
(2016) 10 BOM CK 0173
In the Bombay High Court
Case No : Criminal Appeal No.90 of 2002

Santosh alias Santaram S/o Bhivsan Rahane	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 27-10-2016

Acts Referred:

Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 306, Section 498A

Citation : (2017) 2 AIRBomRCri 631 : (2017) ALLMRCri 2346 : (2017) 1 BomCR(Cri) 495

Hon'ble Judges : V.L. Achliya, J.

Bench : Single Bench

Advocate : Mr. P.F. Patni, Advocate, for the Appellant in Criminal Appeal No. 90 of 2002; Mr. A.V. Deshmukh, Addl. P.P, for the State in Criminal Appeal No. 90 of 2002; Mr. A.V. Deshmukh, Addl. P.P, for the Applicant in Suo Motu Revision Application No.3 of 2002 in

Final Decision : Allowed

Judgement

V.L. Achliya, J.—Being aggrieved by the judgment and order dated 6th February, 2002 passed in Sessions Case No. 441 of 1999 by the 2nd Additional Sessions Judge, Aurangabad, the appellant/accused has preferred this appeal.

2. Briefly stated the facts unfolded during the course of trial are summarized as under:

(a) The appellant was put to trial to face charge under Section 498A, 306 of the Indian Penal Code with allegations that he had subjected his wife Bebitai (hereinafter referred to as the deceased) to cruelty and thereby abetted her to commit suicide.

(b) In nutshell, the prosecution has approached with the case that the marriage between the appellant - accused and Bebitai was solemnized in the year, 1986. The couple was blessed with three children which include two sons and one

daughter. Immediately after the marriage, they started residing separately from parents. The accused got addicted to liquor and in the state of intoxication, he used to beat his wife Bebitai. On 29.4.1999, Bebitai was admitted in the Hospital with burn injuries. On 3.5.1999 Murlidhar Dandekar, Special Executive Magistrate (P.W.8) recorded her dying declaration (Exh.22). In her dying declaration (Exh.22), the deceased has disclosed that her husband always used to beat her under influence of liquor. On 29.4.1999, the accused has beaten her and therefore, at about 9 p.m., she poured kerosene on her person and set her ablaze. She was admitted in GHATI Hospital by her sister-inlaw Sangita. On the basis of the dying declaration (Exh.22) recorded on 3.5.1999, ASI Mohmed Arif Sk. Afzal (P.W.7) - Station House Officer on duty attached to Police Station Khultabad registered the offence under Section 498A and 323 of IPC vide Crime No.68/1999. On 3.5.1999 at about 10.40 p.m. deceased succumbed to the burn injuries and an offence under section 305 IPC came to be added. Thereafter, PSI Anilsingh Gautam (P.W.6) attached to Police Station Khultabad conducted the investigation. Prior to him, Head Constable Namdeo Kawale had conducted the investigation. From 4.5.1999, PSI Anilsingh (P.W.6) conducted further investigation. He arrested the accused on 4.5.1999. He recorded statements of the witnesses such as Bharat Dapke (P.W.2) brother of the deceased, Tukaram Dapke father of the deceased, Kartik Dapke Sarpanch of the village. On conclusion of the investigation, it was transpired that the deceased committed suicide due to continuous ill-treatment and harassment at the hands of the accused. He, therefore, prepared the charge-sheet and filed it in the Court of J.M.F.C., Aurangabad. In due course, the case was assigned to the Court of Sessions at Aurangabad. On 20.11.2001 charge was framed against the accused under Section 498A and 306 of IPC. The accused pleaded not guilty and claimed to be tried. The appellant accused has taken defence of total denial. In nutshell, the case of the accused was that the deceased sustained burn injuries accidentally.

(c) In order to prove its case, the prosecution has examined nine witnesses. On conclusion of the trial, the Sessions Court has held the appellant guilty of the offence under Section 498A and 306 of IPC for committing an offence under section 498A of IPC, the appellant has been sentenced to suffer R.I. for one year and to pay a fine of Rs.500/- and in default of payment of fine, to undergo further R.I. for three months. For committing an offence u/s 306 IPC, the appellant has been sentenced to suffer R.I. for five years and to pay a fine of Rs.1000/-, in default of payment of fine, to undergo further R.I. for one year. Being aggrieved, the appellant has preferred this appeal.

3. I have heard the learned Counsel for the appellant and the learned Additional Public Prosecutor for the State and perused the record and the proceedings.

