IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH : NAGPUR

Criminal Appeal No. 241 of 2019

Appellant : Ajay son of Marotrao Thakre, aged about 40 years, Occ: Labour, resident of Wadgaon (Rajadi), Tahsil Chandur Railway, District Amravati (Presently in Central Prison, Amravati)

versus

Respondent: State of Maharashtra, through PSO, Chandur Railway, Tahsil Chandur Railway, District Amravati

Coram : Sunil B. Shukre And
Madhav J. Jamdar, JJ

Dated : 27th April 2020

Ms H. S. Dhande, Advocate (appointed) for appellant

Shri T. A. Mirza, APP for respondent-State

Judgment (Per Sunil B. Shukre, J)

1. Being aggrieved by the judgment and order dated 14th November 2017 rendered in Sessions Trial No. 230 of 2014, the appellant has preferred the present appeal.

2. Briefly stated, the facts of the case are as under:

(a). The appellant was husband of deceased Nanda. He was cohabiting with deceased Nanda at his house at village Wadgaon (Rajadi), Tahsil Chandur (Railway), District Amravati. During the wedlock, deceased Nanda had two sons with him and at the time of incident, sons Sojwal and Chetan were aged about 9 years and 5 years respectively.

(b). It is alleged that on 19.3.2014, deceased Nanda, appellant and their children were present in their house when the incident occurred. The incident took place at about 12.30 noon of that day. There was some quarrel between the deceased and the appellant which enraged the appellant so much so that he picked up a can containing kerosene oil, opened it, poured some of the kerosene on the person of deceased and set her ablaze by means of a lit match-stick.

(c). It was the case of prosecution that the appellant did not do

anything to extinguish the fire of the deceased and it were the neighbours who rushed to the house of accused after they heard the shouts of the deceased seeking some help to relieve herself of the agony of the flames. The neighbours put out the fire of the deceased and rushed her to the hospital which was Rural Hospital, Dhamangaon Railway, it being a nearby hospital. The deceased had sustained extensive burns to the extent of 92% and she was required to be shifted to the Government Hospital, Yavatmal.

(d). Deceased Nanda was administered treatment for her burn injuries. On the next day i.e. 20th March 2014, a dying declaration of the deceased was recorded by a police officer which blamed the appellant. Though treatment was being given to the deceased, it had no beneficial effect for the deceased and ultimately, she succumbed to her injuries on 22.3.2014. A post-mortem report was obtained. It disclosed the cause of death as septicemic shock due to burns. Meanwhile, spot panchanama of the spot of incident and seizure of articles lying at the spot of incident was made.

(e). As the police had already swung into action after receipt of information regarding hospitalization of deceased Nanda at Rural Hospital, Dhamangaon Railway and her dying declaration had also

incriminated the appellant, first information report was registered against the appellant at Police Station, Chandur Railway against the appellant on 21.3.2014. Initially, the offence registered against the appellant was of attempt to commit murder which was later on converted into that of murder punishable under Section 302 of the Indian Penal Code. The investigation was carried out and after completion of investigation, police filed a charge-sheet against the appellant. After the case was committed for trial to the Sessions Court, charge for the offences punishable under Sections 302 and 498A of the Indian Penal Code was framed against the appellant to which he pleaded not guilty and thus was prosecuted for these offences.

(f). On merits of the case, the learned Additional Sessions Judge found the appellant as not guilty for an offence of cruelty punishable under Section 498A of the Indian Penal Code, but found him guilty for the offence of murder punishable under Section 302 of the Indian Penal Code and thus convicted him to suffer imprisonment for life and also to pay a fine of Rs. 2000/- and in default, to suffer simple imprisonment for six months, by the impugned judgment and order.

3. We have heard Ms Hemlata Dhande, learned appointed counsel for the appellant and Shri T. A. Mirza, learned Additional Public

Prosecutor for respondent-State. We have perused record of the case including impugned judgment and order.

4. Learned counsel for the appellant submits that this case being based upon the sole dying declaration, learned Additional Sessions Judge ought to have seen that the dying declaration was voluntarily made while being in mentally and physically fit condition and thus, was a reliable document. She submits that the police officer PW 2 Gopika Kodape who recorded dying declaration in the afternoon of 20.3.2014 did not even satisfy herself by putting adequate questions to the deceased about her being mentally and physically fit to make the statement and to worsen the case of the prosecution, the Medical Officer who allegedly gave fitness certificate, was not examined. She further submits that the dying declaration, in her opinion, could never have inspired confidence of the Court and thus, it was worthy of rejection. She finally submits that the dying declaration relied upon by the trial Court being a suspect document and there being no other evidence available on record to nail the appellant in the offence alleged against him, the appellant deserves to be acquitted of the same in the present case.

