

Allauddin Abdul Inamdar vs The State Of Maharashtra And Another on 29 May, 2020

Equivalent citations: AIRONLINE 2020 BOM 593

Author: M.G. Sewlikar

Bench: T.V. Nalawade, M.G. Sewlikar

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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 114 OF 2014

Allauddin S/o Abdul Inamdar
Age 68 years, Occ. Nil
R/o Kilaj, Tq. Tuljapur,
District : Osmanabad

Appellant.

Versus

The State of Maharashtra

Respondent

Shri S.R. Shirsath, Advocate for the appellant.
Shri R.V. Dasalkar, APP for the State.

CORAM : T.V. Nalawade &
M.G. Sewlikar, JJ.

RESERVED ON : 3rd MARCH, 2020.
PRONOUNCED ON : 29th May, 2020.

JUDGMENT :

(PER M.G. SEWLIKAR, J.)

1. This appeal is preferred by the original accused No. 2 against the judgment and order dated 04.09.2012 in Sessions Case No. 4/2012 passed by the Adhoc Additional Sessions Judge, Osmanabad, whereby accused No. 2 has been convicted of the offence punishable under Section 302 of the Indian Penal Code and has been sentenced to suffer rigorous imprisonment for life and fine of Rs. 5,000/-, in default, to suffer simple imprisonment for one year. Accused Nos. 1 to 3 have been acquitted of the offence punishable under Section 498A r/w Section 34 of the Indian Penal Code. Accused Nos. 1 and 3 have been acquitted of the offence punishable under Section 307 r/w Section 34 of the Indian Penal Code.

2. Prosecution case can be briefly stated as under :-

Deceased Hasinabee was the wife of accused No. 1.

Accused No. 2 (appellant herein) is the father-in-law of the deceased Hasinabee and accused No. 3 is the mother-in-law of the deceased Hasinabee. PW 3 Dadamiyan is the brother of the deceased Hasinabee and PW 4 Rashidabee is the mother of the deceased Hasinabee. It is the case of the prosecution that marriage between accused No. 1 and the deceased Hasinabee was solemnized about one year before the incident. Accused Nos. 1 to

3 were staying together at the time of marriage. The deceased was maintained well for a period of one month after marriage. Thereafter, all the accused started ill-treating her saying that she is a bad cook and that she could not do household chores and used to beat her. It is also the case of the prosecution that accused No. 2/appellant used to demand sexual favour from the deceased Hasinabee. He used to say that she should allow him to share bed. She had informed PW 3 and PW 4 about the ill-treatment on telephone. When she refused to oblige accused No. 2, accused No. 2 beat her. Therefore, accused No. 1 showed willingness to live separately from accused Nos. 2 and 3 and demanded Rs.20,000/- from PW 3 Dadamiya. PW 3 paid Rs.20,000/- to accused No. 1 but he did not live separately. On 17.01.2011 at about 5.30 pm, he received phone call from an unknown number that his sister Hasinabee had suffered burn injuries and she was admitted to Civil Hospital, Osmanabad. On reaching Osmanabad, he asked the deceased about the incident and she told him that the appellant said to her that she should allow him to share bed and when she refused, he poured kerosene on her and set her on fire.

3. The deceased was admitted in the hospital by the appellant. Intimation of admission of burnt patient was given to the Police Station vide letter Exhibit 28. PW 2 Police Naik Rajasab Fulari approached Medical Officer Dr. Pathan. After obtaining certificate of fitness of Hasinabee to give dying declaration from Dr. Pathan, he recorded the dying declaration of the deceased on 17.01.2011. In the dying declaration, the deceased stated that on 17.01.2011 at 4.00 to 5.00 pm, all the accused alongwith her brother-in-law, were present. They started saying that she did not do household chores. Her father-in-law i.e. the appellant said as to why she did not allow him to share bed and poured kerosene on her and set her on fire. It is also stated in the dying declaration that when people gathered, the appellant poured water on her and extinguished the fire and admitted her to the hospital.

4. On the basis of this dying declaration, offence under Section 498A, 307 read with Section 34 of the Indian Penal Code was registered by Osmanabad Police Station and since the offence pertains to Naldurg Police Station, investigation was handedover to Naldurg Police Station. On 18.01.2011, at about 12.40 am, Hasinabee died during treatment. Accordingly, intimation was given by the Medical Officer to the Police Station Osmanabad vide intimation Exhibit 45.