4. In order to prove its case, the prosecution has examined nine witnesses. The conviction of the appellant is mainly based upon the dying declaration (Exh.22) recorded by Murlidhar Dandekar (P.W.8) and the oral testimonies of Bharat

Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4). The trial Court has found the dying declaration to be truthful and worth to be relied. It is further observed that the dying declaration has been duly corroborated by the testimonies of P.Ws.2 to 4 coupled with the testimony of Dr. Rathod (P.W.1) the autopsy surgeon and Dr. Anil Degaonkar (P.W.9), who examined the deceased before recording her dying declaration (Exh.22). In this view, it is necessary to closely scrutinize the testimonies of the said witnesses.

5. Since the case is mainly based upon the dying declaration (Exh.22), it is necessary to examine whether the dying declaration (Exh.22) can be treated as a truthful dying declaration and can form basis to convict the appellant - accused. The dying declaration made by a person on the verge of his/her death has a special sanctity as it is presumed that at such a solemn moment the person is most unlikely to make any untrue statement and the shadow of death is by itself the best guarantee of the truth of the statement by a dying person regarding the causes or circumstances leading to his/her death. It is the settled position in law that the dying declaration can solely form the basis to convict a person provided such dying declaration is found to be truthful and does not suffer from infirmities. The dying declaration like any other evidence has to be tested by the touch stone of credibility to be acceptable and more particularly, for the reason that the accused does not get an opportunity of questioning the veracity of such statement by cross-examination. Only if the dying declaration is found to be voluntary, truthful and free from any doubt, then only it can be made sole basis to convict an accused. The best test to be applied to guarantee the truthfulness of the dying declaration is to seek corroboration from other material or substantial evidence. If there are inconsistencies and discrepancies in such dying declaration, it is unsafe to rely upon such dying declaration. It is, therefore, incumbent upon the prosecution to prove that the dying declaration as relied upon is untainted and truthful. The Court is also expected to be on safeguard that the statement of the deceased was not a result of tutoring, prompting or stretch of imagination. It is also necessary to see that while making such dying declaration, the deceased was in a fit state of mind.

6. Mr. Patni, learned Counsel for the appellant has strenuously contended that the reasons and finding recorded by the trial Court are absolutely perverse and not sustainable in law. The dying declaration (Exh.22) which has been formed the basis to convict the appellant, suffers from so many infirmities and the same cannot be treated as truthful and worth to be relied upon. It is pointed out that the incident was occurred on 29.4.199 at about 9 p.m. The deceased was admitted in the hospital at about 10 p.m. Intimation in respect of admission of the deceased in a burnt condition was duly given to Police. The dying declaration allegedly recorded by Murlidhar Dandekar (P.W.8) was recorded after two - three days after the incident. The offence in question was also registered after three days of the incident. The offence has been registered on the basis of the dying declaration (Exh.22). As per the case of the prosecution, the deceased was admitted on 29.4.1999. The intimation in respect of her admission was duly

notified to the police on the same day. As per the testimonies of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4), they met the deceased on 30.4.1999 and the deceased had made oral dying declaration to them to the effect that she committed suicide on account of beating at the hands of accused. No complaint was lodged by them. The deceased succumbed to burn injuries on 3rd may, 1999 at about 10 p.m. Subsequent thereto, Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4) have given the statement of alleged harassment and oral statement made by the deceased. The prosecution has not explained the inordinate delay of more than three days in registering the offence. The dying declaration allegedly recorded by Murlidhar Dandekar (P.W.8) is itself suspicious and there is a reason to believe that no such dying declaration was recorded. There is no certificate from the doctor that the deceased was in a fit state of mind and in a position to make such a statement. The dying declaration (Exh.22) bears no endorsement from the Medical Officer. There was no requisition from the Special Executive Magistrate to the Medical Officer to examine and certify that the deceased was in a fit state of mind and physically and mentally sound to make a statement. There is no endorsement at the end of the dying declaration that throughout the recording the deceased was in conscious state of mind. So also the dying declaration (Exh.22) was not read over to the deceased and she admitted the contents thereof to be recorded truly and correctly as per her narration. The thumb impression appearing on the Exh.22 bears no attestation by the Special Executive Magistrate. No preliminary question were put up by the special Executive Magistrate to assess the soundness of the deceased to make a statement. As per dying declaration (Exh.22), the statement was recorded in between 3 to 3.15 p.m., the alleged endorsement of the doctor made on the requisition letter written by the Police Constable appears to be made at 2.30 p.m. On the requisition letter sent to the Magistrate, no time has been mentioned as to sending of the requisition and receipt of the same. It is also not mentioned that the dying declaration was sealed and handed over to Namdeo Kawale (P.W.5). By referring the testimonies of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Namdeo Kawale (P.W.5), the learned Counsel for the appellant pointed out that the testimonies of the said witnesses are full of omissions and contradictions and they are related to deceased and interested persons, therefore, it is highly unsafe to rely upon their testimonies. It is further contended that even if we accept the allegations in its entirety, the act attributed to the accused neither can be termed as cruelty within the meaning of section 498A of IPC nor it amounts to an act of abetment to commit suicide punishable under Section 306 of IPC.

