The theory of prosecution cannot be discarded on the basis of meager amount. Therefore, it can be concluded on the basis of oral as well as documentary evidence that accused had subjected Rekha to cruelty on account of unlawful demand of remaining dowry and set her to fire and caused her homicidal

death, which certainly constitute offence punishable under Sections 302, 304B, 498A, of Indian Penal Code, which does not appear perverse, illegal, bad in law.

28. In view of above discussion, we do not find substantial grounds. Hence, the present appeal is liable to be dismissed. Accordingly, we proceed to pass the following order:

ORDER

- (i) The appeal is dismissed.
- (ii) Record and proceedings be remitted back to the trial Court.

[Y. G. KHOBRADE, J.] [SMT. VIBHA KANKANWADI, J.]

SMS