5. During the investigation, statements of the witnesses were recorded, clothes of accused Nos. 1 to 3 were seized and spot panchanama was drawn. From the spot of the incident, a can of kerosene, half

burnt saree having smell of kerosene, match box having smell of kerosene, half burnt match stick, earth having kerosene smell were seized and panchama Exhibit 41 was drawn. All these articles were referred to Chemical Analyser for analysis vide letter Exhibit 47. Statements of the witnesses were recorded and after disclosure of the offence, charge-sheet was submitted against the appellant and acquitted the accused Nos. 1 and 3 before the learned Judicial Magistrate First Class Tuljapur, who committed the same to the Court of Session in usual manner.

6. Charge Exhibit 18 was framed, read over and explained to the accused. They pleaded not guilty to it and claimed to be tried. Their defence is of total denial. It is their defence that the deceased had stated while recording history at the time of admission in the hospital that she suffered accidental burn injuries.

7. Prosecution examined as many as 15 witnesses to substantiate the charge. On considering the entire evidence, the learned Adhoc Additional Sessions Judge, Osmanabad, convicted the appellant under Section 302 of the Indian Penal Code and acquitted him under Section 498A of the Indian Penal Code. He also acquitted accused Nos. 1 and 3 of the offence punishable under Sections 302, 498A read with Section 34 of the Indian Penal Code. Appellant No. 2 has assailed his conviction by this appeal. The State has not preferred any appeal against acquittal of accused Nos. 1 and 3.

8. Heard Shri Shirsath, learned counsel for the appellant and Shri Sangle, learned APP for the State.

9. Shri Shirsath, learned counsel for the appellant argued that the deceased Hasinabee wanted to live separately from other accused as accused No. 3 Bismillabee is suffering from leprosy. The deceased Hasinabee was required to do cooking because of the ailment of accused No. 3. He argued that in the medical history recorded by PW 1, the deceased had stated that she suffered burn injuries in an accident. He contended that the dying declaration is not free from suspicion. He submitted that on the dying declaration, time of commencement of dying declaration was written as 8.00 pm and it was over written as 8.20 pm. Because of that, dying declaration shows that recording started at 8.20 pm and it was over at 8.20 pm. Thus, this itself is indicative of the fact that the dying declaration is a forged one. He submitted that the deceased had sustained 95% burn injuries. She was continuously moaning and demanding water. A patient who suffers 95% burn injuries cannot be in a sound mental state to give the dying declaration. Dr. Sushilkumar Sarde PW 12 has admitted in the cross examination that a person having 95% burn injuries is usually administered sedatives and because of the same, the mental condition of the patient can get affected. He submitted that PW 1 Dr. Pathan has admitted that the condition of the deceased was deteriorating. She died within four hours of recording of the dying declaration. This fact itself indicates that she was not in a position to give dying declaration. He submitted that the appellant is 65 years of age. It cannot be believed that a person of 65 years of age would indulge in such heinous activities that too with his daughter-in-law. He submitted that for all these reasons, the dying declaration cannot be believed. He therefore, prayed for setting aside the impugned judgment.

10. Shri Sangle, learned APP for the State submitted that Medical Officer Dr. Pathan examined the deceased Hasinabee and certified that she was in sound state to give the dying declaration. He submitted that accused No. 1 is a driver and he used to be away for days together from house. He

further submitted that accused No. 3 is suffering from leprosy. Taking undue advantage of absence of accused No. 1 from the house, accused No. 2 used to indulge in such activities. He submitted that the deceased Hasinabee did not approve of these sexual advances of the appellant. The appellant got agitated because of her continuous refusal and set her on fire. To cover up the criminal act, he made a show to extinguish fire and admitted the deceased into the hospital. He submitted that at the time of recording of dying declaration, the deceased was in a sound state of mind. Merely because she passed away in four hours does not mean that she was not in a sound state of mind. He submitted that kerosene residues were detected on the clothes of the appellant. This clearly shows involvement of the appellant in the commission of the offence. He therefore, contended that the impugned judgment is sound and no interference is warranted.

11. Evidence of prosecution is based on the dying declaration of the deceased (Exhibit 30) recorded by PW 2 Police Naik Rajasab Fulari. It is also based on oral dying declaration given to PW 3 and PW 4. The law on the dying declaration is well settled. The Honourable Apex Court in the case of Satish Ambona Bansode Vs. State of Maharashtra, AIR 2009 SC 1626 has beautifully explained the concept of the dying declaration as under:-

Though a dying declaration is entitled to a great weight, it is worth while to note that the accused has no power of cross examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Courts also insist that the 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 a 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 clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction on the same without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole base of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

In the case of Paniben Vs. the State of Gujarat, recorded in AIR 1992 Supreme Court 1817, the principles governing 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 (Cri.)