7. On the other hand, the learned Additional Public Prosecutor for the State has supported the reasons and findings recorded by the trial Court. He has submitted that the evidence of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4) can safely be relied. They are the best persons to know about the marital life of the deceased and the ill-treatment the deceased was suffering at the hands of the accused. He has further submitted that the dying declaration

(Exh.22) can safely be relied upon as truthful.

8. In order to appreciate the submissions advanced, I have closely scrutinized the oral and documentary evidence adduced by the prosecution and further considered the reasons and findings recorded by the trial Court to convict the appellant.

9. On carefully considering the submissions advanced in the light of the reasons and findings recorded by the trial Court and the evidence adduced by the prosecution, I am of the view that the conviction of the appellant is not sustainable in law and the reasons and the findings recorded by the trial Court are perverse and not sustainable in law.

10. If, we consider the overall case of the prosecution, then the fact is not in dispute that the deceased has died on account of burn injuries and the cause of death was "shock due to burns injuries." The fact is also not in dispute that there was no ill-treatment and harassment on the part of accused to coerce the deceased to meet any unlawful demand either from the deceased or her relatives. The only cause assigned for committing suicide is the habit of the appellant - accused to consume liquor and the alleged beating in the state of intoxication. It is therefore, necessary to scrutinize the evidence from the view point as to whether the acts as attributed in the dying declaration (Exh.22) amount to an offence either under Section 498A or 306 of IPC. Section 498A OF IPC reads, as under:

"498A. Husband or relative of husband of a woman subjecting her to cruelty:

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation-For the purpose of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

11. If, we consider section 498A of IPC then all types of harassment, ill-treatment are not treated as cruelty. The cruelty has been defined as quoted above in Explanation Clause (a) and (b) of Section 498A IPC. In order to attract the offence under Section 498A, it is incumbent upon the prosecution to establish the acts amounting to "cruelty" as explained under clause (a) or clause (b) of Explanation to Section 498A of IPC. Clause (a) of Explanation to Section 498A IPC refers to any wilful conduct which is of such a nature as is likely to drive the

woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the woman. So far as clause (b) of the said section is concerned, "cruelty" contemplates harassment of the woman where such harassment is with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or on account of failure by her or any person related to her to meet such demand. If, we consider the dying declaration (Exh.22), then it nowhere refers to any harassment to the deceased to meet any unlawful demand by herself or any person related to her. Similarly, the testimonies of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4) also do not refer to any such harassment to the deceased to meet unlawful demand. Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4) have deposed that whenever the deceased used to go to her parents house, she used to disclose about the habit of the accused of consuming liquor and beating her under the state of intoxication. Thus, on the face of the entire evidence, there is no iota of evidence to establish the cruelty as defined under Clause (b) of Section 498A of IPC.

12. The next question that falls for consideration is whether the prosecution has proved the cruelty of the nature as defined in clause (a) of section 498A. No doubt, the deceased has alleged to have committed suicide and the dying declaration (Exh.22) and the oral testimonies of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4) disclose that the deceased had told to them that she committed suicide. However, the evidence on record is not sufficient to treat the act of the accused as a conduct wilful in nature to drive the deceased to commit suicide. In order to establish cruelty, as explained in clause (a) of Explanation to Section 498A IPC, the act attributed to the accused must be a wilful act which is likely to drive the woman to commit suicide or to cause grave injury or danger to life. The only act attributed to the accused is that he has developed habit of consuming liquor and under the state of intoxication, the accused used to beat the deceased. On the unfortunate day of incident, the deceased was alleged to have been beaten by the accused which has prompted her to commit suicide. If, we take the allegation in its entirety to be true, still the act of the accused to beat the deceased cannot be termed as a wilful act to drive the deceased to commit suicide. It is pertinent to note that the marriage between the appellant and the deceased was solemnized in the year, 1986. The incident occurred after the period of thirteen years from their marriage. They had three children born out of the wedlock. They were residing separately from the parents. The habit of consuming liquor was also claimed to be developed two - three years after the marriage. Therefore, even if it is presumed that the deceased has committed suicide and that too, on account of alleged act of the accused, still it cannot be said that the conduct of the accused was wilful. There must be reasonable nexus to exist between cruelty and suicide in order to make good the offence of cruelty. In other words, the cruelty to be established has to be of such a grave nature, likely to drive the woman to commit suicide. If the accused was consuming liquor and allegedly committing the act of beating for

last ten years, it cannot be accepted that there was a nexus between the act of cruelty and commission of suicide by the deceased.

