



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

CRIMINAL APPEAL NO. 818 OF 2019

Sarang Manik Garad
Age: 35 years, Occu.: Agri.,
R/o Khairkheda, Tq. Sengaon,
Dist. Hingoli

..APPELLANT

VERSUS

State of Maharashtra
Through Police Inspector,
Goregaon Police Station,
Dist. Hingoli

..RESPONDENT

....
Mr. S.J. Salunke, Advocate for appellant (appointed)
Ms. U.S. Bhosale, A.P.P. for respondent - State
....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ**
RESERVED ON : 21st MARCH, 2024
PRONOUNCED ON : 02nd APRIL, 2024

JUDGMENT (PER : R.G. AVACHAT, J.) :

1. The appellant, vide judgment and order dated 15th July, 2019 passed by Additional Sessions Judge, Hingoli in Sessions Case No. 34 of 2016, has been convicted for committing murder of his wife by setting her ablaze, and therefore, sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- with default stipulation. He is, therefore, in this appeal before us.

2. The record indicates that alongwith the appellant, his mother, brother and even brother's wife were charged and prosecuted for offences

punishable under Sections 302, 304(B) and 498-A read with Section 34 of the Indian Penal Code ('I.P.C.'). After appreciation of the evidence on record, it was realised that the appellant and the deceased were the only persons residing together. The trial Court, therefore, rightly acquitted the mother, brother of the appellant and brother's wife. The appellant too was acquitted of the offences punishable under Section 304-B and 498-A of the I.P.C. Neither the State nor victim has preferred appeal against acquittal.

3. The facts, giving rise to the present appeal, are as under :-

Sau. Sharada (deceased) had married the appellant. It was her second marriage. Her first marriage was dissolved with decree of divorce. On marriage she had started residing at her matrimonial home alongwith the appellant and her in-laws. There used to be frequent quarrels between the couple on one or the other reason.

4. It is the case of prosecution that at 07:00 a.m. on 14th February, 2016 deceased – Sharda was cooking on hearth at her residence. The appellant came. He doused her with kerosene. She thereby caught fire. She was rushed to the hospital. Her statement was recorded on 14th February, 2016 by 02:25 p.m. by the Executive Magistrate at the request of a police officer. Based on said statement, crime vide C.R. No. 23 of 2016 was registered with Goregaon Police Station, Dist. Hingoli for the offences punishable under Section 307 and 498-A of the I.P.C.

5. Sharda succumbed to the burns on 17th February, 2016. Section 302 of the I.P.C., therefore, came to be invoked. Scene of offence panchanama (Exh.30) was drawn. A kerosene can, half burned match stick and some burned clothes came to be seized from the scene of offence. The mortal remains of deceased – Sharda was subjected to autopsy. The seized articles were sent to FSL, Aurangabad for analysis. Statements of the persons acquainted with the facts and circumstances of the case were recorded. On completion of investigation, the appellant and in-laws of the deceased were proceeded against by filing charge-sheet before the Court of J.M.F.C, Sengaon, who in turn, committed the case to the Court of Additional Sessions Judge, Hingoli ('trial Court').

6. The trial Court framed charge (Exh.15). The appellant pleaded not guilty. His defence was of false implication.

7. To establish the charge, prosecution examined eight witnesses and produced in evidence certain documents. The trial Court, on appreciation of the evidence in case, convicted the appellant and consequently sentenced as stated above.

8. Mr. Salunke, learned counsel appointed to represent the appellant, would submit that the case is based on sole dying declaration (Exh.34). It is in printed form. Our attention has been drawn to certain documents to suggest the Executive Magistrate received the requisition from

the police officer by 01:50 p.m. for recording dying declaration, whereas the dying declaration itself indicates the Executive Magistrate to have requested the medical officer on duty at 01:45 p.m. to certify whether the patient (Sharda) was conscious oriented to make a statement. Then he brought to our notice overwriting at two places to ultimately submit that the so called dying declaration might have been recorded by the Executive Magistrate at the instance of someone else. According to him, there is no other corroborative evidence to support the dying declaration. Our attention has also been drawn to the oral evidence of the close relations of the deceased to submit that the deceased met with an accidental death. According to learned counsel, no medical papers of the deceased were brought on record. The medical officer, who certified her to be conscious oriented to make statement, was not the treating doctor nor was he on duty in burn ward. The same caused prejudice to the appellant in his defence. Learned counsel ultimately urged for allowing the appeal.

