IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 460 OF 2015

Feroj Mohammad Shaikh,
Age : 30 years, Occu : Labour,
R/o Dahitana, Tq. Tuljapur,
Dist. Osmanabad. .. **Appellant**

Versus

The State of Maharashtra,
Through Police Station,
Tuljapur, Tq. Tuljapur,
Dist. Osmanabad. .. **Respondent**

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Shri G.R. Syed, Advocate for the Appellant.
Shri D.R. Kale, A.P.P. for the Respondent-State.

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CORAM : T.V. NALAWADE &
M.G. SEWLIKAR, JJ.
DATE : 13.12.2019

JUDGMENT : (Per: *M.G. Sewlikar, J.*)

This appeal is preferred by the appellant being aggrieved by the judgment and order passed by the learned Additional Sessions Judge, Osmanabad whereby the appellant has been convicted of the offence punishable under Section 302 of the I.P.C. and sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- in default to suffer further rigorous imprisonment for one year. The appellant and his mother accused no.2-Bilkis Mohammad Shaikh have been acquitted of the offence

punishable under Section 498-A read with Section 34 of the I.P.C. Accused No.2-Bilkis has also been acquitted of the offence punishable under Section 302 of the I.P.C. The State has not challenged the acquittal of accused no.2 under Section 302 and 498-A read with Section 34 of the I.P.C.

2. The prosecution case can be briefly stated as under:

3. Shahanaj, the deceased, married the appellant Feroj Mohammad Shaikh about seven years before the incident in question. They have a son and a daughter out of the wed-lock. The said Shahanaj was treated well till the birth of the daughter. After one year of the birth of daughter, accused no.2 who is the mother in law of the deceased-Shahanaj, started causing mental ill-treatment to the deceased. She used to pass sarcastic remarks at her. The appellant Feroj developed an addiction to alcohol. He would demand money from Shahanaj for consumption of liquor. He would abuse and beat Shahanaj if she refused to oblige him. The appellant sent the deceased-Shahanaj to her maternal place when the daughter of Shahanaj who was one year old and she was asked to bring Rs.10,000/- from her father. Since the financial condition of the father of the deceased-Shahanaj was precarious she could not fulfill the said demand, as a result of which she had to stay with her father for one year. The father of the deceased-Shahanaj raised the said amount of Rs.10,000/- by taking hand loan and doing labour work and paid the said amount to accused

no.2-Bilkis. Thereafter the deceased-Shahanaj started co-habiting with the appellant. After two three months again the appellant Feroj started demanding Rs.10,000/- from the deceased-Shahanaj to be brought from her father for re-payment of personal loan obtained from a finance company. The father of the deceased-Shahanaj fulfilled the said demand also. Despite that the appellant-Feroj once again started demanding Rs.10,000/- from Shahanaj to be brought from her father.

4. It is the further case of the prosecution that on 16.02.2013 at about 10.00 pm he got a call from his niece Shabana from Government Hospital, Osmanabad informing that Shahanaj had sustained burn injuries. The father of the deceased-Shahanaj along with Ex-Sarpanch of the village Umakant Kadam reached Civil Hospital, Osmanabad at 2.00 am and noticed that Shahanaj was fully burnt. He asked Shahanaj as to how the incident took place. Shahanaj told him that at about 9.00 pm in the night of Saturday accused Feroj demanded money from her for drinking liquor. She refused to give money and further stated that she would not give money to him in future also, owing to which a quarrel ensued between her and appellant-Feroj and accused no.2-Bilkis. Thereafter, appellant-Feroj abused her, poured kerosene on her person. At that time accused-Bilkis was instigating the appellant to kill the deceased. The appellant-Feroj set her on fire by lighting the match stick.

Both the accused went out and came back after five minutes. On hearing her screams wife of landlord and Shabana came there and tried to extinguish the fire. She was taken to a hospital by rickshaw. On 17.02.2013 at about 11.00 am Shahanaj breathed her last.