13. There is no cogent, reliable and convincing evidence either to sustain the charge under Section 498A or 306 of IPC. As discussed, the conviction has been mainly based upon the oral testimonies of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4) and the dying declaration (Exh.22). If, we examine the testimony of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4), then their testimonies cannot be accepted as full of credence and safe to be relied to base the conviction. As stated, Bharat Dapke (P.W.2) and Tukaram Dapke (P.W.3) are closely related to the deceased as brother and father, respectively. It is therefore, necessary that their testimonies are to be closely scrutinized. Bharat Dapke (P.W.2) has deposed that the deceased was his younger sister, married to the accused about 13 to 14 years back. He has deposed that after 2 - 3 years of the marriage, the accused started drinking liquor and beating his sister after consuming liquor. He was addicted to liquor. Whenever, the deceased used to come to his house, she used to disclose about the ill-treatment to her from the accused that he used to beat her after consuming liquor. He ;further deposed that on 30th April, 1999 at about 12 noon, he received a telephonic message that his sister was admitted in burnt condition in GHATI hospital, Aurangabad. He, therefore, came to Aurangabad along with Sarpanch of the village and his brothers and parents had also came to GHATI hospital and they met the deceased. When he enquired from the deceased as to what had happened, she told him that on the previous night she was beaten mercilessly by the accused after consuming liquor and due to that reason, she poured kerosene on her person and set herself on fire. He deposed that she was in the hospital for four - five days and on 4.5.1999 the deceased died in the hospital. In the cross-examination, Bharat Dapke (P.W.2) has admitted that when his statement was recorded by the police, he had not disclosed that whenever his sister was visiting his house, she used to disclose about the ill-treatment to her from the accused and the facts which he has deposed before the Court, have been deposed by him for the first time in the court. Thus, if we consider the testimony of Bharat Dapke (P.W.2) in the light of the cross-examination, then the material fact about ill-treatment to the deceased deposed by Bharat Dapke (P.W.2) has been proved to be by way of material improvement and, therefore, it is unsafe to place any reliance on the testimony of such witness who was related to the deceased and highly interested to see the accused being convicted. Similarly, the conduct of the witness is quite unnatural. Although, the witness has deposed that the deceased used to complain about the ill-treatment to her at the hands of the accused, no complaint was lodged in the past. Bharat Dapke (P.W.2) claims that the deceased had disclosed the circumstance under which she poured kerosene and set herself on fire and attributed the same as an outcome of the beating at the hands of the accused; still, no complaint was lodged by P.W.2. If really such disclosure was made on 30th April, 1999, in natural consequence, the conduct of the witness should have been to lodge complaint

against the accused. In this view, it is difficult to place any reliance on the testimony of such witness who is otherwise highly interested person.

14. On the same line, the prosecution witness Tukaram Dapke (P.W.3) - father of the deceased has deposed. He has deposed that marriage of his daughter was solemnized fifteen years back with the accused. After one year of marriage, the accused started consuming liquor and in such state of consumption of liquor, accused used to beat his daughter Bebitai. He further deposed that whenever Bebitai (deceased) used to come to his house, she used to disclose about the ill-treatment to her. He further deposed that on receipt of the information that his daughter was admitted in burnt condition, he visited her in GHATI hospital. His daughter disclosed that due to beating by the accused after consuming liquor, she poured kerosene on her person and set her on fire. Tukaram Dapke (P.W.3) is also related to the deceased as father. It is no where the case of the P.W.2 and P.W.3 that any time in past, a complaint was lodged or the deceased had left her matrimonial house and came to stay with them. It is no where case of P.W.2 and P.W.3 that any mediation had taken place and deceased was sent back to her matrimonial house. Except the alleged allegation that the accused was addicted to liquor and used to beat the deceased under influence of liquor, there is nothing in the testimonies of Bharat Dapke (P.W.2) and Tukaram Dapke (P.W.3) to disclose cruelty, grave in nature to commit suicide by the deceased. There is a variance in the testimonies of Bharat Dapke (P.W.2) and Tukaram Dapke (P.W.3). Bharat Dapke (P.W.2) has deposed that after two - three years of marriage the accused developed addiction of liquor. Tukaram Dapke (P.W.3) has deposed that after one year of marriage, the accused developed addition to liquor. The allegations about the ill-treatment which the deceased used to tell are general in nature and without any specification. The conduct of Bharat Dapke (P.W.2) and Tukaram Dapke (P.W.3) is quite unnatural. They had not made any complaint in the past. The father alleged disclosure made by the deceased on 30th April, 1999.

