

**(2001) 06 BOM CK 0009**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 407 of 1995**

Ramesh Parteki

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

**Date of Decision :** 27-06-2001

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Evidence Act, 1872 — Section 32(1), 32(2), 32(3), 32(4), 32(5)  
Penal Code, 1860 (IPC) — Section 302, 498A

**Citation :** (2001) ALLMR(Cri) 2092 : (2001) CriLJ 3780

**Hon'ble Judges :** P.S. Brahme, J; J.N. Patel, J

**Bench :** Division Bench

**Advocate :** M.R. Daga, for the Appellant; K.S. Dhotey, Assistant Public Prosecutor, for the Respondent

**Final Decision :** Dismissed

## Judgement

P.S. Brahme, J.—Appellant Ramesh Parteki was tried for offences punishable under Sections 302 and 498A of I.P.C. before the 5th Additional Sessions Judge, Nagpur, in Sessions Trial No. 252 of 1994, for the charge of committing murder of his wife Gulabwati by burning her alive and for subjecting her to cruelty. The learned Additional Sessions Judge, Nagpur, by his judgment and order dated 26-9-1995, convicted the appellant of the offence u/s 302, IPC and sentenced to suffer imprisonment for life, while acquitted him of the offence u/s 498A I.P.C. by this appeal, the appellant is challenging the order of conviction and sentence.

2. The incident which gave rise to this prosecution against the appellant, occurred on 3-3-1994 around 4.30 p.m. in the residential quarter of the appellant at Kandri Mines, District Nagpur. The victim Gulabwati was second wife of the appellant. Pramila Rashid Sheikh is admittedly the daughter of the appellant, born from his first wife and she is married to Sheikh Rashid (PW 3) and both of them had come to reside with the appellant and deceased Gulabwati since a month prior to the Incident. On the day when the incident took

place, Sheikh Rashid was taking rest on the rear side of the house, while his wife Pramila (PW 2) had gone to the market. As such the appellant and the victim Gulabwati were the only persons in the house. It is the case of the prosecution that the appellant used to ill-treat his wife Gulabwati and at times, he used to beat and abuse her in drunken state. That, at around 5 p.m. the appellant abused Gulabwati in drunken state. There" ensued quarrel between them as she prevented the appellant from taking away utensils for the purpose of selling or pledging. The appellant, it is alleged, poured kerosene on the person of Gulabwati and set her on fire by throwing burning stick on her person. As soon as she caught fire, she raised shouts, calling her son-in-law namely Rashid (PW 3). The appellant ran away from the house. Sheikh Rashid came there on hearing the cries and shouts and extinguished her fire. In that process, he also sustained burns on his hands. Sheikh Rashid immediately brought Gulabwati to Cottage Hospital at Mansar. He also gave information to Police Out Post at Mansar, to Police Head Constable Prakash Lohi (PW 8) who was, that time, on duty, who immediately rushed to the hospital and ascertained from the doctor that victim Gulabwati was brought in the hospital in burnt condition. Dr. Ezaz Ahmed was the Medical Officer on duty at Primary Health Centre, Mansar. He examined Gulabwati and found that her condition was serious and advised to shift her to Government Hospital, Nagpur. He also found that she was conscious and fit to make a statement. Police Constable Lohi, after ascertaining from Dr. Ezaz Ahmed about the condition of the victim, recorded her dying declaration in the presence of panch witnesses Doma Nagpure (PW 9) and Dr. Ezaz Ahmed (PW 10) and the victim made a statement as per Exh. 32 Police Head Constable Lohi went to the out post and made entry in the occurrence register vide C No. 32/94 u/s 307 of the Indian Penal Code and then went to Police Station, Ramtek along with occurrence report and statement of the deceased Exh. 32. On the basis of the occurrence report and the statement of deceased Exh. 32, Police Station Officer, Ramtek, registered crime for the offence punishable u/s 307 of the Indian Penal Code against the appellant. On the same day, on getting requisition, the Executive Magistrate Shri Madhaorao Thombare (PW 6) visited the Hospital at Mansar and after ascertaining from Dr. Ezaz Ahmed regarding condition of the patient, recorded her dying declaration which is the second dying declaration. Dr. Ezaz Ahmed made endorsement on the letter of requisition Exh. 42 about the condition of the victim Gulabwati.