5. According to the prosecution, on 16.02.2013 Shahanaj was admitted in burn ward of Civil Hospital, Osmanabad. The deceased-Shahanaj gave dying declaration to police head constable-Hanmant Kolangade (PW-3) B.No. 808 between 9.10 am and 9.35 am on 17.02.2013. Dr. Bharat Thadkar (PW-2) examined her. The deceased was found conscious and thereafter dying declaration was recorded. She stated in her dying declaration that on 16.02.2013 her husband demanded money from her for drinking liquor. A quarrel ensued between them. The appellant-Feroj poured kerosene on her and set her on fire. Her mother in law instigated the appellant. Thereafter on 18.02.2013 at 3.30 pm F.I.R. was lodged by the father of the deceased by name Imam Akbar Shaikh (PW-1) on the basis of which the offence was registered under Section 498-A, 302 read with Section 34 of the I.P.C. The deceased died on 17.02.2013.

6. On 16.02.2013, intimation was given to the police at 10.00 pm. The said intimation is at (Exhibit-21). Spot panchanama was prepared vide (Exhibit-22) on 17.02.2013 between 10.15 am and 11.15 am. Post mortem

was conducted on 17.02.2013 vide (Exhibit-28). Statement of witnesses were recorded and after disclosure of the offence charge-sheet was submitted in the Court of J.M.F.C., Tuljapur who committed the same to the Court of Sessions in usual manner.

7. Charge (Exhibit-12) was framed by the learned Sessions Judge, Osmanabad. It was read over and explained to the accused. They pleaded not guilty and claimed to be tried. Their defence is of total denial. It was also their defence that the clothes of the deceased caught fire because of the stove blast.

8. To prove its case the prosecution examined seven witnesses. The learned Additional Sessions Judge, Osmanabad convicted appellant-Feroj under Section 302 of the I.P.C. and sentenced him as above. He acquitted the accused no.2 Bilkis under Section 302, 498-A read with Section 34 of the I.P.C. and also acquitted appellant-Feroj under Section 498-A of the I.P.C. The appellant has challenged his conviction under Section 302 of the I.P.C. by this appeal.

9. Heard Shri Syed the learned counsel for the appellant and Shri Kale the learned A.P.P. for the respondent-state.

10. Shri Syed contended that the deceased sustained 94% burns. In

this condition, it is incomprehensible that any person having 94% burns would be in a sound mental and physical state to give the dying declaration. Therefore the dying declaration is shrouded with mystery. He further argued that the medical papers were not brought by the Medical Officer (PW-2) Dr. Thadkar while he was being examined in the court. He submitted that without medical papers, it would be highly difficult to come to a conclusion that the deceased was in a sound mental state to give dying declaration. He further submitted that the learned Additional Sessions Judge acquitted the accused under Section 498-A of the I.P.C. Therefore, there was no motive for the commission of the alleged crime. He further submitted that the conduct of the accused would go to show that the deceased was not set on fire by him but she had accidentally caught fire because of stove blast. When the appellant-accused Feroj heard the screams of the deceased, the appellant-Feroj immediately poured water on her person and tried to put off the fire. He submitted that this conduct does not indicate his guilty mind. If he had set her on fire there was no reason for him to pour water on the person of the deceased to extinguish fire. He further submitted that the accused-appellant himself admitted the deceased in the hospital. These circumstances indicate that the accused appellant did not commit the offence. The learned Additional Sessions Judge did not consider all these aspects in their proper perspective and erroneously recorded the conviction against the accused. He

argued that therefore interference by this Court is necessary. He placed reliance on the cases of **Sitaram Nana Sarvade & Anr. V/s. State of Maharashtra; 2014 (12) LJSOFT 77, Sunder Gounder s/o Sanmugam Gounder V/s. State of Goa; 2015 (4) LJSOFT 137, Mahendra Ashok Jadhav V/ s. State of Maharashtra; 2015 (2) LJSOFT 58, State of Maharashtra V/s. Shaikh Sinkandar Isamoddin; 2015 (4) LJSOFT 109 and Vilas @ Pankaj S/o. Yadav Sable & Ors. V/s. State of Maharashtra; 2015 (4) LJSOFT 50.**

11. Shri Kale the learned A.P.P. argued that the Medical Officer examined the deceased and certified that she was conscious and was oriented with time, place and person. After conclusion of the dying declaration the same endorsement was made by the Medical Officer. He submitted that this indicates that the deceased was in a sound state of mind to give the dying declaration. He further submitted that proof of motive is not essential if the evidence on record is cogent. He submitted that the dying declaration was given by the deceased when she was in sound state of mind. Therefore the learned trial Court has correctly recorded the conviction and no interference is called for by this Court.