15. If, we consider the testimony of Kartik Dapke (P.W.4), who claims to be Sarpanch of the village, he has deposed that for a period of one year the deceased was treated properly by the accused. After one year of the marriage, deceased Bebitai was complaining about the beatings given to her by the accused after consuming liquor. About four years prior to her death, deceased was at the house of her parents for two - three months. At that time, the deceased had received notice from the accused. He and other villagers called a meeting and sent Bebitai to the house of accused for cohabitation. He further deposed that on 30.4.1999, after receiving telephonic message, he too, visited the deceased who was lying admitted in GHATI Hospital. On enquiry, the deceased told him that on previous day at 9 p.m. the accused beat her after consuming liquor and therefore, she poured kerosene on her person and set herself on fire. In the cross-examination, Kartik Dapke (P.W.4) has deposed that at least once or twice in a year the deceased used to visit her parents' house. He admitted that the fact deposed by him that prior to three - four years of death of the deceased, a notice was received by her from the accused and he along with

other villagers had set her back for cohabitation, was not disclosed before the police. Thus, an important material fact of earlier marital discord has been first time disclosed before the Court. This is material improvement. It appears that Kartik Dapke (P.W.4) is also closely related to the deceased. He admitted that he had no occasion to meet the accused at any time. He expressed his ignorance that the accused was suffering from T.B. It is pertinent to note that though Kartik Dapke (P.W.4) claims to be Sarpanch of the village and the deceased has allegedly disclosed the reason for pouring kerosene and setting her ablaze, still no complaint was lodged by P.W.4.

16. In the light of the discussion made in the foregoing paragraphs as to the overall testimonies of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4), it is highly unsafe to place reliance on their testimonies. The prosecution has not examined any independent witness to establish that the deceased had suffered continuous ill-treatment at the hands of the accused. No one was examined from the neighbourhood of the deceased to show that the accused used to continuously beat the deceased under the consumption of liquor. All the said witnesses deposed about the alleged ill-treatment only after death of the deceased. I am therefore, inclined to accept the contention of the learned Counsel for the appellant - accused that the testimonies of the Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4) are not be worthy of placing reliance and that too, in absence of corroboration from an independent witness.

17. The next question poses for consideration is whether the alleged dying declaration (Exh.22) can be treated as truthful and form basis to convict the appellant. If, we examine the dying declaration (Exh.22) in the light of evidence on record, then it raises serious doubt as to whether any such dying declaration was made by the deceased on 3.5.1999. Admittedly, the incident had occurred on 29.4.1999 at about 9 p.m. The deceased was admitted in the GHATI hospital on the same day at about 10 p.m. by the sister of the accused. Since the deceased was admitted in the hospital with burn injuries, the intimation was naturally given by the Medical Officer to the Police on 29.4.1999. As per the testimonies of Bharat Dapke (P.W.2), Tukaram Dapke (P.W.3) and Kartik Dapke (P.W.4), they met the deceased on 30.4.1999 when she made alleged disclosure to them. It is pertinent to note that the dead body of the deceased was referred for postmortem along with requisition letter to Autopsy Surgeon. The prosecution has examined Dr. Rathod (P.W.1) - the Autopsy Surgeon. He has deposed that on 4.5.1999 at about 8.50 a.m. a dead body of deceased Bababai w/o Santosh Rahane was referred to him through City Chowk Police Station, Aurangabad. He conducted the postmortem and issued postmortem report vide Exh.9. The postmortem report (Exh.9) reflects that the dead body of the deceased was referred for postmortem on 4.5.1999 by the police with a history of "Accidental burn on 29.4.99 at 21.00 hours." Thus, till 4th May, 1999, the deceased appears to be treated with a history of accidental death. The requisition letter forwarded with the dead body also reflects that the history was disclosed as accidental

death. After death of the deceased, inquest panchanama of the dead body of the deceased was made on 4th May, 1999. In the inquest panchanama (Exh.7), it is categorically mentioned that after death of the deceased, A.D. was registered to conduct inquiry as to cause of death as contemplated under Section 174 of Cr.P.C. Thus, the important documents such as inquest panchanama (Exh.7) and the postmortem report (Exh.9) dated 4th May, 1999 reveal that up to 4th May, 1999, death of the deceased was treated as an accidental death. In this background, it is necessary to examine as to whether the dying declaration (Exh.22) dated 3.5.1999 can be treated as untainted and worth to be relied to base the conviction. The contents of the dying declaration Exh.22 read, as under:

