

**Dada Vs. The State of Maharashtra**

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**Court :** Mumbai Aurangabad

**Decided On :** Jun-25-2014

**Judge :** S.S. Shinde & the Honourable Mr. Justice A.I.S. Cheema

**Appeal No. :** Criminal Appeal No. 666 of 2011

**Appellant :** Dada

**Respondent :** The State of Maharashtra

**Judgement :**

**Shinde, J.**

1. This criminal appeal has been filed by the appellant being aggrieved by the judgment and order dated 30.11.2011 passed by the Additional Sessions Judge, Dhule in Sessions Case No.30 of 2011 thereby convicting the appellant for the offence punishable under Section 302 of I.P.C. vide Section 235 of Cr.P.C., and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine, to suffer rigorous imprisonment for six months. The appellant / accused is in Jail from 30.11.2010.

2. The prosecution case as emerges from the record is, as under:

The deceased Begambai was married with the accused. She had two sons out of the marriage. Both sons reside separate. Deceased and accused were residing at

Sindhkheda.

3. Deceased had earned wages by labour work of plucking cotton. Accused was not doing any work and he was addicted to liquor. On 20.11.2010 at about 8 a.m., accused demanded money to the deceased for consuming liquor. Deceased refused to pay money. While deceased was making tea on fire place, accused came from behind, poured kerosene of lamp on her person and set her on fire by means of match stick, due to which deceased caught fire. Accused then poured water on her person. Deceased was lying in burnt condition. So her brotherinlaw (Dir) Ukha, cousin fatherinlaw and other persons took her to Rural Hospital, Sindhkheda.

4. Ravindra Kedar P.W.6 was on duty at Rural Hospital, Sindhkheda. He got telephonic message from PSI Sindhkheda to record statement of Begambai. P.W.6 met concerned doctor and requested him to examine the deceased for recording her statement. Doctor examined her and certified that she was in fit condition. Accordingly P.W.6 Kedar recorded statement vide Exh.38 and took her thumb impression. Doctor again examined her and put endorsement that she was in a fit condition to give statement.

5. PSI Pawar issued a letter vide Exh.19 to Executive Magistrate, Sindhkheda to record Dying declaration of the deceased. Accordingly, P.W.2 Pramod Chavan visited Rural Hospital, Sindhkheda, met concerned doctor and requested him to examine the deceased for recording her statement. Accordingly, doctor examined Begambai and certified that she was in a fit condition to give statement. Thereafter, P.W.2 Pramod Chavan recorded dying declaration of the deceased as per her say vide Exh.20 and took her thumb impression. Doctor again examined the deceased and certified that she was in fit condition and put his endorsement on Exh.20.

6. The statement recorded by P.W.6 Kedar vide Exh.38 was treated as FIR, on which CR No.118/2010 was registered against the accused for the offence punishable under sections 307, 498A, 323, 504 and 506 of IPC. Investigation was entrusted to P.W.7 Atmaram Pradhan. P.W.7 Atmaram Pradhan visited the spot and drew spot panchanama vide Exh.28 and arrested accused under arrest

panchanama Exh.29. During the treatment, deceased expired on 5.12.2010. Accordingly, offence punishable under Section 307 was converted to section 302 of IPC. Dead body of deceased was sent for post mortem. P.S. Mr. Pradhan P.W.7 recorded statements of witnesses, sent the seized muddemal for C.A., collected post mortem report and after completion of investigation filed chargesheet before JMFC, Sindhkheda.

7. Accused pleaded not guilty to the charge explained to him at Exh.6. To prove the offence, prosecution examined in all seven witnesses. Accused did not examine any witness in defence. His defence was that the deceased was suffering from eye cancer. She was not getting any relief. So being fed up with the pain and suffering, she committed suicide by burning herself.

8. The Sessions Court convicted the appellant / accused as stated in para 1 herein above. Hence, this appeal.

9. Heard learned Counsel for the appellant and the learned APP for the State. The learned Counsel for the appellant ;submits that both the dying declarations do not inspire confidence and, therefore, those are required to be disbelieved and as a result, the appellant deserves to be acquitted. It is submitted that the appellant did take defence before the trial Court that his wife deceased Begambai was suffering from eye cancer and under depression she had committed suicide by pouring kerosene on her person and set herself on fire. It is submitted that if both the dying declarations are disbelieved, there is no any other evidence on record so as to sustain conviction of the appellant. In the alternate, it is submitted that even if the prosecution case is taken as it is, the act of the appellant was not with premeditation or preplanned and, therefore, the case would fall under exception 4 to Section 300 of IPC. In support of this contention, learned Counsel for the appellant placed reliance in case of Prakash Chand vs State of H.P. (AIR 2004 SC 4449)and also 1 AIR 2004 SC 4449; an unreported judgment dated August 20, 2013 of this Court in case of Dilip Janaba Kamble vs State of Maharashtra in Criminal Appeal No.958 of 2010. The learned Counsel for the appellant further pressed into service reported judgment of this Court in case of Waman Gulab Kadam and ors vs State of Maharashtra. (2012(4)Bom.C.R.(Cri.)496)Therefore,