3. A.S.I. Vilas Deshmukh (PW 11) took up the investigation in the matter, He visited the place of occurrence and drew the spot panchanama Exh. 29 and seized some articles under Seizure Memo Exh. 30. On 7-3-1994, Gulabwati died in the hospital at Nagpur. Exh. 9 is the Death Certificate which shows the cause of death as burns 40% sup c Septicemia c C.R.A. Dr. P.G. Dixit and Dr. A.G. Wankhede conducted autopsy on the dead body of Gulabwati and prepared the postmortem notes Exh. 16. In column No. 17 of the Postmortem Notes, details of burns sustained by the victim have been given and it is revealed that the victim had sustained 62% burns and as per the say of the doctor the probable cause of

death was Pyaemia due to burns. In the course of investigation, the articles seized were sent to Chemical Analyser for analysis. The report of C.A. Exh. 20 shows that the results of test for detention of kerosene residue in respect of the clothes of deceased and empty bottle with lid and wick, are positive. After completing the Investigation, charge-sheet was filed in the Court. of Judicial Magistrate, who in turn, committed the case to the Court of Session at Nagpur, for trial.

4. Before the Additional Sessions Judge, Nagpur, the appellant pleaded not guilty to the charge and claimed to be tried. In the trial, the prosecution examined in all 11 witnesses including Pramila (PW 2), Sheikh Rashid (PW 3), Beniprasad Kathote (PW 4) and Harisingh Bisen (PW 5), who alleged to have heard the victim disclosing that she was burnt by her husband, Madhaorao Thombare (PW 6) who recorded the dying declaration Exh. 27, Police Head Constable Lohi (PW 8) who recorded the dying declaration Exh. 32, Doma Nagpure (PW 9) who was claimed to be panch witness in whose presence the dying declaration Exh. 32 was recorded by the Police Constable Lohi, Dr. Ezaz Ahmed (PW 10) who was present when the dying declaration was recorded and who certified that the victim was conscious and was fit to make statement, and P.S.I. Deshmukh (PW 11) who carried out the investigation in the matter. After the prosecution led the evidence, statement of accused u/s 313, Cr.P.C. came to be recorded. From the answers given by him, it is revealed that his defence is that of total denial. However, he has stated in reply to question No. 19 as "At the time of incident, I was not present in the house. I returned back in the night and thereafter I learnt about it. When I returned back, I saw deceased Gulabwati lying unconscious in burnt condition I told Rashid that I was going to lodge a report.

5. Before the trial Court, the witness Pramila, Rashid, Doma, Beniprasad did not support the prosecution and as such their evidence was left out of consideration. The trial Court discarded the evidence of these witnesses Harisingh Bhimsingh Bisen (PW 5) claimed that the lady made a statement that quarrel had begun between herself and her husband as she prevented her husband from taking away household utensils, and thereafter set her on fire, The trial Court accepted the evidence of Police Head Constable Lohi, Executive Magistrate Madhaorao Thombre, Dr. Ezaz Ahmed and found that both the dying declaration Exh. 27 and Exh. 32 were true and the victim Gulabwati was conscious and fit to make a statement and relying on these dying declarations, the trial Court found that the victim Gulabwati was done to death by the appellant by burning her and, therefore, the trial Court convicted the appellant for committing murder of his wife and consequently was sentenced to suffer imprisonment for life. Hence this appeal.

