

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

CRIMINAL APPEAL NO. 686 OF 2016

Balasaheb s/o. Asaram Sonwane,
Age : 27 years, Occ : Agri.,
R/o. Loharwadi, Taluka Newasa,
District Ahmednagar.

... Appellant.

Versus

The State of Maharashtra

... Respondent.

...
Mr. Rajendra M. Chavan, Advocate for Appellant (Appointed)
Mr. A. V. Deshmukh, APP for Respondent – State.
...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

**RESERVED ON : 24th JULY, 2023
PRONOUNCED ON : 02nd AUGUST, 2023**

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. A convict charged for offence under section 302 of Indian Penal Code (IPC), i.e. for setting his wife on fire, is hereby taking exception to the judgment and order dated 05.11.2016 passed by learned District Judge-1 and Additional Sessions Judge, Newasa in Sessions Case No. 29 of 2016.

BRIEF BACKGROUND OF THE TRIAL CASE

2. Deceased Sharda was married to appellant in 2003 and

after marriage she came to cohabit with her husband and in-laws. Appellant husband, after getting drunk used to suspect her character, abuse her and beat her.

On 04.10.2015, around 11:00 a.m., appellant came home drunk, abused her after suspecting her Chastity, poured kerosene on her and ignited her. Neighbours shifted her to the hospital, where her dying declaration was recorded, and on the strength of the same, crime bearing No.I-175 of 2015 was registered for offences under sections 307 and 504 of IPC. After Sharda succumbed to 87% burns, offence under section 302 of IPC came to be added and accused was duly charge-sheeted for the above offence and was made to face trial.

At trial learned Additional Sessions Judge examined 10 witnesses on behalf of prosecution. Two dying declarations recorded by Special Executive Magistrate and police official were appreciated. Oral evidence was also appreciated and vide above judgment learned trial court recorded guilt, thereby convicting and awarding life sentence to the appellant. Such judgment is now questioned before us by way of instant appeal by invoking section 374 of the Code of Criminal Procedure (Cr.P.C.).

EVIDENCE ON RECORD

3. **PW1** Prashant Gosavi, Special Executive Magistrate, gave evidence about receiving communication from police, visiting civil hospital, Ahmednagar, approaching doctor on duty and on examination about fitness, recorded dying declaration, which he identified at Exh.15.

PW2 Nitin, police head constable, who on receipt of dying declaration registered crime and handed over investigation to PW10 Sachin.

PW3 Dr. Ravindra, medical expert, who examined deceased after ASI Raje (PW5) approached him and requested him.

PW4 Dr. Ashok, another medical expert, who admitted deceased in the casualty at around 2:10 p.m. and on request of PW1 Prashant, examined deceased.

PW5 ASI Raje claims that he was deputed at civil hospital on 04.10.2015. On receipt of MLC, he gathered case papers, made communication to Special Executive Magistrate to record statement and he himself approached doctor at 4:20 p.m. to issue fitness certificate to enable him to record dying declaration. He identified the dying declaration at Exh.18.

PW6 Sitaram, landlord of appellant and deceased. He

claims that, on hearing shouts he rushed, doused the fire by pouring water and shifted the lady to the hospital. He did not support prosecution.

PW7 Manohar, panch to spot panchanama.

PW8 Sunil, Manager of petrol pump who was allegedly employed. According to him, appellant had kept clothes in his drawer and the same were handed over by him when appellant was accompanied by police.

PW9 Anna, father gave evidence about marriage of his daughter 12 years back with appellant. According to him, appellant was addicted to liquor, used to beat and abused her. He claims that, on receipt of information when he reached, he saw his daughter in burnt condition and that she was shifted to hospital. On the way, his daughter informed him in the ambulance that accused suspected her character, assaulted her and set her on fire by pouring kerosene.

PW10 Sachin is the Investigating Officer, who narrated all steps taken by him during investigation till filing of charge-sheet.

RIVAL CONTENTIONS

4. On hearing learned counsel for appellant, we found him raising following grounds :-

Firstly, there is no clear cogent evidence in support of his charge.

Secondly, there was no motive behind the incident.

Thirdly, dying declarations are inconsistent, not voluntary and are product of tutoring.

Fourthly, dying declarations are fabricated and are noted at the instance of relative.

Fifthly, there is serious doubt about fitness of deceased to give dying declaration as she had suffered over 87% burns and was admittedly critical since beginning.

Sixthly, learned trial court has erred in accepting dying declarations as proved, voluntary and consistent.

Lastly, law on appreciation of dying declaration has not been followed and applied.

