

Neeta S.  
Sawant

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**Criminal Appeal No. 357 / 1998**

Kundlik Nagappa Mane

Aged about 45 years,

Occupation : Service,

Residing at Gut No.11, Bombatwadi,

Behind Mankhurd Municipal School,

Mumbai — 400088.

.. Appellant

**Versus**

The State of Maharashtra

(At the instance of Trombay

Police Station, Mumbai).

.. Respondent

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Mr. Rupesh Bobade, Advocate for Appellant through Legal Aid  
Committee.

Smt. Sharmila Kaushik, APP for State/ Respondent.

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**CORAM : SANDEEP K. SHINDE J.**

**DATE : 26<sup>th</sup> FEBRUARY, 2021.**

**ORAL JUDGMENT :-**

1. Appellant has been convicted for the offences punishable under Sections 498-A and 306 of the Indian Penal Code, 1860 in the Sessions Case No. 471 / 1994 by the learned Additional Sessions Judge, Greater Mumbai, who sentenced him to suffer imprisonment for four years, which he had undergone as on the date of his conviction, as a under trial Prisoner.

2. Against the conviction and sentence, this appeal is preferred under Section 374 (2) of the Code of Criminal Procedure, 1973.

3. Heard. learned Counsel for the Appellant and learned APP for State.

4. Briefly stated prosecution case is that;

Accused was married to one lady by name Laxmi. They had no issue out of the wedlock. Thus, with the consent of Laxmi, he married Shobha (deceased). The accused was charge-sheeted for causing murder of Shobha and for ill-treating her. On 22<sup>nd</sup> December, 1993, Local Police received a message, that a lady having sustained burn injuries, was admitted in the Hospital. Hence, P.S.I. Vinod Chavan contacted Special Executive Magistrate, Ms. Sulochana Swarna and alongwith her, he went to Hospital Shatabdi. That after making enquiry with doctor on duty, whether, Shobha was in fit condition to give statement, Executive Magistrate recorded her Dying Declaration. Thereafter, another statement of Shobha was recorded by the Police Officer, whereafter the crime no. 447 / 1993 was registered under Section 306 of IPC.

5. During investigation, spot panchanama was drawn, whereby, a plastic can of Kerosene, Nylon Saree and burned blouse pieces were attached. Statements of neighbours and of relatives were recorded. The learned Judge framed a charge under Section 498-A and 302; in alternative under Section 306 of IPC and upon appreciating the evidence of the Special Executive Magistrate, Investigating Officer and PW-4 Prakash Namdeo Alhad (neighbour), convicted accused of the offence punishable under Section 306 of IPC.

6. Learned Advocate (appointed), in support of the appeal has taken me through the Dying Declaration recorded by the Special Executive Magistrate at Exhibit-8 and would submit since, Shobha had suffered 70% terminal burn injuries, before recording the Dying Declaration, doctor was not consulted to ascertain whether Shobha was in fit condition to give a

statement or not. In support of the contention, he has brought to my notice an approval of doctor, which it appears was made on a separate sheet appended to Dying Declaration and not on declaration itself. He would contend that the Special Executive Magistrate admitted, in his testimony that he had not taken endorsement of doctor before recording the statement. Therefore, submission is; in absence of certification by doctor, that Shobha was in condition to give statement, Dying Declaration cannot be relied upon and it is to be kept out of the consideration. He would further submit that the evidence of Prakash Alhad — PW-4, clearly shows that it was a case of self immolation and in support of this contention, he has also relied on the spot panchanama, which suggests that deceased had locked the door from the inside. Counsel would further submit that there are material contradictions in two Dying Declarations; one recorded by the Special Executive

Magistrate and another by Police Officer on the same day and therefore, even Dying Declarations did not further the prosecution case. On these grounds, he seeks acquittal of the appellant.

7. Per-contra, learned APP would support the conviction and sentence and submitted, that the findings recorded by the learned Judge are founded on cogent and reliable evidence and therefore, unless, shown that the findings are perverse, this Court may not interfere with the impugned conviction and sentence.

8. I have carefully considered the arguments of respective Counsel and perused the evidence. One of questions, for consideration is; Whether, certification, by doctor that, victim was in fit state of mind, is mandatory before admitting the Dying Declaration to evidence.

. The Apex Court in the case of **Laxman Vs. State of Maharashtra** (2002) 6 SCC 710 has held that;

“ Normally, therefore, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye-witnesses or a Magistrate recording the statement state that the deceased was in a fit and conscious state to make the 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 certification by the doctor is essentially a rule of caution.”