6. We have heard Mr. Daga, the learned counsel for the appellant. In the first place., he pointed out glaring discrepancy and inconsistency between the two dying declarations Exh. 27 and Exh. 32 in respect of dying declaration Exh. 27 recorded by the Executive Magistrate, it is pointed out that before recording the

dying declaration, he did not ascertain from the Medical Officer who was present, as to the condition of the patient to make the statement. He pointed out that in the endorsement Exh. 42, which the Medical Officer has made, it is not certified specifically that the patient was conscious and physically and mentally fit to give statement. There is no endorsement made by the Medical Officer, on the dying declaration Exh. 27 to show that the statement was recorded in his presence and the patient was in a fit condition to make a statement. He further pointed out that even from the evidence of the Executive Magistrate Madhaorao Thombre, and that of Dr. Ezaz Ahmed, it cannot be said that the statement was recorded in the presence of Dr. Ezaz Ahmed, or Dr. Ezaz Ahmed was present when the statement was recorded by Madhaorao Thombre. He also pointed out that there is no endorsement on the statement Exh. 27 that the statement was read over to the patient and the same was accepted by her to be true. The statement Exh. 27 was recorded in Marathi language, while the statement Exh. 32 was recorded in Hindi language, to which the victim was well acquainted with. It is, therefore, submitted by the learned counsel for the appellant that in the absence of endorsement that the patient admitted the statement to be true, it is unsafe to place reliance on the statement which is recorded in the language other than language in which it was narrated by the patient. Mr. Daga pointed out that Dr. Ezaz Ahmed stated in his evidence that the patient was conscious and fit physically and mentally to make statement, but that is not reflected in either of the endorsement on Exh. 42 and Exh. 32. In fact, the endorsement on Exh. 32 is only to the effect "Statement is given before me". While the endorsement on Exh. 42 is "she can give her statement " Mr. Daga placed reliance on a decision rendered by the apex Court in Uka Ram Vs. State of Rajasthan, in which it is held that when the deceased was mentally retarded woman and medical fitness was for her physical condition, the dying declaration is not reliable. The medical certificate only states to her physical condition to make a statement, but does not refer to her mental condition even at that time. Mr. Daga also refers to the disparity inasmuch as in the first dying declaration Exh. 32, the left hand thumb mark of the deceased was obtained while in the second dying declaration Exh. 27, thumb mark of left great toe of the victim was taken. It is submitted that deceased was not conscious and as such both the dying declarations are not truthful and so cannot be relied upon. Mr. Daga also made statement that in the death certificate Exh. 9, the cause of death is given as 40% burns (sup) with septicemia. He pointed out that right from 3-3-1994. the victim was in the hospital till 7-4-1994 on which date, she died in the hospital. She was undergoing treatment. The septicemia might be due to improper or wrong treatment or negligence in treating the patient. It cannot be said that the death of the patient was on account of the burns as such the offence u/s 302, IPC is not made out. He, therefore, urged that the appellant is entitled to acquittal. The appeal be allowed.

7. Mr. Dhote, the learned A.P.P. supported the Judgment of conviction. He gave emphasis on the evidence of Dr. Ezaz Ahmed and Police Head Constable Lohi,

who stated that it was ascertained that the patient was conscious and in a fit condition to make statement. He submitted that the discrepancy pointed out in both the dying declarations are not material and significant so as to discredit the statement made by the victim. He further pointed out that the report of Chemical Analyser Exh. 20 shows positive detection of kerosene residue on the articles namely piece of burn clothes of the deceased sent to the Chemical Analyser for examination. Mr. Dhote also placed reliance on the decision of the Apex Court in the case of Bakhshish Singh Vs. The State of Punjab, wherein it is held that though the deceased gave narration in Punjabi but if was reduced into writing in Urdu, cannot be said to be a ground for saying that the statement was not correctly reproduced to what was stated by the declarant and this was wholly inadequate reason for rejecting the declaration. Relying on this case, Mr. Dhote submitted that the submission of the learned counsel for the appellant that the statement of the patient in dying declaration recorded by the Special Executive Magistrate, vide Exh. 27, in Marathi language, bring out infirmity, as it is not in the language in which the patient has given the narration, cannot be accepted. As regards the cause of death, the learned A.P.P. submitted that there is no evidence that the victim has died due to medical negligence for want of proper treatment. In the absence of that, it is to be said that the cause of death was the burns sustained by the deceased which has direct nexus with the act of the accused in pouring kerosene on the person of the victim and setting her on fire. It is submitted that the positive finding of kerosene residue on the burnt pieces of clothes of the deceased, corroborates the claim of the victim in the statement Exh. 27 and Exh. 32 that the accused appellant poured kerosene on her and set her on fire. He, therefore, urged that the appeal merits on consideration and the same should be dismissed.