"ek>s irh nk: fimu usgeh eyk ekjgk.k djrkr0 R;kP;k ekjgk.khP;k Rjklkyk daVKGwu fn0 29-04-1999 jkst xq:okjh jkRjh eyk irhus ekjgk.k dsY;kus 9 oktrk eh R;kaP;k Rjklkyk daVKGwu vaxkoj jkWdsy vksrwu Lor%gkl dkMh ykowu tkGwu / ksrys vkgs0 eyk u.kan laxhrk fgus /kkVh nok[kkU;kr nk[ky dsysy vkgs0 ek>s irh fo:) dkjokb gks.ksl t:jh vkgs0"

18. If, we consider the dying declaration (Exh.22), then on the face of the dying declaration (Exh.22) there is no endorsement by the Medical Officer before recording of the dying declaration or at the end of the dying declaration that the dying declaration was recorded after due examination of the deceased by the Medical Officer and that too, in a fit state of mind to make such declaration. The deceased succumbed to burn injuries on 3.5.1999 at around 10 p.m. The alleged dying declaration is shown to be recorded in between 15.00 hours to 15.15 hours i.e. few hours prior to death of the deceased. There is no evidence brought on record to show the overall condition of the deceased on 3.5.1999. No medical papers relating to treatment and condition of the deceased were produced before the Court. The alleged registration of the offence was claimed to be made on 3.5.1999 at Police Station Khultabad at about 16.40 hours i.e. after the period of one hour of recording of the alleged dying declaration. The deceased was lying admitted in the hospital at Aurangabad. The alleged registration of offence in the Police Station Khultabad, within whose jurisdiction the incident had occurred, is claimed to have been done after one hour of recording of the dying declaration.

19. The testimony of Namdeo Kawale (P.W.5) Head Constable, then attached to Police Station Khultabad and claimed to be instrumental in getting the dying declaration recorded and who conducted the investigation on 3.5.1999, raises serious doubt as to whether such dying declaration was recorded in the manner stated by Namdeo Kawale (P.W.5) and Dr.Anil Degaonkar (P.W.9). Namdeo Kawale (P.W.5) has deposed that on 3.5.1999 the message was received about admission of the deceased in GHATI hospital with burn injuries in Ward No.23. He, therefore, requested the Medical Officer to tell him as to whether the patient is in a position to give statement before her death. He gave letter in writing to that effect, which is at Exh.16. He further deposed that the Medical Officer permitted him to record statement. He further deposed that at that time the Special Executive Magistrate was with him. He had given letter to the Special

Executive Magistrate to record the dying declaration of the deceased. The copy of the letter is at Exh.17. He further deposed that the Special Executive Magistrate Shri Dandekar (P.W.8) recorded the statement of the deceased and handed over the same to him, which he handed over at the Police Station. The A.S.I. Arif Mohd. (P.W.7) who was the Police Station Officer, registered the Crime No.68/99 on the basis of the said dying declaration against the accused and then handed over the case papers to him for further investigation. On 3.5.1999 at 5.30 p.m. he went to spot of incident at Kasabkheda and made spot panchanama vide Exh.11. Then, he recorded statements of neighbours of the accused. On 3.5.1999 at about 10.40 p.m., the deceased died in the hospital. He further deposed that on 4.5.1999 he received the postmortem report and then added offence punishable under section 306 of IPC and then handed over the investigation to the P.S.I. Gautam. In the cross-examination, the witness has expressed his inability to tell the exact time at which the information was received from GHATI hospital. He deposed that he came to GHATI hospital at about 12 to 1 O'clock in the noon time. He gave letter to the Medical Officer at about 2 p.m. on 3.5.1999. He deposed that when he went to the hospital, the Special Executive Magistrate Dandekar was with him.

20. The prosecution has examined Murlidhar Dandekar r/o Khultabad as (P.W.8). He deposed that at 2 p.m. Head Constable Namdeo Kawale (P.W.5) had visited him at his house and told him that he should come with him to GHATI hospital, Aurangabad for recording dying declaration. They reached GHATI hospital at about 3 p.m. They made request to the Medical Officer to certify as to whether Bebitai was fit to give statement. The doctor gave him in writing and permitted to record the dying declaration. He then went inside the ward with the medical officer on duty. He further deposed that he directed the visitors to go outside the ward. Then, he asked Bebitai about her name and also disclosed to her that he is the Executive Magistrate and wanted to record her statement and then recorded her statement. He deposed that the deceased has told him that the accused was always quarreling with her after consuming liquor and due to that she poured kerosene on her person and set herself on fire at 9 p.m. on 29.4.1999. She was admitted by Sangita. He further deposed that he reduced her statement into writing and obtained her thumb impression on the dying declaration and then he too signed on it and handed over to the Head Constable Kawale. He identified the dying declaration (Exh.22) as the same. In the cross-examination, he expressed inability to tell the exact time at which he received the letter (Exh.17) from the police constable Kawale. He categorically deposed that he came to the hospital at Aurangabad at about 2 p.m. He denied the suggestion that the deceased was in unconscious condition and not in a position to give statement. He denied the suggestion that she was not in a position to put her thumb impression.