12. He placed reliance on the cases of **Laxman V/s. State of Maharashtra; AIR 2002 SUPREME COURT 2973**, **Ganpat Bakaramji Lad V/s. The State of Maharashtra; 2018 ALL MR (Cri) 2249 (F.B.)**, **Janrao Khushalrao**

Bhute & Ors. V/s. State of Maharashtra; 2010 (2) Bom. C.R. (Cri.) 884, **Dilip Vasant Sawant V/s. State of Maharashtra; 2010 ALL MR (Cri.) 880** and **Sher Singh and Anr. V/s. State of Punjab; AIR 2008 SUPREME COURT 1426**.

13. The case of the prosecution hinges on dying declaration given by the deceased-Shahanaj and oral dying declaration given to the informant Imam Akbar Shaikh (PW-1). There is no eye witness to the incident therefore the dying declaration recorded by the head constable Hanmant Kolangade (PW-3) will be taken up first for discussion.

14. Section 32 of the Evidence Act deals with the cases in which the statement of relevant fact by a person who is dead or cannot be found is relevant. Sub-section (1) of Section 32 makes relevant what is generally described as dying declaration though such an expression has not been used in any statute. It essentially means statements made by a person as to the cause of his death, or as to the circumstances of the transaction resulting in his death. The principle on which the dying declaration is admitted in evidence is indicated in the legal maxim "*Nemo moriturus praesumitur mentire*" i.e. "a man will not meet his Maker with a lie in his mouth". The situation in which a person is on death bed is so solemn and serene when he is dying that the grave position in which he is placed is the reason in law to accept the veracity of the statement. Though a dying declaration is entitled to

a great weight, it is worthwhile to note that the accused has no opportunity of cross-examination. This is the reason why the Court insists that a dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after having a clear opportunity to observe and identify the assailant. Once the Court finds that the declaration was true and voluntary, it can base its conviction without any further corroboration. In the case of **Paniben Vs. State of Gujarat; AIR 1992 SUPREME COURT 1817**, the principles governing the dying declaration are enumerated as under:

> *" It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring-corroboration is merely a rule of prudence. The Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:*
>
> *(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P. (1976) 2 SCR 764) (AIR 1976 SC 2199).*
>
> *(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).*

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Ram Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264 : (AIR 1974 SC 332).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P., AIR 1982 SC 1021).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl.) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505)

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said

that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another v. State, AIR 1988 SC 912).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 SC 1519)."

15. In the case of **Laxman** cited supra the Hon'ble Apex Court held that the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witnesses state that the deceased was in a fit and conscious state to make declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. No oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for

such recording. Consequently, what evidentiary value is to be attached to such statement necessarily depends on the facts and circumstances of each particular case. 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.

16. Bearing in mind these principles the evidence adduced by the prosecution will have to be scanned.

17. As stated above the deceased had sustained 94% burn injuries the details of which are given in post mortem report (Exhibit-28). In para 17 of the post mortem report (Exhibit-28) the details of burn injuries which are superficial to deep are as under:

Head, neck face	-	9%
Chest, back	-	28%
Right upper limb	-	16%
Left upper limb	-	16%
Right lower limb	-	12%
Left lower limb	-	12%
Genital	-	1%
Total	-	94%