the learned Counsel for the appellant submits that appeal deserves to be allowed.

10. On the other hand, learned APP appearing for the State submits that both the dying declarations inspire confidence inasmuch as, the Medical Officer stated that the patient was conscious throughout recording of the dying declaration and the Executive Magistrate and the police officer who have recorded the dying declarations stated that the same have been recorded by them after ascertaining that the deceased Begambai was in a fit mental condition and well oriented to give dying declarations. The learned APP, in reply to the alternate submissions of the Counsel for the appellant that the case of the appellant would fall under Exception 4 of section 300 of IPC submitted that there was no sudden quarrel or fight and, therefore, ingredients of Exception 4 of Section 300 of IPC are not attracted. In support of this contention, he relied upon the Supreme Court judgment in case of *Dhirajbhai Gorakhbhai Nayak vs State of Gujarat*. (2003) 9 SCC 322)

11. We have carefully considered the submissions of the learned Counsel for the appellant and the learned APP for the State and with their able assistance, perused the entire evidence and other material placed on record including the two dying declarations, which are basis for conviction of the appellant. There is no direct evidence in the nature of eye witnesses in the matter and therefore, the entire prosecution case rests upon two dying declarations; one recorded by the Executive Magistrate, Sindhkheda, Taluka Sindhkheda on 30.11.2010 at 11.30 a.m. (Exh.20), and another recorded by Police Officer at Exh.38. Upon careful perusal of the dying declaration at Exh.20, it appears that there is no mention in the dying declaration that the same was read over and explained to the deceased. Therefore, in view of the judgment of the Supreme Court in case of *Shaikah Bakshu and ors vs State of Maharashtra* (2007(11) SCC 269) in absence of such mention, the said dying declaration is of no avail to the prosecution. Therefore, we discard the said declaration at Exh.20.

The another dying declaration at Exh.38 came to be recorded by the Police Officer and on the basis of said dying declaration, it appears that the FIR came to be lodged.

12. P.W.6 Ravindra Bhaurao Kedar in his deposition before the Court stated that on 30.11.2010 he was present on duty in Rural Hospital, Sindhkheda. PSO Sindhkheda gave telephonic message to him to record statement of Begambai who was admitted in burnt condition. Then P.W.6 Ravindra met the doctor. The doctor examined Begambai and put an endorsement that she was in a fit condition to give statement.

In her statement, Begambai stated that on 30.11.2010 she had brought wages of labour work. Her husband was demanding money to drink liquor. She refused to give money. While she was preparing tea, her husband came from behind and poured kerosene of lantern and set her ablaze. The said witness identified his handwriting and stated that the contents of the dying declaration are correct and it bears thumb impression of Begambai and also signature and endorsement of the doctor. He specifically stated in his crossexamination that except doctor, himself and Begambai, no other person was there while recording the statement. He was shown the statement at Exh.38 i.e. dying declaration and he narrated the statement of Begambai as it is. He denied the suggestion given by the defence that the said statement was recorded in police station.

13. The Medical Officer Dr. Manish Gulabsing Kharde was examined as P.W.6. In his deposition, he stated that on 30.11.2010 he was present on duty as Medical Officer in Sindhkheda Rural Hospital from 8 a.m. to 8 a.m. of next day. Begambai was admitted in the Hospital. On 30.11.2010 Head Constable of Sindhkheda Police Station came to hospital for recording statement of Begambai. Head constable requested him to examine the patient Begambai as to whether she was in a fit condition to give her statement. Accordingly, he examined the patient. He stated that she was in fit condition to give her statement. He put his endorsement and signature on the statement of Begambai shown to him which is at Exh.38. Thereafter, the Head Constable recorded the statement of Begambai and took her thumb impression. He specifically stated that throughout recording dying declaration, he was present. In his crossexamination, he stated that Begambai was admitted in hospital at 9.30 a.m. Then intimation was given to police station and at about 10 a.m., P.W.6 came for recording statement of Begambai. He recorded her statement for about 30 to 45 minutes. He stated that Dr. Lokhande

was also present while recording dying declaration.