21. In order to prove that the deceased was in a fit statement of mind to give statement (Exh.22), the prosecution examined Dr. Anil Degaonkar (P.W.9). His testimony is at Exh.27. He deposed that the deceased was admitted in the hospital on 30.4.1999 at mid night with 82% burns. On 3.5.1999 at about 2 to

2.20 p.m., Head Constable Kawale B.No.595 gave letter (Exh.16) and requested to certify whether the patient was in a position to give statement. Then he examined Bebitai and found her to be conscious and fit to give statement. Accordingly, he recorded note on the letter (Exh.16). He further deposed that along with Head Constable, one Special Executive Magistrate was also present. Out of two, somebody recorded the statement of Bebitai. In the cross-examination, the witness has admitted that generally the person who gives the letter, records the statement of the patient.

22. If, we examine the dying declaration (Exh.22) in the light of evidence of Namdeo Kawale (P.W.5), Murlidhar Dandekar (P.W.8) and Dr. Anil Degaonkar (P.W.9) then there is no consistency in their testimonies and it raises serious doubt as to whether the dying declaration (Exh.22) was at all recorded in the manner stated by the Murlidhar Dandekar (P.W.8). If, we consider the testimony of Dandekar (P.W.8), then according to him Head Constable Kawale (P.W.5) visited his house at Khultabad on 3.5.1999. He met him and requested to record the dying declaration and also gave letter in writing to that effect. It is pertinent to note that the deceased was lying admitted in GHATI hospital, Aurangabad. P.W.5 Kawale has deposed that intimation of admission of deceased was received on 3.5.1999. In the examination-in-chief itself, the witness has categorically deposed that after receiving the intimation, he went to GHATI hospital and gave letter to the Medical Officer vide Exh.16 to record the statement of the deceased. He categorically deposed that the Special Executive Magistrate was with him when he gave letter (Exh.16) to the Medical Officer. He further deposed that he had also given letter to the Medical Officer vide Exh.17. In the cross-examination, Namdeo Kawale (P.W.5) has categorically deposed that after receiving the intimation from GHATI hospital at Police Station, Khultabad where he was present on duty, he came to GHATI hospital at Aurangabad at about 12 to 1 O'clock at noon time and then, visited the deceased who was lying in the ward. He further deposed that he gave letter to the Medical Officer at 2 p.m. As discussed, the Special Executive Magistrate has categorically deposed that the Head Constable Kawale visited him at his residence at Khultabad at 2 p.m. Whereas, Namdeo Kawale (P.W.5) has deposed that he reached at GHATI hospital at about 12 to 1 O'clock at noon time. It is pertinent to note that Khultabad is at a distance of about 25 - 30 Kms. from GHATI hospital, Aurangabad. If, Kawale (P.W.5) was present in GHATI hospital at 12 to 1 O'clock at noon time and had seen the patient, gave letter (Exh.16) to the Medical Officer, then it rules out the possibility of crap 190.02 36 Namdeo Kawale (P.W.5) to have met Murlidhar Dandekar (P.W.8) at 2 p.m. at Khultabad and then both of them came to Aurangabad. On the letter (Exh.16) given to the Medical Officer, the M.O. Has specifically endorsed the time as 2.30 p.m. of recording the endorsement. He has categorically deposed that at about 2.20 p.m. Namdeo Kawale (P.W.5) approached him and requested to certify as to whether the deceased is fit to make statement.