18. Medical Officer-Dr. Thadkar (PW-2) is the witness who examined the patient and certified that she was conscious and oriented with the time,

place and person. He deposed about the mental fitness of the deceased. It has come in the evidence of this witness that on 16.02.2013 the deceased was admitted in the burn ward of the Civil Hospital. On 17.02.2013 police came to the hospital for recording dying declaration. He was asked to give his opinion about fitness of the deceased for recording dying declaration. Accordingly, he examined the deceased-Shahanaj at 09.10 am. He recorded her blood pressure and found that she was conscious and oriented with time, place and person. Accordingly, he put his endorsement on the dying declaration (Exhibit-27) that the deceased was conscious and oriented with time, place and person. The police removed the relatives of the patient and recorded dying declaration in his presence. After recording dying declaration again he examined the patient and found that the patient was conscious and oriented with time place and person. The Medical Officer made the endorsement (Exhibit-27/1) at the conclusion of the dying declaration that the deceased was conscious and oriented with time place and person. A question was asked to this witness in the cross-examination whether he had mentioned about physical and mental condition of the patient in the endorsement. This witness gave the reply that the patient is oriented with time place and person and was conscious indicates that the patient was in a sound mental state to give the declaration. This endorsement clearly shows that the deceased was in a position to identify the person, could state about

the place where she was and was also in a position to state the time. True it is that the Medical Officer has made the endorsement that the patient was conscious and oriented with time, place and person. He did not state about the mental condition of the patient. This question had fallen for consideration before the Hon'ble Supreme Court in the case of **Laxman** cited supra and the Hon'ble Apex Court has held in para 5 as under:

> *"5. ...For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in Paparambaka Rosamma and others v. State of Andhra Pradesh, 1999 (7) SCC 695 to the effect that ". . . . . in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration."*

19. Thus what is essentially required for the dying declaration to be made acceptable is that the deceased must be in a fit state of mind to give the

declaration. If the person who records the dying declaration is satisfied that the deceased was in a sound state of mind to give declaration, conviction can be based on it. Certification by doctor is a rule of caution.

20. Police Head Constable Hanmant Kolangade (PW-3) recorded the dying declaration. It has come in his evidence that he removed all the relatives of the patient from the burn ward and requested Dr. Thadkar to examine the patient and to certify whether she was in a condition to give the statement. Dr. Thadkar examined the patient and made an endorsement on case papers. Dr. Thadkar testified that the patient was in a condition to give statement.

21. It has further come in his evidence that he introduced himself to the patient. He asked her name and village. She disclosed her name as Shahanaj Feroj Mohammed, age 24 years, resident of Vasudeo Galli, Tuljapur. It has further come in her evidence that after the dying declaration was recorded he read over the statement to the patient. She admitted the contents to be correct. She affixed impression of her left toe as her both the hands were burnt. On his request (PW-2) Dr. Thadkar examined the patient and disclosed that the patient was conscious and was able to speak.

22. Thus, the testimony of this witness clearly shows that the

deceased was in a fit condition of mind to give the statement. Not only did he request the Medical Officer to examine the patient and certify about her mental condition, but also he got himself satisfied about the mental condition of the patient by putting her questions about her name and village. He removed all the relatives from the burn ward before commencing the recording of the dying declaration. The testimony of this witness clearly indicates that the deceased was in a sound state of mind to give the dying declaration and this witness had also ensured that no relative was present while recording dying declaration. Therefore, the possibility of tutoring the deceased has been completely ruled out. Even no such suggestion has been given to either PW-2-Dr. Thadkar or PW-3-Hanmant Kolangade that the dying declaration was a product of tutoring. Therefore, the evidence adduced by the prosecution establishes beyond reasonable doubt that the deceased was in a sound state of mind to give declaration. It was argued that medical papers were not produced in the trial Court and therefore it cannot be said that the deceased was in a sound state of mind to give the dying declaration. Reliance was placed on the case of **Sitaram Nana Sarvade** cited supra. In this authority the deceased had sustained 93% burns. Medical papers were not brought on record by the prosecution. It has been held in para 10 as under:

> *"10. Now this leads us to go to only available material around which the case of the prosecution revolves and the said*

material is the dying declaration of the victim woman which is at Exh. 56. On this aspect, the substantive evidence of PW 3 Dr.Vaishali is of much importance. At the threshold, it must be mentioned that admittedly the medical papers of actual treatment given to the victim woman when she was under treatment at Solapur Hospital or for that matter at the Primary Health Center at Modnimb are not brought on record by the prosecution. On this aspect, the learned senior counsel for the appellants brought our attention to the earlier two applications preferred by the accused persons during the trial which are at Exh. 12 and Exh. 44. Exh. 12 is the first application dated 18.10.2010 by which the accused persons asked for production of the medical papers as to the exact treatment given to the victim while she was hospitalized. The said application was vehemently opposed by the prosecution and it was submitted that the said application is premature and as and when need arises, the prosecution would produce the said documents. On that premise, the said application was rejected by the Sessions Court. Then, the matter was under evidence and two witnesses were already examined. Another application which was preferred at Exh. 44 on 17.9.2011 for similar prayers asking for medical papers was also opposed by the prosecution mentioning that the attending Doctor who was subsequently examined as PW 3 was yet to be examined. Again that application was also rejected by the Sessions Court, thus it is a factual position that the said medical papers were not brought before the Court even during the evidence of PW 3 Dr. Vaishali.

In our considered view, this is definitely a mitigating circumstance to the case of the prosecution in order to establish

whether the victim woman was in a condition to give her statement, well oriented and was able to understand it."

23. In the case of **Sitaram Nana Sarvade** cited supra the accused had demanded papers of actual treatment given to the woman but they were not made available. In the case at hand Dr. Bharat Thadkar (PW-2) has stated that he had brought the hospital papers with him. There is nothing on record to show that the accused had made any such request for bringing medical papers on record. There is nothing on record either to show that the hospital papers brought by Dr. Bharat Thadkar (PW-2) did not contain the papers relating to the treatment given to the deceased. Therefore, when the Medical Officer-Dr. Thadkar says that he had brought hospital papers with him clearly denotes that those papers also contained the papers relating to the treatment given to the deceased. Therefore this authority is of no assistance to the appellant.

24. Reliance was also placed on the case of **Mahendra Ashok Jadhav** cited supra in support of the argument that the dying declaration is not reliable. This authority is also of no help to the appellant in this case. The endorsement of the doctor on the dying declaration did not show that the patient was conscious and in a position to give a statement but only showed that the statement was taken in his presence. There were serious discrepancies

in the evidence of SEO and the constable. In the case of **Mahendra Ashok Jadhav** cited supra in para 8 it has been held as under:

> *"8. In the present case, if the dying declaration Exh. 27 is perused, we find that the endorsement of the doctor thereon does not show that the patient was conscious and in a position to make a statement. In fact, the endorsement only shows, "statement taken in my presence". No doubt, it is not necessary that every dying declaration has to bear the endorsement of the doctor that the patient was conscious and in a fit condition to give a dying declaration. However, at least the person who recorded the dying declaration must be satisfied that the deceased was in a fit state of mind. On going through the evidence of PW 4 SEO Smt. Dhangada, we find that she has not asked the medical officer to examine the patient and find out whether the patient was conscious and in a fit condition to give her statement. What PW 4 SEO Dhangada states is that she asked the patient whether the patient was in a condition to give a statement and the patient answered in the affirmative. Thereafter the patient narrated the incident to her."*

25. This is not the fact situation in the case at hand. There is certification by the doctor that the patient was conscious and oriented with time, place and person. Hanmant Kolangade (PW-3) who recorded the dying declaration had asked the patient her name, age and place of residence. He introduced himself to the patient. Therefore this authority is of no assistance

to the appellant.

26. The case of Sunder Gounder s/o Sanmugam Gounder cited supra is also of no assistance to the appellant because there were two dying declarations, one recorded by the P.S.I. and the other by the Executive Magistrate and both were inconsistent with each other and acceptance of one falsifies the other. This is not the fact situation in the case at hand.

27. In the case of **Vilas @ Pankaj S/o. Yadav Sable** cited supra there was dying declaration recorded by the police head constable and two oral dying declarations. The dying declarations were not consistent with each other. This authority is not applicable to the facts of the instant case because in the case at hand only one dying declaration is given and the other one is given to the informant. Both the dying declarations are consistent.