9. In this case, the evidence of Executive Magistrate reveals that, before recording the statement, she had enquired with Dr. Shetty and Godbole about the mental/ health condition of the

Shobha (deceased). The subject Dying Declaration also shows statement was read over to the deceased, which the deceased stated to be correct. Thus, in view of the evidence, I have no reason to discard the Dying Declaration recorded by the Special Executive Magistrate, which is at Exhibit-8. In **Khushal Rao's case**, AIR 1958 SC 22, Honourable Apex Court has held that the statement made by a person who is in danger of losing his life, as to the cause of his death or as to the transaction which resulted in his death, becomes a relevant fact upon his death.

10. Herein, deceased disclosed to Special Executive Magistrate, that husband poured kerosene, set her ablaze, latched the door from outside and left the place. Indisputably, deceased died due to severe burn injuries. Thus, in view of deceased narration, accused caused her death.



11. However, the trial Court, has held, deceased had suffered 'suicidal' and not 'homicidal death' and convicted the accused of offence of 'Abetment of suicide'. Question is; Whether the prosecution has proved beyond reasonable doubt that accused was guilty of abetting suicide, of his wife-Shobha.

. To ascertain, whether the person has abated commission of suicide of another, the consideration would be, is the accused guilty of the act of 'instigation of suicide'.

True that, abetment may be, by instigation, conspiracy or intentionally aiding, by any act or illegal omission, as provided under Section 107 of the Indian Penal Code. Thus, abetment involves a mental process of instigating a person of doing something and offending action ought to be proximate to the time of occurrence. If the person who committed suicide had been hyper sensitive and action of accused is otherwise not ordinarily expected to induce a similar circumstanced person to

commit suicide, it may not be said to hold the accused guilty of abatement of suicide. Hon'ble Apex Court in the case of **Gurcharan Sing V/s. State of Punjab**, in Criminal Appeal No. 40/2011, has held : "As in all crimes, *mens-rea* has to be established, to prove the offence of abetment as specified under Section 107 of IPC, the state of mind to commit a particular crime must be visible to determine the culpability. In order to prove *mens-rea*, there has to be something on record to establish or show that the accused had guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased. The ingredients of *mens-rea* cannot be assumed, ostensibly present but has to be visible and conspicuous."

12. Keeping in mind the above understanding of law and applying the ratio to the facts of the case; herein deceased married the accused hardly 4 - 5 months before the incident.

It was second marriage of the accused. Prosecution has largely relied on Dying Declarations to contend that deceased statement which relates to cause of death, is a "relevant fact". It may be stated that except the Dying Declarations, there is no other evidence to corroborate the deceased statement which relates to cause of death. Deceased stated that husband was suspecting her fidelity and on that count was persistently harassing and beating her. Deceased alleged that when she was having spat with her husband, he poured kerosene and set her ablaze. Thus initially offence under Section 302 of IPC was registered. The prosecution in support of charge had examined Prakash Alhad, a neighbour of the deceased. He was next door neighbour. His testimony reveals that upon hearing the cries of the deceased, he rushed to the spot. He found and seen the accused was trying to open the door with all possible efforts at his command. It

appears from his testimony that he had helped accused to open the door. Therefore, the evidence of Prakash Alhad suggests that the door was not latched from outside, but from inside. To ascertain the variability of evidence of this witness, I have carefully gone through the spot panchanama. It shows due to persistent jerks, lock inside the door was damaged. Thus, suggesting force was applied from outside, in efforts to open the door. Panchas had noted a dent to inner latch in panchanama. Therefore, it is to be stated that the evidence indicates that the door was not latched from outside, but from inside and Shobha was alone in the house, when the incident had taken place.

13. In the circumstances, the learned trial Court has correctly rejected the prosecution case that accused caused death of Shobha by setting her ablaze. Admittedly, there is not other

independent evidence to establish that, Shobha was recurrently harassed by the appellant either doubting her chastity or otherwise. The statement of Dying Declaration, cannot be looked into because, 'cause of death' alleged by deceased has been proved 'false'. Thus, to be stated absolutely there is no evidence to hold the appellant guilty of the act of 'instigation of suicide'.

14. In consideration of the evidence and for the reasons stated above, appeal is Allowed. Bond executed by the Appellant is cancelled and sureties are discharged. The fine amount, if paid, be refunded to the appellant.

15. The appeal is disposed of.

**(SANDEEP K. SHINDE, J)**