14. The prosecution has also examined Dr. Atmaram Bhagwan Lokhande P.W.1. In his deposition before the Court, he stated that at the relevant time, he was serving as Medical Officer at Rural Hospital, Sindkheda. On 30.11.2010 he was present on duty. On that day, Begambai Dada Baisane was admitted to hospital in burning ward. He informed Sindkheda police station. Police Constable of said police station came to him and asked him whether the patient was in a fit condition to give statement. Accordingly, P.W.1 Dr. Lokhande also examined Begambai. He stated that she was in a fit physical and mental condition to give statement. He identified his signature. In his crossexamination, defence has not brought anything on record which would be helpful to the defence. Therefore, upon careful perusal of the dying declaration at Exh.38 and also endorsement of the Medical Officer and also the thumb impression of deceased Begambai and the fact that the said dying declaration was read over to her and she admitted that the contents of the said dying declaration are true, in our considered opinion, the said dying declaration inspires full confidence and was rightly believed by the trial Court. Therefore, in our opinion, the said dying declaration at Exh.38 deserves to be accepted.

15. As already observed, the dying declaration at Exh.20 was not read over to Begambai and she did not state that the contents of the said dying declaration were true. Therefore, the said dying declaration at Exh.20 does not inspire confidence and we disbelieve the same.

16. The defence which was taken by the appellant /accused in his statement u/s 313 of Cr.P.C., was that the deceased was suffering from eye cancer. She was not getting any relief. So being fed up with the pain and suffering, she committed suicide by burning herself. The learned Counsel for the appellant, as already observed, made alternate submission that even if the prosecution case is taken as it is, it would fall u/s exception 4 of section 300 of IPC. The learned Counsel for the appellant also invited our attention to the fact that the total percentage of burn injuries was 58. He also invited our attention to the fact that in dying declaration itself, Begambai stated that the appellant poured water on her person to extinguish

fire. He also invited our attention to the fact that the appellant sustained burn injuries to his hands and knees. He invited our attention to page 15 of the compilation of the paper book and submits that the Investigating Officer himself while describing Cheharepatti, has stated in the report that he noticed burn injuries on his hands and knees.

17. We have carefully considered the contents of the dying declaration and also the fact that the appellant poured water when Begambai was in burnt condition. The act of the appellant in pouring water was certainly to extinguish fire. Upon perusal of the report of the Police Officer, Sindhkheda Police Station, when the appellant was arrested on 30.11.2010 at about 20.05 hours, it is stated in the said report that on right hand and both the knees, there are burn injuries. Therefore, the prosecution ought to have brought on record the injuries sustained by the accused / appellant by sending him for medical examination. In our opinion, certainly, prosecution was under legal obligation to refer the accused for medical examination.

Upon taking the contents of the dying declaration as it is, it appears that the appellant asked for money from his wife Begambai (deceased) for consuming liquor and on refusal, kerosene was poured on her person and she was set ablaze by the appellant /accused. While accepting the case of the appellant, this Court in case of Dilip Janaba Kamble vs The State of Maharashtra (supra), did take into consideration percentage of burn injuries and also the fact that the appellant therein did not come to the spot armed with weapon. After quarrel ensued, the appellant took kerosene which was available in the house and poured on Kalpana and set her on fire. In the present case also, it is not the case of the prosecution that the appellant came armed or had preplanned or there was premeditation to commit murder of his wife. On refusal of money for consumption of liquor and quarrel, it appears that the appellant in the heat of passion followed his wife home, took kerosene and poured on the person of Begambai and set her ablaze. He did not take disadvantage and in the course of incident itself tried to put out the fire. Therefore, taking into consideration the attending circumstances, including injuries noticed by the police officer on right hand and both knees of the accused / appellant and the fact that he poured water on the person of Begambai soon after

the occurrence and that, there was no premeditation as such, we are of the view that exception 4 to section 300 of IPC applies to the facts of the present case and appropriate conviction would be u/s 304 part II of IPC.

18. Hence, the conviction of the appellant u/s 302 of IPC is set aside and instead, the appellant is convicted u/s 304 part II of the Indian Penal Code. For the said offence, the appellant is sentenced to rigorous imprisonment of ten years and to pay fine of Rs.1000/, in default, to suffer S.I. for one month.

Criminal appeal is accordingly partly allowed.

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