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 to 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)."

12. Keeping in mind these principles, it will have to be examined whether the dying declaration is truthful or not. PW 2 is the person who recorded dying declaration of the deceased. On the date of the incident he was deputed as Chowki Amaldar in Civil Hospital, Osmanabad. He got information in writing from Dr. Pathan that Hasina Yunus Inamdar had sustained 95% burn injuries and was admitted in the hospital. Thereafter, he approached PW 1 Dr. Pathan. Dr. Pathan took him to the patient. On his request, Dr. Pathan examined the deceased Hasinabee and certified that she was conscious and well oriented with time, place and person. Thereafter, he asked her relatives to leave the ward. He read out the questions in the format to the deceased and noted the answers given by her. After the dying declaration was recorded, he read over it to the deceased. The deceased admitted it to be correct. Thereafter, he asked the Medical Officer to certify whether the deceased was in sound state of mind. Dr. Pathan again examined the deceased and certified that the deceased was in a condition to give the statement. Accordingly, she made the endorsement under his signature. He obtained the thumb impression of the deceased on it. In the cross-examination, he has stated that the deceased was asking for water because of burns.

13. Medical Officer Dr. Shahiya Pathan corroborated the testimony of this witness. She has stated that Hasinabee was admitted in the burn patient ward at 6.50 pm and was brought by her father-in-law i.e. appellant. She had sustained 95% superficial to deep burn injuries. She informed the police about the admission of the deceased Hasinabee vide letter Exhibit 28.

14. She has further stated that on the request of PW 2 Fulari, she checked the patient and found that she was conscious and well oriented with time, place and person. Accordingly, she made entry in the indoor papers. PW 2 Fulari recorded the statement. It was read over to the deceased. Her thumb impression was obtained on it. On the request of PW 2, she again verified whether the deceased was still conscious and found that she was conscious and well oriented with time, place and person and accordingly, made endorsement at the bottom of the dying declaration. She denied in the cross-examination that there was over-writing while mentioning the time as 8.20 pm. She denied that the time was over-written as 8.20 pm in the certificate given at the time of commencement of the dying declaration and in the certificate at the closure of the dying declaration, time is over-written as 8.40 pm. She voluntarily stated that corresponding entry of time is on admission paper.

15. The testimony of this witness clearly shows that the deceased was in a sound state of mind while giving dying declaration. She stated that the deceased was conscious and well oriented with time, place and person. It is pertinent to note that a question was put to PW 2 that the deceased was demanding water which means she was conscious at the time of giving dying declaration. The evidence of the Medical Officer shows that she examined the patient and found her to be conscious, well oriented with time, place and person. It is true that the ridges of the thumb impression of the deceased are clearly visible on the dying declaration. However, nothing has been brought on record to show that the thumb of the deceased was completely burnt. PM report does not show that her thumb was completely burnt nor the Medical Officer Dr. Pathan has been cross examined on this point. In the case of State of Madhya Pradesh Vs. Dalsingh and others Criminal Appeal No. 2303/2009, the Hon'ble Apex Court has held as under :-

So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in the case of such burns in the body, the skin of a small part of the body, i.e. thumb, may remain intact, therefore, it is a question of fact whether the skin of the thumb had in fact been completely burnt, and if not, whether the edges and curves had remained intact.

In the case at hand, nothing is there on record to show that thumb of the deceased had been completely burnt. Thus, from the testimony of PW 1 and PW 2, it is manifest that deceased was in a sound state of mind while giving dying declaration.

Therefore, dying declaration is confidence inspiring.

16. The dying declaration states that the appellant said to her as to why she was not allowing him to share bed and poured kerosene on her and set her on fire. It is pertinent to note that the deceased did not implicate accused No. 1 or 3. She has specifically stated that appellant poured kerosene and set her on fire. PW 3 has stated in the cross examination that accused No. 1 is a driver and he used to be away from home on account of his job. Taking undue advantage of this, the appellant used to demand sexual favour from the deceased. It is also pertinent to note that accused No. 3 is suffering from leprosy and naturally, she must not be in a position to meet the demand of appellant because of her ailment. The argument that a person of the age of appellant will not indulge in such activities holds no ground. Instances are not few wherein a person of his age has indulged in such activities and in some cases, elderly persons have also been accused of rape. Therefore, age is not a relevant factor to be considered in such cases. It is worth noting that the deceased, in the dying declaration did not implicate either accused or accused No. 3. Even if it is assumed for the sake of argument that appellant has been falsely implicated, in that scenario, she would have implicated her husband and mother-in-law also. This conduct of the deceased in implicating only the appellant makes the dying declaration even more confidence inspiring and reliable.