8. The principal evidence against the appellant consisted of the dying declaration made by deceased Gulabwati from time to time in Primary Health Centre, Mansar, on the day of occurrence before she was shifted to Government Hospital, Nagpur. The dying declaration, first in time, was recorded by the Police Head Constable Lohi (PW 8) as per Exh. 32 in the presence of Dr. Ezaz Ahmed (PW 10). Then the second dying declaration was recorded by the Executive Magistrate Madhaorao Thombre (PW 6) as per Exh. 27. The other evidence is circumstantial evidence about positive detection of kerosene residue on the burnt pieces of clothes of the deceased in the bottle and its lid seized from the place of occurrence. The burning could have been either homicidal or accidental. In view of the detection of kerosene residue seen in burnt piece of clothes of the deceased, so also in the bottle, the possibility of the accidental death is totally ruled out. It is not suggested by the defence either before the trial Court or before us, that the victim died suicidal death. Having regard to the clinching statement of the victim in her dying declaration Exh. 32, which we are finding to be truthful and reliable, that appellant poured kerosene on her person and set her on fire, we have no hesitation in holding that death of the victim was homicidal one.

9. In this context, we propose to advert to the submissions made by the counsel appearing for the appellant . He pointed out that as per the death certificate Exh. 9, the cause of death was burns 40% sup with septicemia . In postmortem note Exh. 16, the doctors have given the cause of death as Pyaemia due to burns. It is vehemently contended by the counsel for the appellant that septicemia might be an outcome of improper treatment given to her by the doctors having regard to the fact that the victim was all alone in the hospital from 3-3-1994 to 7-3-1994 when she died. So It is submitted that if the death was due to Pyaemia due to burns or septicemia, it was not the death caused due to burns sustained by the deceased and if that is so, then the appellant cannot be held guilty for the offence of committing murder of deceased Oulabwati, It is a matter of record that the victim sustained 62% burns in the Incident. We have, in the postmortem report Exh. 16, the details of the burns sustained by the deceased on her person . Having regard to the extent of burns sustained by the deceased, it is crystal clear that the intention of the culprit behind the act of setting the victim on fire, was to cause death of the victim. It is also very clear from the findings of the doctors in the postmortem report Exh.16 that the probable cause of death was due to burns. This clinchingly goes to show that the burns sustained were sufficient in the ordinary course of nature to cause death. When this sufficiency exists and death follows, and the cause of such injury is evident, the offence is of murder. There is no evidence that the cause of death was only due to septicemia. It is further significant to note that there is no reason to doubt that septicemia or pyaemia which was the cause of death, was due to the burn injuries sustained by the deceased and not on account of improper or wrong treatment. There is no material on record to show that there was any negligence by the doctors in treating the deceased in the absence of that, we cannot accept the contention of the learned counsel for the appellant that victim did not die of burn injuries caused by the accused. In the case before hand, it can safely be said that septicemia was caused due to burn injuries. It was direct result of the burn injuries sustained by the deceased. It is to be seen that the cause of death was consequent of the burn injuries sustained by the deceased.