9. Learned A.P.P. would, on the other hand, submit that the dying declaration was recorded by the Executive Magistrate. It has more sanctity than one recorded by the police official. The scene of offence panchanama (Exh.30) reinforces the dying declaration. According to her, a kerosene can was seized from the scene of offence. The C.A. report (Exh.63) indicates the burnt clothes and other articles seized from the scene of offence had thereon kerosene residues. According to learned A.P.P., the sole dying declaration can form the basis of conviction. She reiterated the reasons given by

learned trial Court in support of the impugned judgment and order. Learned A.P.P. ultimately urged for dismissal of the appeal.

10. Considered the submissions advanced. Perused the evidence on record. Also gone through the judgment and order impugned herein. Let us advert thereto and appreciate the same.

11. P.W.6 – Dr. Pawan conducted the autopsy of the mortal remains of Sharda. The postmortem report under his signature finds place at Exhibit 39. In his opinion, the deceased died of, “shock due to burn”. Colum No.17 of the P.M. report gives details of burns as follows :-

<u>Part of Body</u>	<u>Burnt area (%)</u>	<u>Spare area</u>
Head neck face	03	forehead, both cheek, scalp
Front of trunk	16	lower abdomen
Back of trunk	15	lower back
Right upper limb	08	palm
Left upper limb	08	palm
Right lower limb	17	sole
Left lower limb	17	sole
Genitals	0	whole spared
Total Burn %	84	

12. The question is whether the appellant committed murder of his wife. Admittedly, the appellant and deceased were the only persons residing in a two room premises. The incident took place on 14th February, 2016 by 07:00 a.m. The deceased was cooking on hearth at her residence. Since she caught fire, she was immediately rushed to Government Medical College and Hospital, Akola.

13. The record indicates that her relations viz. parents and brother were informed immediately. They even rushed to the hospital. None of them came forward to lodge the F.I.R. against the appellant. The record indicates that statement-cum-dying declaration (Exh.34) given by the deceased was treated as F.I.R. It is best known to P.W.8 – Avinash, Investigating Officer as to why did he commenced investigation post Sharda breath her last, since the crime was registered on 17th February, 2016 i.e. three days after the incident and post demise of Sharda. P.W.8 – Avinash, Investigating Officer, in his evidence submitted that he had been to the relations of the deceased to record their statements. They submitted him to have not been in mental frame to make a statement. According to him, they submitted him that they themselves would come to give their statements lateron.

14. P.W.1 – Santosh is the real brother of deceased – Sharda. It is in his evidence that Sharda was previously married. Since the couple could not pull on together, the marriage was dissolved with a decree of divorce. Sharda then married the appellant. It is in his evidence that Sharda's marital life was smooth. He went on to state that Sharda died accidentally after one and half month of marriage with the appellant. According to him, Sharda caught fire while she was engaged in cooking. He went on to state that on receipt of her admission to the hospital, he rushed there immediately. He talked to her. She told him to have caught fire accidentally.

15. The witness was declared to have not been supporting the prosecution. His attention was drawn to certain portion in his police

statement. He disowned to have had stated the same. The same was nothing but the appellant to have made demand of Rs.1 lakh and the deceased disclosed him to have been set on fire by the appellant. The evidence of P.W.1 – Santosh, brother of the deceased, does not support the prosecution.