17. Argument that the deceased wanted to live separately from accused as accused No. 3 was suffering from leprosy has no substance because none of the witnesses has admitted that she wanted to live separately.

18. It is true that the Medical Officer Dr. Pathan has admitted in the cross-examination that the deceased while recording history has stated that she suffered burn injuries in an accident. Evidence on record clearly indicates that the deceased could not have made such a declaration. It is pertinent to note that the Chemical Analyser report Exhibit 60, records that the clothes of the deceased were having residues of kerosene. In case of accidental fire, possibility of detection of kerosene does not exist. Moreover, it is not explained as to how fire broke out accidentally. It is most unlikely that in case of accidental fire, a person will have 95% burn injuries. Therefore, the possibility of accidental fire is completely ruled out.

19. The deceased had given dying declaration to PW 3 Dadamiya and PW 4 Rashidabee, who are brother and mother of the deceased respectively. She had given oral dying declaration to them

which is in consonance with the dying declaration Exhibit

30. They have stated that the deceased told them that appellant poured kerosene on her and set her on fire. Spot panchanama also shows that there was half burnt piece of saree of green colour and a match box and half burnt match stick having kerosene smell and they were seized. Chemical Analyser Report Exhibit 60 also shows that the earth collected from the spot had kerosene residues. This clearly indicates that there was use of kerosene. If kerosene had been used for cooking purpose, there was no reason for the fall of kerosene on the ground. Having regard to this, the possibility of accidental burns is ruled out completely.

20. Thus, the entire evidence on record clearly shows that it was the appellant who had poured kerosene on the person of the deceased and set her on fire. Shri Shirsath, learned counsel for the appellant has placed reliance on case of Bombay High Court in the matter of Bhausaheb Waman Shinde Vs. State of Maharashtra in Criminal Appeal No. 389/2015. This case is not applicable to the instant case because there were two dying declarations and there was variance in both the dying declarations.

21. Reliance is also placed on the case of State of Andhra Pradesh Vs. Sk. Moin reported in 2004(6) SCC 34. The facts were that the deceased had 65% to 70% burn injuries. The first dying declaration was given to the neighbor to the effect that she was set on fire by her husband as he had illicit relations with another woman. The second dying declaration was given to the police but it was not certified by the doctor. At that time, there were relatives i.e. her mother and others. Therefore, this dying declaration is also disbelieved. Third dying declaration was made to the Judicial Magistrate. He recorded it in the presence of Doctor in which she implicated her husband. The Honourable Supreme Court observed that the dying declaration of the deceased given to the Magistrate also could not be believed as the deceased had given the dying declaration in Urdu and it was translated by the Magistrate in Telugu. It was noticed that the Magistrate did not know Urdu language. The Honourable Supreme Court on the basis of these infirmities rejected the dying declaration. However, in the case at hand, the deceased has given the dying declaration in the presence of the Medical Officer who had certified the deceased to be in sound mental condition. Therefore, this authority has no application to the facts of the instant case.

22. Shri Shirsath has also placed reliance on the case in the matter of Kishanlal and others Vs. State of Rajasthan reported in 2000(1) SCC 310. In this case, facts were that the deceased had given oral dying declaration to her father, grand-mother and uncle that she was burnt by appellant Kishanlal and his mother, father and brother. Complaint was made on 11.11.1976 by the father of the deceased and on his complaint, a dying declaration was recorded by the Magistrate. On 15.11.1976, the deceased died. On the basis of complaint dated 11.11.1976, crime was registered against the accused. After investigation, the police did not find any sustainable evidence against the appellant Kishanlal and other family members and accordingly, final report was submitted. Thereafter, father of the deceased filed complaint before the Judicial Magistrate First Class in which, he referred to dying declaration dated 06.11.1976 made to him, his wife and others. The Honourable Supreme Court observed that in the dying declaration dated 11.11.1976 made before the Magistrate, the deceased did not mention any accused including the appellants. The oral dying declaration made to the father,

grand-mother and other relatives was disbelieved as different statements were made in it. Therefore, both the dying declarations were rejected by the Honourable Supreme Court. This is not the fact situation in the case at hand.

23. Thus, in view of what is stated hereinabove, the prosecution has proved that the deceased was set on fire by the appellant after pouring kerosene on her. Therefore, the learned Adhoc Additional Sessions Judge, Osmanabad, did not commit any error in recording conviction against the accused. Appeal is therefore devoid of any substance hence dismissed.

(M.G. Sewlikar)
Judge

(T.V. Nalawade)
Judge

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