5. Learned Additional Public Prosecutor disagrees. He submits that though it is true that the Medical Officer who gave the fitness

certificate was not examined, the dying declaration together with the medical certificate proved through the evidence of PW 2 Gopika Kodape is worthy of acceptance in evidence and capable of forming basis for conviction of the appellant. He also submits that there is no explanation whatsoever given by the appellant as to how did his wife die, what did he do when she was in flames and whether he attended to her during her period of hospitalization. This conduct of the appellantmakes dying declaration even more reliable, so submits the learned Addl. PP.

6. The argument made on behalf of the appellant and the counter argument made in response thereto by the learned Additional Public Prosecutor would have to be appreciated in the light of evidence available on record. On doing so, we are convinced that this is a case of insufficient and unreliable evidence and, therefore, we would uphold the argument made on behalf of the appellant.

7. While appreciating the evidence brought on record by the prosecution, we would first take up the aspect of nature of death of deceased Nanda. While the prosecution maintained that death of Nanda was homicidal and the trial Court too found that her death was homicidal in nature, the appellant kept complete silence on the nature of death of his wife. To worsen the things, the neighbours who had extinguished the

fire of the deceased and had taken her to the hospital, as per the original prosecution story, were not examined. So, it is an uphill task for us to make any conclusion about nature of death of Nanda. Howsoever difficult it may be, must we perform it and we do so by delving into whatever prosecution evidence is available on record. We think, post-mortem report is the only evidence which helps in this regard and when it is considered, along with other relevant circumstances, we should be able to unravel the mystery behind nature of death of Nanda. Of course, dying declaration is also there and if it is taken into account, the nature of death could be commented upon in a definite manner. But, we have our own doubt about the creditworthiness of the dying declaration and, therefore, at this moment, we would keep it aside and only consider the post-mortem report vide exhibit 37 and the other relevant circumstances of the case.

8. The post-mortem report discloses that the deceased had sustained in all 92% of burn injuries out of which there were ten deep burn injuries. The cause of death as disclosed in the post-mortem report is septicemic shock due to burns. Sustaining of such extensive burn injuries suggests that the cause for the same could hardly be accidental and mostly could be suicidal or be some deliberate act on the part of somebody. Suffering of extensive burn injuries in one's own house at a

time when other family members were present and during day time, as per prosecution case, would not ordinarily suggest any accident being the cause for catching of fire by the deceased. Besides, the spot panchanama (exhibit 18) does not show that any other articles in the house had been burnt or partially burnt which otherwise would have been the case had the deceased caught fire due to an accident. There were also no such articles as oil lamp or kerosene stove found lying in the house. If the person catches fire accidentally, he or she would try to save himself/herself, run helter skelter in the house or perhaps, may come outside the house in a frantic bid to save himself or herself. But, no such signs of struggle were seen in the house. Therefore, in this case, possibility of accidentally suffering of burn injuries by the deceased has been ruled out. This is the reason why we would say that the death possibly could have been either suicidal or homicidal.

9. Now, coming to the possibility of suicidal death, we find that it is neither the case of the prosecution nor of the appellant that deceased Nanda died a suicidal death. There is also no evidence whatsoever regarding deceased Nanda being ill-treated, tortured and harassed by the appellant. There is no evidence that deceased Nanda was suffering from any depression or any terminal disease or was going through any phase of extreme frustration. All these factors would rule out the possibility of

suicidal death of Nanda. Then what remains is only the homicidal nature of death and this is what we find to be the cause here by applying the law of probability to the fact situation discussed earlier. Thus, we uphold the finding recorded by the Additional Sessions Judge that deceased Nanda's death was homicidal in nature. Now, the question would be, who did it, appellant or somebody else ? Answer to the question is difficult, given the nature of prosecution evidence.

10. In this case, there are no eye witnesses and as stated by us earlier, there are also no witnesses examined by the prosecution post catching of fire by deceased Nanda though they were available. These witnesses were the neighbours of the deceased who had taken her to the hospital. But, alas, they were not examined and no reasons came forward for their non-examination. Even, the Medical Officer, Dhamangaon (Railway) Hospital or the Medical Officers, Government Hospital, Yavatmal who had occasions to medically examine deceased Nanda were not examined by the prosecution. Had they been examined, some useful light could have been thrown on the question of identification of real culprit. That opportunity, however, was not given to us by the prosecution.

11. As if the above deficiencies were not enough, even the

Medical Officer who conducted post-mortem examination of the dead body of Nanda was not examined by the prosecution and it appears that the reason for the same was that the post-mortem report's genuineness was not disputed by the defence.