28. Thus, from the evidence adduced by the prosecution discussed above clearly spells out that the deceased was in a fit condition to give dying declaration. The dying declaration was not a product of tutoring or imagination. It is voluntary and truthful. Therefore, the dying declaration stands to the test of scrutiny. Therefore, the learned trial Court did not commit any error in placing reliance on the dying declaration (Exhibit-27).

29. This takes us to the oral dying declaration. It is stated that the

niece Shabana i.e. the daughter of informant's (PW-1's) brother informed him on phone on Saturday 16.02.2013 at 09.00 pm that Shahanaj was burnt and she was being taken to Osmanabad. He along with Ex-Sarpanch of the village Umakant Kadam reached Civil Hospital, Osmanabad on motorcycle. He found that Shahanaj was totally burnt. On inquiry with his daughter-Shahanaj, she told him that appellant-Feroj poured kerosene on her person and set her on fire as she refused to give money to him for drinking liquor. This witness was subjected to lengthy cross-examination. However nothing of substance could be extracted from the testimony of this witness so as to render his testimony untrustworthy. Thus this dying declaration also clearly indicates that the deceased-Shahanaj had implicated the accused to be the person who had set her on fire. It is true that Shabana (PW-4) has turned hostile. However, that does not erode the credibility of the written and oral dying declaration.

30. So far as the motive is concerned, it is true that the learned Additional Sessions Judge has acquitted the accused under Section 498-A of the I.P.C. Simply because the appellant has been acquitted of the offence under Section 498-A of the I.P.C. one cannot directly reach to a conclusion that there was complete absence of motive. It is well settled that motive is a state of mind and it will not be always possible for the prosecution to discern the motive. In the case of Sitaram cited supra, it has been held that when the case

is based on circumstantial evidence the motive plays vital role and it is required to be established by the prosecution beyond reasonable doubt.

31. In the case at hand, it cannot be said that there was complete absence of motive. The dying declaration states that the accused appellant as usual demanded money for drinking liquor. When she refused there ensued a quarrel as usual and thereafter the accused appellant poured kerosene oil on her and set her on fire. This shows that there was a motive to kill the deceased as she was refusing to give money for drinking liquor. The accused was addicted to drinking has been established by the prosecution beyond reasonable doubt. Satish Bande (PW-5) admittedly is the landlord of the appellant. PW-5 has stated that the appellant-Feroj habitually used to consume liquor due to which there used to be quarrel between him and the deceased. He stated about the burn injuries of the deceased and also stated that accused Feroj came out of the house and poured water on the person of Shahanaj.

32. This witness Satish Bande (PW-5) is an independent witness. He has no axe to grind against the appellant. The appellant, through the cross-examination of his witness, could not bring anything on record to show that this witness had any animus against the appellant. Therefore, the testimony of this witness as regards drinking habits of the appellant and quarrel on that

count is trustworthy. Therefore, it can be said that the motive for commission of the offence was the refusal of the deceased to give money for drinking liqour. Recently, the Hon'ble Supreme Court in the case of **Sukhpal Singh Vs. State of Punjab; 2019(3) Crimes 92 (SC)** has held that the inability of the prosecution to establish motive in a case of circumstantial evidence is not always fatal to the prosecution case. It has been observed as under :-

> *"15. …It is undoubtedly true that the question of motive may assume significance in a prosecution case based on circumstantial evidence. But the question is whether in a case of circumstantial evidence inability on the part of the prosecution to establish a motive is fatal to the prosecution case. We would think that while it is true that if the prosecution establishes a motive for the Accused to commit a crime it will undoubtedly strengthen the prosecution version based on circumstantial evidence, but that is far cry from saying that the absence of a motive for the commission of the crime by the Accused will irrespective of other material available before the court by way of circumstantial evidence be fatal to the prosecution."*

