

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.788 OF 2013

Ashwini Rammehar Sharma ...Appellant

vs.

The State of Maharashtra ...Respondent

Mrs. Neha Bhide for the Appellant.

Mr. V. V. Gangurde, APP for the Respondent.

**CORAM : B. P. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.**

DATE : 08/04/2019.

JUDGMENT (Per Prakash D. Naik, J.)

. The appellant is convicted for the offence punishable under section 302 of IPC and sentenced to suffer imprisonment for life vide judgment and order dated 30/3/2013 passed by the Learned Additional Sessions Judge at Sewree, Mumbai. Appellant has challenged the said impugned judgment and order by preferring this appeal under section 374 of Cr.P.C.

2. The case of prosecution is based on the statement of victim which was treated as dying declaration. The incident referred to in dying declaration is recorded on 3/11/2010. At around 4.00 p.m it is stated that there was quarrel between the deceased and her husband/appellant. The appellant accused had allegedly poured kerosene on the victim and set her on fire. Investigation has proceeded. The statement of victim was recorded and same is treated as dying declaration On completing investigation chargesheet was filed.

3. The prosecution has examined 11 witnesses PW-1 Suresh Desai is the brother of deceased Vijaya. PW-2 Dr. Dhritiman Nath is the Medical Officer at KEM Hospital. He conducted post mortem. PW-3 Suresh Vishwakarma is the neighbour. PW-4 Baburao Telange is neighbour . PW-5 T. R. Yadav is the panch witness for spot panchanama. PW-7-Usha Chavan is sister of deceased. PW-8-Kamal Desai is the brother of deceased, PW-9 Rajesh Desai is brother of deceased. PW-10 S. G. Rajput is Investigating Officer. PW-11 Krishna Chavan P.S.I. who recorded statement of victim. The appellant accused has examined himself as defence witness.

4. Mrs. Neha Bhide learned counsel representing appellant submitted that, the trial Court has failed to take into consideration the conduct of appellant. As soon as he heard cry of the victim, he immediately rushed inside house and tried to extinguish the fire by putting mat on the victim and during the process suffered injuries to his right hand. He took victim to hospital. Trial Court had ignored evidence of PW-3 and PW-4. There were several lacunae in dying declaration. It was unreliable. It is a fake document. PW-11 did not make attempt to call Magistrate for recording declaration. Time of recording not reflected.

5. Whereas learned APP submitted that there is sufficient evidence on record to establish guilt of accused. Dying declaration is genuine. Trial Court has assigned cogent reasons for convicting the appellant. There is no reason to disturb the findings of trial Court. The contents of dying declaration are proved. The victim has clearly stated that the appellant has poured kerosene and set her on fire. The evidence of other witnesses corroborates the prosecution case. The defence has not succeeded in discarding the evidence on record. The declaration was recorded in question and answer form. There was no possibility of tutoring the victim. She was ill-treated by appellant, which fact is evident from

version of witnesses.

6. PW-1 has deposed that Ashwini (appellant) gave call on his mobile and informed that victim is burnt. In the cross examination he admitted that, he did not state in his police statement that, he was there along with Ashwini and Rajesh when treatment was going on, police came and recorded statement of Vijaya (deceased) and she stated that Ashwini quarreled with her and poured kerosene and burnt. PW-2-Dr. Nath deposed that flame burn injuries present over whole body except both palms. Brain congested, pleura congested, both lungs congested. PW-3 stated that, accused had held body of his wife on his hands and shouting for help. He was saying that his wife was burnt. He carried his wife in hand from seventh floor. He did not observe quarrels between victim and accused. PW-4 stated that he and others, notice that, accused was bringing lady holding in his hands below the building. He asked for help to arrange rickshaw. The lady stated that she is burnt, she should be saved. He advised accused to take victim to Rajawadi hospital. In the cross he stated that the victim had claimed that quarrel had taken place so she had burnt herself. She did not disclose with whom she had quarrel. There was no re-examination by prosecution. These are the witnesses examined by prosecution. PW-6 Dr. Gulati was Medical Officer in Seven Hills hospital. Appellant brought victim to said hospital. The patient had 91% burns. According to him appellant had stated that he had quarrel with victim and she poured kerosene herself on her person. Police recorded her statement His certificate is below statement. In cross he stated that in Exhibit 31 he nowhere mentioned that patient was conscious and oriented. He however stated that it is so mentioned in Exhibit 30. In MLC note he did not mention that police recorded statement of patient in his presence. Brothers of victim had conversation with patient in his presence. They did not have face to face talk with patient. Her palms were burnt. Police provided statement of

patient before him on that day when it was recorded and obtained his signature. Then he claimed that statement was not given by police. PW-7 is sister of victim. It has come in her evidence that accused had complained that Vijaya (victim) cannot prepare proper meals and does not listen to him and threatened that he would desert her. In cross she admitted that the fact that accused stopped relations with them, accused threatened to desert her in her presence is not appearing in her statement. The version two months ago she visited Vijaya is also not reflected in her statement. PW-8 stated that accused used to complain about victims inability to cook meals properly, that wrist of Vijaya was fractured and that accused was demanding money. He admitted that these facts are not reflected in his statement. PW-9 has also deposed similar version. PW-11 has stated that he recorded statement of victim. He has referred to contents of statement of victim. She had stated that accused poured kerosene on her and burnt her. Dr. Gulati was present while recording statement. He further stated that statement is in handwriting of constable Jadhav. Victim had endorsed thumb impression on statement. Accused had burn injury on his palms. In cross it is deposed that it is not found that he asked victim whether she was tutored before recording statement. In Exhibit 47 it is not mentioned that the statement was read over to the victim and she admitted correctness of the statement. In Exhibit 47 he did not obtain doctors opinion certificate at the beginning as well as at its end. There is no certificate that constable Jadhav written the statement. The eyes of victim were half opened. The appellant examined himself as defence witness.