10. The law with regard to the dying declaration is very clear. A dying declaration may be closely scrutinised as to its truthfulness like any other important piece of evidence, the light of surrounding facts and circumstances of the case, bearing in mind, on one hand, that the statement is by a person who is not examined in the Court on oath and, on the other hand, that the dying man is normally not likely to implicate innocent person falsely as a person on whose head the sword of death is looming large, is not expected to speak lies. It is presumed that a person would speak the truth only. If the Court is satisfied on closed scrutiny of the dying declaration that it is truthful then it is open to the Court to convict the accused on the basis of the dying declaration without any depending corroboration. There could be no doubt that when the dying declaration is recorded, the person who records the statement must be satisfied that the person who make the statement is consciously making the statement

understanding the Implication of the words, he used and that he/she is physically and mentally fit to make statement. That is why it is required that the person who records the dying declaration has to ascertain it from the Medical Officer as to the fitness of the person making the statement.

11. The statement, written or verbal of relevant facts made by person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expenses which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts under the circumstances enumerated under Sub-sections (1) to (8) of Section 32 of the Evidence Act. When the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question is admissible in evidence being relevant whether the person was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Such statements in law are compendiously called dying declaration. The admissibility of dying declaration rests upon the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscious and virtuous man under oath, "*Nemo moriturus praesumuntur mentiri*". Such statements are admitted, upon consideration that their maker is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth. The principle on which the dying declarations are admitted in evidence, is based upon the legal maxim "*Nemo moriturus praesumitur mentire*" i.e. a man will not meet his maker with a lie in his mouth. It has always to be kept in mind that though a dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it is essential for the Court to insist that dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or product of imagination. Before relying upon a dying declaration, the Court should be satisfied that the deceased was in a fit state of mind to make the statement. Once the Court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration as rule requiring corroboration is not a rule of law but only a rule of prudence.

12. First we have to make judicial scrutiny of the dying declaration Exh. 27, which is, admittedly, recorded by the Executive Magistrate Madhaorao Thombre. In this connection, the material evidence is that of the Executive Magistrate Madhaorao Thombre (PW 6) and that of Dr. Ezaz Ahmed (PW 10). It is seen that this dying declaration Exh. 27 has been recorded in Marathi language by the Executive Magistrate though the narration of the statement by the deceased was in Hindi. The learned counsel for the appellant submitted that as the victim was

knowing only Hindi language, recording of the dying declaration in Marathi brings out certain infirmity and as such it is not reliable. We do not think that the dying declaration could be discarded merely on the ground that it is recorded in different language than the one in which narrated by the deceased. The Apex Court in the case of Bakhshish Singh Vs. The State of Punjab, has dealt with this aspect of the matter. In that case, the deceased gave the narration of the things in Punjabi and the statement was taken out in Urdu. The trial Court rejected the dying declaration on that ground the Apex Court observed that in Punjabi that is how the dying declarations are taken down and that has been so ever since the Courts were established, and judicial authority has never held that to be an infirmity in dying declaration making them inefficacious. Therefore, in the case before hand, merely because the Executive Magistrate recorded the dying declaration in Marathi which is the State language, though the deceased gave narration in Hindi which language she was only conversant to, it does not, by itself, affect the credibility of the statement made by the deceased. It is nobody's case that the Executive Magistrate Madhaorao Thombre was not conversant with Hindi. It is certain that if the statement is made in the language not known to the person recording the statement, it is difficult to accept that without the aid of interpreter or translator, a person can record his statement as that of the maker.

13. It. is pointed out that the Medical Officer Dr. Ezaz Ahmed has not given endorsement that the deceased was conscious and physically and mentally fit to give statement. His endorsement on Exh. 42 is only to the effect that she can give the statement. No time has been given in Exh. 42 as to when the endorsement was made by the Medical Officer. From the evidence of witness Madhaorao Thombre and Dr. Ezaz Ahmed, it is very clear that Dr. Ezaz Ahmed was not present when the statement was recorded by the Executive Magistrate. It is also admitted by the Executive Magistrate Madhaorao Thombre that he himself did not ascertain as to the condition of the patient to make a statement. In this set of circumstances, when the statement was not recorded in the presence of the Medical Officer Dr. Ezaz Ahmed, it is very difficult to place reliance on this statement Exh. 27. It does not inspire confidence as it appears doubtful whether the deceased was in a fit condition to make statement. Therefore, we do not find it safe to place reliance on the dying declaration Exh, 27,