33. Now the question that falls for consideration is whether a patient having 94% burns is capable of giving a dying declaration. To put it the other way, whether a person having 94% burns is mentally and physically sound to give a dying declaration. This question is no longer *res integra*. In the case of ***Govindappa and Ors. V/s. State of Karnataka; (2010) 6 Supreme Court Cases 533,*** the victim had 100% burn injuries and yet she was found to be in a fit

state of mind to give her statement. The dying declaration was accepted by the Hon'ble Apex Court on the evidence of victim who was in a position to talk. Thus percentage of burns is not a determinative factor for deciding whether a person having 100% burns is or is not in a position to give a dying declaration. What has to be ascertained is whether the patient having 100% burn injuries is in a sound state of mind to give the dying declaration. In the case at hand, the evidence of (PW-2) and (PW-3) unmistakably show that the deceased was in a sound state of mind to give the dying declaration. Therefore, simply because the deceased had 94% burn injuries, *ipso facto* it cannot be said that the deceased was not in a sound mental state to give a dying declaration. In this view of the matter, the submission of the learned counsel cannot be accepted.

34. It is true that the burnt clothes of the deceased were sent to the chemical analyzer but the report of chemical analyzer is not forthcoming. According to Shri Syed the learned counsel for the appellant, in the absence of the chemical analyzer's report it cannot be concluded that the kerosene was poured on the deceased. It is pertinent to note that the appellant-accused has taken the defence that the deceased died due to stove explosion. The panchanama of the spot (Exhibit-22) shows presence of the stove but the panchanama does not give any indication that there was a stove explosion.

Had there been a stove explosion, there would have been some evidence on the stove indicating its explosion. The stove was, as per the spot panchanama, neatly kept near the wall. Therefore, the possibility of stove explosion is completely ruled out. Having regard to this, merely because chemical analyzer report is not forthcoming does not dent the case of the prosecution. When a dying declaration is voluntary and truthful and inspires confidence in the mind of the Court, by mere absence of chemical analyzer report the prosecution case cannot be thrown overboard. In this view of the matter, the submission of the learned counsel in this respect deserves rejection.

35. It is true that the accused-appellant poured water on the person of the deceased. According to Shri Syed, this is a factor indicating that he had no motive to set the deceased on fire. Satish Bande (PW-5) the landlord had also stated that the appellant poured water on the deceased to extinguish the fire. This indicates that accused had no motive. This aspect of the matter has been properly dealt with by the learned Additional Sessions Judge. While dealing with this argument the learned Additional Sessions Judge has observed as under:

> *"23. It is in the evidence on record that the accused poured water on the person of deceased when she came burning out of house. In view of this it has been argued for the accused that accused was not intending to kill the deceased hence he poured water and this is*

not the case under Sec.302 of IPC. I do not find any force in the argument for the reason that when accused poured kerosene on the person of deceased and set her on fire, he was well aware of the consequences of his act. He has not poured water on the person of deceased when she was inside the house, but when she came out of house burning, he poured water on her person. It is certainly done to show his innocence to the persons who had arrived or could be arrived on hearing the uproar."

36. We do not find any infirmity in this appreciation. Clause Fourthly of Section 300 states that culpable homicide is murder if the act done is so imminently dangerous that the accused knows or has reason to believe that in all probability death will be caused or will cause such bodily injury as is likely to cause death. In the case at hand, the act of setting anyone on fire is so imminently dangerous that the accused had the knowledge that in all probability death will be caused or it will cause such bodily injury as is likely to cause death. Therefore the subsequent act of pouring water cannot be treated as a mitigating circumstance. We agree with the learned trial Court that the accused did not pour water on her person when she was inside the house but for making a show of extinguishing fire poured the water on her so that this act of his should be visible to all. Therefore argument of the learned counsel deserves rejection.

37. Thus from the evidence adduced by the prosecution the learned

Additional Sessions Judge has correctly recorded conviction against the accused under Section 302 of the I.P.C. In view of this, the appeal is devoid of any substance. The prosecution has established beyond reasonable doubt that the death of the deceased was homicidal. It was caused by the appellant by setting her on fire after dousing her with kerosene. Therefore the conviction recorded by the learned Additional Sessions Judge is just and proper and no interference is called for in the order of the learned Additional Sessions Judge. The appeal is bereft of any merit and hence the appeal is dismissed.

[M.G. SEWLIKAR, J.] [T.V. NALAWADE, J.]

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