12. The post-mortem report is a document which is like any other document and primary evidence of such document is the report itself. It can be received in evidence on its authenticity being established by the mode of its proof provided under Sections 67 to 71 of the Evidence Act, 1872. Section 294 (1) of the Code of Criminal Procedure enables the accused to waive this mode of proof by admitting it or raising no dispute as to its genuineness when called upon to do so under sub-section (1). Sub-section (3) of Section 294 Cr. P. C. enables the Court to read such document in evidence without requiring the same to be proved in accordance with the Evidence Act. Therefore, in the present case also, there being no dispute raised as to the genuineness of post-mortem report, it could have been and in fact, it has been admitted in evidence. However, there is a difference between authenticity of a document and its probative value. A document proved by adopting the mode of proof prescribed under Section 67 to Section 71 of the Evidence Act or as prescribed under Section 294 Cr. P. C. would be treated as genuine and authentic. But authenticity of the document would not by itself clothe the

document with high evidentiary value. Evidentiary or probative value of a document would depend upon facts and circumstances of the case and there may be some cases wherein inspite of the genuiness of a document having been established, there may be need to examine as a witness, the author of the document. These cases are those wherein there is a possibility of miscarriage of justice upon failure to examine the author. Sometimes, a document like post-mortem report may not throw adequate light on location of injuries, extent of depth and width of injuries and details as to the nature thereof and possibility of their being caused by somebody other than the one put on trial. In such cases, there may not also be available any other evidence to offer explanation as regards these important factors and, therefore, doctor's answer to some pertinent questions put up in evidence, can make a difference to the result of the case, though this may not be true of each and every case. This is a view taken by the Full Bench of this Court in **Shaikh Farid v. State of Maharashtra** reported in *(1981) 83 Bom.LR 278*. In the present case, the facts and circumstances narrated earlier, in our opinion, warranted examination of the doctor who conducted post-mortem examination as a witness before the Court. Had he been examined in the present case, it could have possibly made a world of difference.

13. Thus, the whole prosecution case boils down to just one

piece of evidence, the dying declaration (exhibit 31) made by deceased Nanda in the afternoon of 20.3.2014 for throwing light, if any, on the involvement of appellant or any other person in commission of present crime. Before we deal with the evidence relating to the dying declaration, we would like to take a brief review of the law on the subject.

14. The dying declaration is a piece of evidence which can form sole basis for conviction, it being admissible under Section 32 (1) of the Evidence Act, 1872. However, before it is made admissible in evidence and relied upon, its veracity, truthfulness and voluntariness must all be proved. It should be seen that it does not suffer from any kind of infirmity and suspicious circumstances or otherwise, it would evoke no positive response from law. Once a dying declaration is proved in evidence, it would be accepted and relied upon without any hesitation although the maker of the declaration is not available for being subjected to test of veracity through his cross-examination. This is owing to the principle that a man seeing his death as imminent, tends to elevate himself to a plane higher than the one on which ordinary mortals stand and thus frees himself from the weaknesses such as, anger, malice, prejudices, hatred, wants and desires that may afflict a human being leading a mundane life. In such a state of mind, a person on the death bed tends to speak the truth. A British Poet Mathew Arnold has

incisively commented on the truthfulness of words of a dying man when he said, “Truth sits on the lips of a dying man”. But, as said by us, there being no cross-examination of the maker of the dying declaration to test veracity of the statement that he makes before death, the courts have to be cautious and must ensure that the dying declaration inspires confidence before it is read in evidence.

15. Certain safeguards have been laid down in various judgments of the Hon'ble Apex Court in order that reliance on the sole evidence of dying declaration for finding guilt of the accused can be placed. In **Khushal Rao vs. State of Bombay** reported in *AIR 1958 SC 22*, Hon'ble Apex Court has held that in order to pass the test of reliability, dying declaration must be subjected to a very close scrutiny keeping in view the fact that the same has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. It has been further held that once it is found by the Court that the dying declaration was truthful version as to the circumstances of death and the involvement of assailant or those responsible for the death, no further corroboration is required. What is important is that a dying declaration is truthful, voluntary and should reveal facts and circumstances relevant to ascertain the circumstances surrounding the death and/or those which led to the death. This is the law consistently

laid down by the Hon'ble Supreme Court in its various cases including the cases of **Kusa & ors v. State of Orissa** reported in *AIR 1980 SC 559*, **Meesala Ramkrishnan v. State of AP** reported in *1994 SCC (4) 182* and **Shama v. State of Haryana & ors** reported in *2017 ALL MR (Cri) 448 (SC)*. The above referred principles have now set a direction in which we must proceed while appreciating evidence relating to dying declaration (exhibit 31). We would now deal with it.