16. Same is the case of P.W.2- Baban. He too was the close relation of deceased – Sharda. It is in his evidence that Sharda had smooth marital life. After two months of her marriage, she suffered burns while cooking food on hearth. He denied his wife to have informed him that she was told by Sharda to have been set ablaze by the appellant. He too was declared to be not supporting the prosecution. P.W.2 – Baban's wife has not been examined as witness.

17. Same is the case of P.W.3 – Bhagwan, father of deceased – Sharda. His evidence is on the lines of evidence of P.W.1 and P.W.2. According to him, Sharda died accidentally. He went on to state that while Sharda was engaged in cooking, clothes on her person caught fire accidentally. Nothing could be brought on record from his cross-examination conducted by learned A.P.P., that would help prosecution.

18. As such, the father, real brother and other relatives of the deceased did not support the prosecution. According to them, the deceased died accidentally. P.W.4 – Datta is a witness to scene of offence panchanama (Exh.30). His evidence indicates that scene of offence

panchanama was drawn on 17th February, 2016 by 04:30 p.m. It is in his evidence that a five liter kerosene can, a small plastic can and burnt pieces of saree besides half burnt match stick were recovered from the spot. According to him, the plastic can was in standing position. It had a cork on it. The can even contained kerosene.

19. True, the C.A. report (Exh.63) indicates seized articles to have kerosene residues. The question is whether we can jump to the conclusion that it was the appellant, who doused the deceased with kerosene and she died thereby. To reach to such conclusion, we have only evidence in the nature of statement of the deceased (F.I.R.-cum-dying declaration, Exh.34) recorded by P.W.5 – Gajanan, Executive Magistrate. It is in his evidence that he was Nayab Tahasildar in the Office of Collectorate, Akola. At 01:50 p.m. on 14th February, 2016 he received a requisition (Exh.33) from the police officer for recording of statement of an injured. He, therefore, rushed to the hospital. He asked doctor on duty to examine burnt patient and state him whether she was in a fit mental state to make a statement. It is further in his evidence that the doctor on duty, accordingly examined her before and after recording of statement by him. He went on to state that the doctor certified her to have been conscious oriented both, before and after recording of her statement (Exh.34).

20. Exhibit 33 is a requisition letter made by an police officer to the Tahasildar, Akola. It was received by office of Tahasildar at 01:50 p.m. on

14th February, 2016. Whereas, the dying declaration (Exh.34) indicates P.W.5 – Gajanan to have requested the medical officer on duty at 01:45 p.m. to certify whether Sharda was conscious oriented to make a statement. The request made by P.W.5 – Gajanan to the Medical Officer appears to have been made even before he received requisition (Exh.33). He did not offer any explanation in that regard. True, P.W.7 – Dr. Mohd. Imran testified to have had examined Sharda and certified her to be conscious oriented to make a statement. He referred to his endorsement appearing on the dying declaration (Exh.34).

21. Cross-examination of P.W.7 – Dr. Mohd. Imran, however indicates that he was on duty in Surgery Department. The patient was admitted in Burn Ward. He was not a treating doctor of deceased – Sharda. He, therefore, did not place on record the medical papers of the deceased. According to him, there was no independent doctor looking after the Burn Ward. The fact, however remains that he was not a treating doctor. It is further in his evidence that a burnt patient is administered pain killers. He, however could not state what kind of treatment was extended to Sharda since he did not have any medical papers with him. He admitted to have not been on duty in Burn Ward on 14th February, 2016.

22. It is P.W.8 – Avinash, Investigating Officer, who produced in evidence medical papers (Exh.53). For want of examination of a treating doctor of deceased Sharda, prejudice has necessarily been caused to the appellant in his defence. Had the treating doctor been examined, it could

have been brought on record as to what kind of treatment the deceased was extended at the relevant time. We have reason to observe so for the reason that in the medical papers (Exh.53), the history has been given as, “accidental burn”. It is reiterated that for the reasons best known to the Investigating Officer, he registered the crime post demise of Sharda i.e. three days after the alleged crime was committed. The record indicates the statements of father, brother and other relations of the deceased were recorded more than two weeks after the incident. As such, we have only evidence in the nature of F.I.R.-cum-dying declaration (Exh.34) given by the deceased, which reads as under :-