14. Now we examine the dying declaration Exh, 32. It is undisputed fact that this dying declaration was recorded by the Police Head Constable Lohi who visited the Primary Health Centre on getting information and on ascertaining from, the Medical Officer Dr. Ezaz Ahmed about the condition of the victim. It is also pertinent to note that the Medical Officer Dr, Ezaz Ahmed was very much present when the statement was recorded by Police Head Constable Lohi. He has stated in his evidence before the Court that the statement was recorded in his presence and accordingly he has made endorsement on the statement Exh. 32 to the effect The statement was given before me". Much capital has been made by the



learned counsel for the appellant that the Medical Officer has not specifically certified that the patient was conscious and physically and mentally fit to make statement placing reliance on the decision of the Apex Court rendered in the case of Uka Ram Vs. State of Rajasthan, . We have gone through the decision. In that case, the victim was admittedly having mental disease. The doctor has not certified that the deceased was in a fit state of mind to make the statement. So in that background, the Apex Court has observed that before relying upon the declaration, the Court should be satisfied that the deceased was in a fit state of mind to make the statement and, therefore, the Court discarded the dying declaration.

15. There can be no quarrel on the proposition that the Court should be satisfied that the deceased was in a fit state of mind to make the statement. The Court should be obliged to rule out the possibility of the statement being result of either tutoring, prompting or vindictive or product of imagination. It is essential for the Court to insist that dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court should be satisfied that the dying declaration is true, voluntary and not influenced by way of extraneous consideration. It is needless to say that if the Court is satisfied that the dying declaration is true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration as rule requiring corroboration is not a rule of law but only rule of prudence.

16. In the case before hand, as to the condition of the deceased to make a statement, there is overwhelming evidence of Dr. Ezaz Ahmed. In his evidence, he has stated that Police recorded her statement in his presence and while recording the statement, her condition was fit to make the statement. He further stated that after recording the statement he gave his endorsement as to the condition of the patient on the same statement. He has also stated that he had examined the patient and found her to be fit to make a statement. The Police Head Constable Lohi who recorded the statement, has stated in his evidence that doctor was present when he recorded the statement. He has also stated that the patient was conscious when her statement was recorded. He has stoutly denied the suggestion of the defence that the patient was unconscious. Dr. Ezaz Ahmed also denied the suggestion that the deceased was in unconscious condition and she did not make any statement before him. Having regard to this clinching evidence of Dr. Ezaz Ahmed and Police Head Constable Lohi, we have no doubt that the patient was conscious and fit enough, physically and mentally, when her statement was recorded. In this background, we also take a note of the fact that both the witnesses, Police Head Constable Lohi and Dr. Ezaz Ahmed, were quite disinterested and as such there was no reason for them to falsely implicate the appellant. That is why the statement of the deceased in the dying declaration Exh. 32 is found to be truthful and inspiring confidence. Therefore, we have no hesitation in placing reliance on the dying declaration Exh. 32. As stated earlier, the circumstantial evidence as to the positive detention of kerosene residue in the burnt pieces of clothes of the deceased lends assurance to the statement of

the deceased in the dying declaration Exh. 32 that it was the appellant who poured kerosene on her person and set her on fire. Therefore, the prosecution has clinchingly established that the victim Gulabwati was done to death by the appellant, by setting her on fire by pouring kerosene and as such the appellant is responsible for committing murder of the victim Gulabwati. Therefore, the trial Court has committed no error in holding the appellant guilty for having committed murder of his wife Gulabwati.

17. In the result, the appeal merits no consideration and as such same is dismissed.