16. The dying declaration (exhibit 31) has been proved by the prosecution through the evidence of its recorder, PW 2 Gopika Kodape, the then PSI from Police Station, Yavatmal (City). By 20th march 2014, the deceased was already under the care of the medical authorities at the Government Hospital, Yavatmal and the Police Station, Yavatmal (City) had been duly informed by them of the extensive burn injuries that she had suffered. PW 2 Gopika received an oral order from her superior officer to go and see the patient with a view to possibly recording her statement. The superior officer had issued a letter on 19.3.2014 to the Medical Officer of Yavatmal Hospital to examine the patient and give his opinion regarding fitness of the deceased to make a statement. PW 2 Gopika followed the instructions, went to the hospital on 20.3.2014 and consulted the Medical Officer on duty. The Medical Officer, it appears, examined deceased Nanda and gave a positive opinion that the patient was fit for the dying declaration. It appears that earlier on 19.3.2014, one

medical Officer had given a negative opinion as regards fitness of the deceased to make a dying declaration.

17. The letter issued by the Police Inspector of Yavatmal (City) Police Station is at exhibit 30. This letter bears two certificates in the nature of endorsements issued by the Medical Officer, one on 19.3.2014 and the other on 20.3.2014. The first endorsement is to the effect, “pt is unfit for DD” and it is signed on 19.3.2014. The second endorsement reading “pt is fit for DD” bears signature made on 20.3.2014. These two endorsements appearing to be issued by either one Medical Officer or two different Medical Officers have not been duly proved by the prosecution by examining the authors of these two endorsements. The prosecution has proved this letter (exhibit 30) through the evidence of PW 2 Gopika Kodape. However, PW 2 Gopika never deposed that she saw the medical officer (s) write the opinions and sign below them. She also did not state that she was well acquainted with the hand-writing and signatures of the medical officers. Thus, the requirements of Section 67 of the Evidence Act were not met. These two endorsements, therefore, cannot be read in evidence. Even if we ignore these two fundamental defects in the medical endorsements and decide to consider them, still, that does not help the prosecution case. Reason being that they do not contain any clarification regarding examination of the patient by the concerned

Medical Officer (s) before issuing the certificates. So, it was all the more necessary for the prosecution to have examined the concerned Medical Officer (s) as prosecution witness or witnesses. But, that was not done by the prosecution. So, a big question mark is placed over the authencity of the dying declaration (exhibit 31).

18. The dying declaration (exhibit 31), apart from fitness certificates issued on the letter vide exhibit 30, also bears two endorsements, one at the top and the other at the bottom. These two endorsements have not been independently proved by the prosecution as the maker of these endorsements was not examined as a prosecution witness. The top endorsement is only for the namesake as it does not contain any certificate regarding fitness or otherwise of the deceased to make the dying declaration. It bears signature of one Medical Officer whose name is not mentioned below the signature. Below the signature, only the designation is stated and it is as “Medical Officer”. It also does not bear any date. The bottom endorsement, however, contains a certificate that the patient is fit for dying declaration. It is of the date of 20.3.2014 and the time mentioned therein is of 12.15 pm. Below the signature, the name of Medical Officer is not given, but his designation to be so is.

19. The dying declaration (exhibit 31) is in a printed form and only gaps have been filled in and they are stated to be filled in by PW 2 Gopika Kodape. PW 2 Gopika has stated in her evidence that she had enquired with the concerned Medical Officer regarding the condition of the deceased to make a statement and that she had obtained signature with the remark of concerned Medical Officer regarding fitness of the patient. She, however, does not say that when she asked for fitness certificate from the concerned Medical Officer, the medical Officer had examined the patient and gave his opinion. She also does not state that the concerned Medical Officer had given his opinion to the effect that the patient was fit to make the dying declaration. PW 2 Gopika emphatically states that she obtained signature with remark of the concerned Medical Officer regarding fitness of the patient. She also asserts that after the relevant facts were stated to her by the deceased and those facts were put down in writing by her, she obtained signature of the deceased below the writing that she had made and then she put her signature below the same. She further states that she obtained remark of doctor and then according to her, the doctor concerned gave a remark that the patient was fit while recording her statement and put her signature.