“मी घरी चुलीवर स्वयंपाक करीत होती. तेवढ्यात माझा नवरा सारंग माणिक गरड घरी आला व त्याने घरातील घासलेटची कॅन आणून माझ्या अंगावर घासलेट टाकले. त्यामुळे मी जळाली आहे. आमची घरी नेहमी कोणत्याही कारणावरून भांडणे होत होती. त्यामुळे माझ्या नवरानेच मला जाळले आहे. मी खरे सांगते. नवऱ्या व्यतिरिक्त माझा कोणावरही आरोप नाही.”

23. It has already been observed that P.W.5 – Gajanan, Executive Magistrate, who recorded the F.I.R.-cum-dying declaration, had received the requisition at 01:50 p.m., whereas he requested the medical officer to examine Sharda was timed 01:45 p.m. The distance between his office and civil hospital has not been brought on record. Let us assume that it must have at least taken him ten minutes to reach the hospital post receipt of requisition. The requisition was also received by Tahasildar and not by P.W.5 – Gajanan himself. According to P.W.5, he recorded every matter that was stated by the deceased as it is. While recording the name of deceased, her village, taluka and district, he noted it down as, “Khairkheda, Tq. Risod,

Dist. Washim. Then he erased it down on his own and replaced 'Washim' by 'Hingoli'. Learned counsel for the appellant has, therefore, every reason to contend that the said matter has been written by P.W.5 himself without enquiring with deceased – Sharda.

24. In case of **Khushal Rao Vs. State of Bombay, AIR 1958 SC 22**, it has been observed thus :-

“(D)Evidence Act (1 of 1872), S.32 – Dying declaration – Value.

It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. AIR 1940 Mad, 196, Approved Anno: C.Jl. Ev.Act S.32 N.9.

(E) *Evidence Act (1 of 1872), S.32 – Dying declaration – Corroboration.*

In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once; the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact that the court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities. Observations in A.I.R. 1953 S.C. 420, held to be in the nature of obiter. Anno: C.J.I. Evi.Act S.32 No.9. Paras”

25. In our view, dying declaration (Exh.34) recorded by P.W.5 – Gajanan, inspires no confidence for number of reasons. The prosecution case is based on the F.I.R.-cum-dying declaration made by the deceased. The time recorded thereon and corrections made by P.W.5, who recorded the same indicate his evidence is not fit to be acted upon. All the close relations of the deceased from her parental side testified her to have met with an accidental death. True, they appeared to have been won over. The treating doctor was not examined. The one, who certified as to the patient's fitness, was not her treating doctor. He was even not on duty in the Burn Ward on the given day. In fact, he was on duty in Surgical Ward. In spite of the incident to have taken place on 14th February, 2016, the F.I.R. was registered three days thereafter that too post demise of the victim. Same

suggests her relations from parental side did not have any grievance against the appellant. P.W.8 – Avinash, Investigating Officer, himself testified that her relations told him that they themselves would come to give statements lateron. The record indicates their statements to have been recorded more than two weeks after the incident. The C.A. reports pertain to the articles those were seized three days after the incident. The prosecution evidence inspires no confidence. For all these reasons, we are not at one with the findings recorded by the trial Court.

26. Before parting with, we highly appreciate the able assistance given by Mr. S.J. Salunke, learned counsel appointed to represent appellant.

27. In the result, we pass the following order :-

ORDER

- (I) Criminal appeal is allowed.
- (II) Impugned judgment and order dated 15th July, 2019 passed by Additional Sessions Judge, Hingoli in Sessions Case No. 34 of 2016 thereby convicting the appellant, is hereby set aside.
- (III) Appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- (IV) Appellant shall be released forthwith, if not required in any other case.
- (V) Fine amount paid, if any, be refunded to the appellant.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

SSD