23. If, we examine the testimony of Murlidhar Dandekar (P.W.8) in the light of

the testimonies of Namdeo Kawale (P.W.5) and Dr. Anil Degaonkar (P.W.9), then it raises serious doubt as to the recording of the dying declaration in the manner stated by Namdeo Kawale (P.W.5) and Dr. Anil Degaonkar (P.W.9). It is pertinent to note that the Special Executive Magistrate has not given any letter to the Medical Officer to examine and certify as to whether the patient was in a fit state to make a statement. The exercise is alleged to have been made by Police Constable. The dying declaration (Exh.22) bears no endorsement of the Medical Officer. The deceased died after few hours of alleged recording of statement. There is no endorsement that the alleged statement was read over to the deceased and she admitted the same to have been recorded truly and correctly as per her narration. There is no attestation to the alleged signature/thumb impression. As per the evidence on record, there were about 90% burn injuries sustained by the deceased. Both of her limbs were reported to be burnt. As per the Medical Officer, the statement was recorded either by the constable or the Special Executive Magistrate. It suggests that the Medical Officer was not present throughout the recording of the statement. The alleged time of endorsement and certifying the deceased is stated to be 3.15 p.m. It is nowhere stated by the Medical Officer that he was present throughout recording of the statement and the deceased was throughout conscious and in a fit state of mind to make such statement. If, the statement was recorded at 3.15 p.m., then it is again difficult to believe that the same statement reached at Khultabad Police Station within one hour and offence came to be registered. Therefore, it raises serious doubt as to whether any such statement was recorded. No explanation has come forward as to why the statement was not earlier recorded. There is no explanation as to why the M.L.C. Report was sent to Khultabad on 3.5.1999 when the deceased was admitted on 29.4.1999. There is no explanation as to why death of the deceased was treated as accidental death till conduct of the postmortem. It is, therefore, highly unsafe to rely upon the said dying declaration and that too, to form the basis of conviction.

24. Mr. Patni, learned Counsel for the appellant has placed reliance on the Division Bench Judgment of this Court in case of Manohar Dadarao Landge v. State of Maharashtra, 2000(2) Mh.L.J. 3, wherein this Court has held in very uncertain terms that in absence of the statement recorded by the Magistrate read over to the deceased and she admitted the same to be true and correct as per her narration, the dying declaration cannot be relied and formed basis to sustain the conviction. In paragraph 32 of the said judgment, it is observed, as under:

"32. The prosecution ought to have specifically brought on record that Savita had heard the statement recorded by the Executive Magistrate and she admitted it to be true and correct. This is not mere formality but an essential part while recording the dying declaration. Because the person who cannot be examined afterwards, must at least, at that time, should have confirmed correctness of the statement. But that has not happened in this case. Mere formality of recording the statement might have been done by the Executive Magistrate. But that by

itself is not sufficient to hold that this is a dying declaration on which conviction can be based."

25. The facts of the case in hand are identical to the facts of the case cited. In the instant case, the Special Executive Magistrate i.e. Murlidhar Dandekar (P.W.8) has nowhere stated that the alleged statement made by the deceased was read over to her and she admitted that the same was recorded as per narration and thereafter he obtained her signature/thumb impression. Neither any statement on oath to this effect nor there is any such statement recorded in the dying declaration (Exh.22). Thus, the dying declaration (Exh.22) cannot be treated as a statement proved to be made by the deceased.

26. Till the inquest panchanama and referring the body of the deceased for postmortem, the death of the deceased was treated as accidental one. After death of the deceased, A.D. was registered and enquiry under section 174 of Cr.P.C. was undertaken. In this background, the unexplained delay of more than three days in registration of offence is fatal to the case of the prosecution and raises a serious doubt as to truthfulness of dying declaration (Exh.22).

27. In the light of discussion made in the foregoing paras and on due consideration of the evidence in its totality, I am of the view that there is no cogent, convincing and reliable evidence to sustain the conviction under Section 498A as well as 306 of the IPC. The dying declaration (Exh.22) cannot be said to be truthful and worth to be relied. There are number of suspicious circumstances which raise serious doubt as to recording of the dying declaration (Exh.22). The testimonies of Namdeo Kawale (P.W.5), Murlidhar Dandekar (P.W.8) and Dr. Anil Degaonkar (P.W.9) cannot be safely accepted as reliable.

28. In this view, the reasons and findings recorded by the trial Court are not sustainable in law. In my view, the conclusions drawn by the trial Court are based upon improper appreciation of evidence and against the settled principles of law to be followed in appreciation of evidence in a case based upon dying declaration. Hence, the appeal deserves to be allowed and conviction is liable to be set aside. The accused is entitled to be given benefit of doubt.

29. In view of the conclusion arrived at, the appeal is allowed. Consequently, the Suo Motu Revision Application No.3/2002 deserves to be dismissed.

30. Hence the following order:

i) Criminal Appeal No.90 of 2002 is allowed. The judgment and order convicting the appellant - accused for the offence punishable under sections 498A and 306 of IPC in Sessions Case No.441/1999 decided on 6th February, 2002 by the IInd Addl. Sessions Judge, Aurangabad is set aside. The appellant - accused is acquitted of the offences levelled against him. Bail bonds of the appellant stand discharged. The fine amount, if any, deposited by the appellant, be refunded to the appellant.