7. The prosecution is relying upon the dying declaration (Exhibit 47). It refers to purported statement of the victim. Her statement (dying declaration) is recorded in question and answer form allegedly on 3/11/2010. It has purported thumb impression, signature of Doctor (PW-6) and the signature of police sub-inspector K. J. Chavan. On perusal of said

document it is apparent that it does not bear endorsement of Doctor with regard to the state of mind of the victim. It is not apparent whether the victim was in fit condition to depose as recorded in said dying declaration. It also appears that there is interpolation in the name of the accused introduced below the name of victim. It can also be seen that there is no description of the thumb impression whether it is of right hand thumb or left hand thumb impression of the victim. The introductory sentence appearing on the said dying declaration also appears to have been interpolated which is the date of recording of the statement and the place where statement has been recorded. From perusal of the evidence of PW-6, it is apparent that in paragraph No.11 of his cross examination he has deposed that eyes of the patient were closed because of burn injury to face. Therefore it is doubtful whether the victim was in position to see what was being recorded as stipulated in the dying declaration. Learned counsel for the appellant also pointed out from the post mortem report that in clause 17 of the Post mortem report there was no injury on the palm. Paragraph 12 of the evidence of PW-6 does mention that the palm of her both hands were burnt. Learned counsel for the appellant in this regard contended that the thumb impression appearing on the dying declaration is doubtful and evidence as deposed by the witness is to be considered with caution as impression is not clearly reflected in the dying declaration. In paragraph No.9 PW-6 has stated that he was not asked by the police to issue certificate as to fitness of the patient. He was not asked to record said certificate below the statement of the patient.

8. PW-6 in paragraph No.13 of his deposition have stated that police provided statement of the patient before him on that day when it was recorded and obtained his signature. The prosecution case is primarily based on Exhibit 47. The genuineness of the said dying declaration is being assailed by the appellant. It is contended that there is no evidence that the

dying declaration recorded at Exhibit 47 was read over to the victim and the victim had admitted the contents having been correctly recorded. It is also alleged that the dying declaration has not been recorded by PW-11 but by some other person who has not been examined by the prosecution.

9. The submission of learned counsel is fortified by evidence of PW-11. PW-11 in paragraph 2 of his deposition has deposed that the statement is in the handwriting of constable Jadhav which is recorded vide Exhibit 47.

10. Learned APP has contended that it is not necessary to put up the endorsement of the Doctor in the event the dying declaration is genuine. It is submitted that there is nothing to doubt the genuineness of the said dying declaration. Considering the cumulative effect of entire evidence adduced by the prosecution there is no infirmity in the order of conviction. It is therefore submitted that no interference is warranted in the judgment of the trial Court.

11. As stated herein above we have perused the evidence of witnesses. We have noted herein above the infirmities in the dying declaration which speaks volumes about genuineness of the dying declaration. Statements of witnesses examined by prosecution refers to the fact that appellant had brought the victim from 7th floor by lifting her and she was taken to hospital. Accused was calling for help and conveyance. They have also referred to version of victim. The accused had sustain injury to his palm. The witnesses were independent. Appellant telephoned relatives of victim immediately after incident. He went to hospital and did not run away. He was arrested in hospital. The allegations of ill-treatment appears to be after thought. There were no attempts to call for Executive Magistrate to record dying declaration.

12. A dying declaration can be the basis of conviction, if the Court comes to the conclusion that it represents truthful version. To pass the test of reliability a close scrutiny is necessary as the accused has no opportunity to cross examine the maker of dying declaration. It must inspire full confidence of the Court regarding its correctness and voluntariness and court must ensure that the statement was not the result of tutoring, prompting or product of imagination. In the present case the said document has failed the test of reliability. Considering the nature of evidence adduced by prosecution, we are of considered opinion that the prosecution has failed to establish the charge against appellant who is entitled for benefit of doubt. The conviction has to be set aside. In the circumstances, the judgment and order of conviction passed by the learned trial Court is required to be quashed and set aside.

ORDER

- i) Appeal is allowed;
- ii) The impugned judgment and order in Sessions Case No.95/2011 dated 30/3/2013 passed by the learned Additional Sessions Judge, Greater Bombay at Sewree convicting the appellant for the offence under section 302 of IPC is hereby quashed and set aside and the appellant is acquitted of the charge;
- iii) The appellant is set at liberty forthwith if his custody is not required in any other case;
- iv) Muddemal property be dealt with as directed by the Trial Court after the appeal period of over.

(PRAKASH D. NAIK, J.)

(B. P. DHARMADHIKARI, J.)