20. From such evidence of PW 2 Gopika, an impression is created that before starting recording of the dying declaration, she had obtained

opinion of the Medical Officer regarding fitness of the deceased to give a statement and after completion of recording of the dying declaration also, she had obtained another certificate from the Medical Officer regarding physical and mental condition of the deceased. We have already stated that there are two signatures of the Medical Officers concerned appearing on exhibit 31, one at the top and the other, at the bottom. But, the top signature of the Medical Officer, as we have already noted, does not bear any certificate about fitness or otherwise of the deceased. The bottom signature carries with it a certificate of fitness given by the Medical Officer. However, this so-called fitness certificate does not say that the concerned Medical Officer was present throughout recording of the dying declaration. This bottom remark also does not certify one crucial fact of the patient being all throughout fit while recording her statement. These glaring defects stare on the face of PW 2 Gopika Kodape who has deposed that it was the opinion of the doctor that the patient was fit all throughout. It is clear that PW 2 Gopika has added something to the dying declaration (exhibit 31) which is conspicuously absent in it. Added to it and as we have noted earlier, the concerned Medical Officer (s) was/were not examined at all as a witness or witnesses by the prosecution. His or their examination as witness or witnesses was all the more necessary as Nanda had suffered 92% burns, very extensive by all means. A serious doubt, therefore, arises about the veracity of the alleged

statement of the deceased contained in the dying declaration (exhibit 31).

21. Learned Additional Public Prosecutor for the State submits that even though the concerned doctors were not examined and the fitness certificates issued by them were not properly proved, the fact remains that PW 2 Gopika had, after ascertaining the fitness of deceased, proceeded to record her dying declaration. He submits that in law, there is no need for any certification of doctors as regards the fitness of mind of the declarant to make a declaration. According to learned counsel for appellant, the evidence of PW 2 Gopika would show that she failed even on this count and did not perform her duty diligently in satisfying herself regarding the state of mind of the declarant.

22. Sofar as the law on the point is concerned, there can be no quarrel. It is not necessary that a dying declaration must have support of a certificate of fitness issued by the doctor. It is not the law that in the absence of a medical certificate, a dying declaration would be rendered inadmissible in evidence. The only requirement of law is that a person who records the statement must be satisfied that the deceased is in fit state of mind to make a statement and certificate of doctor is only a rule of caution. This principle of law has been laid down by the Hon'ble Apex Court in the case of **Laxman v. State of Maharashtra** reported in *AIR*

2002 SC 2973. The relevant observations, as they appear in paragraph 3, are reproduced thus -

> "What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

If we consider the evidence of PW 2 Gopika and also the dying declaration, we would find that PW 2 Gopika did not put any question to the deceased to ascertain her state of mind to make the declaration. No where in her evidence has PW 2 Gopika stated that apart from the fitness certificate issued by the doctor, she herself was satisfied regarding the fit condition of the deceased to make the statement. Thus, this is a case wherein there is neither any certificate of the doctor regarding fit state of mind of the declarant duly proved before the Court nor the satisfaction of the person who recorded the dying declaration as to the fitness of the deceased to make a declaration. Therefore, such a dying declaration cannot be relied upon and it would be risky for this Court to give any credence to such a dying declaration. The evidence in the nature of dying

declaration is rejected by us.

23. Apart from the rejected evidence of dying declaration, there is no evidence brought on record in the present case against the appellant. The prosecution has also not examined any neighbours of the deceased although some of them had taken the deceased to the hospital. No explanation for their non-examination has been given either. The prosecution has not explained as to where the appellant was at the time when his wife deceased Nanda received burn injuries. There is no evidence brought on record by the prosecution showing presence of appellant at the spot of incident at the relevant time. Therefore, conduct of appellant would not be of any significance here. The appellant was arrested on 21.3.2014 and whereas the incident occurred on 19.3.2014. It is not known as to where the appellant was between the date of incident and the date of his arrest. The appellant has taken a defence of complete denial. So, it is difficult to say anything about the background of the death of Nanda and as to what were the circumstances surrounding her death. But, sofar as the prosecution case against the appellant is concerned, it has to fail on account of extremely insufficient evidence and evidence of doubtful character. All these aspects of the matter have not been considered by the trial Court. The impugned judgment and order is replete with flawed inferences based upon sketchy and unreliable

evidence and, therefore, deserves to be quashed and set aside by acquitting the appellant of the offence of murder charged against him, by giving him benefit of doubt.

24. In the result, appeal is allowed. Impugned judgment and order are quashed and set aside. Appellant/accused is acquitted of the offence of murder punishable under Section 302 of the Indian Penal Code and he be set at liberty forthwith, if not required in any other case. *Muddemal* property, being worthless, be destroyed.

Amount of Rs. 5000/- be paid to the learned appointed counsel as her remuneration in the case.

MADHAV J. JAMDAR, J **SUNIL B. SHUKRE, J**

joshi