5. Per contra, learned APP would submit that prosecution went to trial with a full proof case. That, accused husband suspected her character, and after getting drunk he abused and beat her. That, dying declaration recorded shortly after the occurrence is categorical about role of appellant-husband. That, there are not one, but two dying declarations and both are consistent regarding accusations against appellant. Apart from both dying declarations, there is acceptable oral evidence of

medical authorities and scribes of dying declarations. Their testimonies are intact and having remained unshaken, learned trial Judge rightly accepted the same and held case of prosecution as proved. Resultantly, he submits that, there is no case in appeal and so prays to dismiss the appeal.

ANALYSIS

6. Here, prosecution has relied on two dying declarations recorded by police official and Special Executive Magistrate. Before putting both dying declarations to scrutiny and re-examination, it would be desirable to give brief account of settled legal position on the point of manner of appreciation of dying declaration and its evidentiary value.

7. Since the judgment of *Khushal Rao v. State of Bombay*, AIR 1958 SC 22, on numerous occasions law on this aspect has been propounded and certain principles have been culled out from plethora of judgments by the Hon'ble Supreme Court. Very recently the Hon'ble Supreme Court in the case of *State of Uttar Pradesh v. Veerpal and Another*, (2022) 4 SCC 741, while deciding Criminal Appeal No.34 of 2022 on 01-02-2022, has reiterated the principles to be borne in mind while analyzing and accepting dying declaration. The settled principles are as follows :

- “1. It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;
2. Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;
3. It cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;
4. A dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;
5. A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character : and
6. In order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and

that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

Other celebrated and water-shedding judgments on above aspects are (i) **Laxman v. State of Maharashtra**; (2002) 6 SCC 710 and (ii) **Jagbir Singh v. State (NCT of Delhi)**; (2019) 8 SCC 779.

8. In the light of above requirements, we proceed to re-appreciate the dying declarations first and then sift oral account of prosecution witnesses.

FIRST DYING DECLARATION

9. It is emerging that alleged incident has taken place between 10:00 to 11:00 a.m. on 04.10.2015. Record shows that, on communication of doctor at civil hospital, Ahmednagar, PW5 ASI Raje swung into action, made communication to Special Executive Magistrate (PW1) to get dying declaration recorded. His evidence is at Exh.13. On visiting the same we find that the dying declaration is in question answer form. According to him, when he asked how she sustained burns, she allegedly answered that her husband poured kerosene and set her on fire. She answered that Sitaram Mali and Gangaram Mali, neighbours extinguished the fire and that she was brought to hospital by Anna Ghuge and Popat

Rokade. According to him, as her both palms were affected due to burns, he obtained her left leg great toe impression. He identified the dying declaration at Exh.15.

In cross-examination he admitted that, many persons were around deceased when he visited hospital. He admitted that, dying declaration is noted on blank typed format. He admitted that when doctor gave endorsement, he did not cause signature. Rest is all denial.

Herein in above dying declaration to the question as to who were in the house at the time of incident, she has answered that, father-in-law, mother-in-law and husband were in the house. To last two questions as to against whom she had complained, answer is noted that as against husband. He poured kerosene and set her on fire.

10. The doctor who gave endorsement is examined as PW4 Dr. Ashok. He stated that, Special Executive Magistrate approached him and he certified about her fitness. Noting of above dying declaration seems to have commenced at 2:15 p.m. and concluded at 2:30 p.m.

In cross-examination, he has admitted that in case

paper it is not noted that burns to the palms were superficial. He admitted that there were burns on the face of the patient. He admitted that 87% burns are dangerous to life of patient.

SECOND DYING DECLARATION

11. The second dying declaration is scribed by **PW5** ASI Raje. He also stated about receiving information from civil hospital, gathering case papers and communicating to PW1 Prashant to record dying declaration. According to him, Special Executive Magistrate immediately came to the civil hospital along with him and they approached CMO. He stated that then he came back and Special Executive Magistrate handed over recorded dying declaration. He further stated that at 4:20 p.m., he himself again went to the hospital, requested Dr. Sonar to issue opinion. Doctor examined the patient and thereafter, he recorded statement, wherein deceased allegedly informed that, at 11.00 a.m. husband came drunk and suspected her character and thereafter poured kerosene on her person by use of mug and set her on fire. He identified the dying declaration (Exh.18). According to him, he put the dying declaration in envelop and forwarded it along with the envelop of statement handed over by Special Executive Magistrate.

In cross-examination above witness has answered that, he is unable to state whether there was ink to the hands or legs. He

admitted that, before giving letter to Special Executive Magistrate, he had not contacted police station, Sonai. He admitted that police station Tophkhana is located in the civil hospital. He admitted that he had not carried carbon paper with him.

12. Dying declaration recorded by above witness is at Exh.18. It is apparently in detail. It is recorded at 4:20 p.m., therein statement is given about marriage and about husband suspecting character, abusing and beating her. It is stated that, around 11:00 a.m., appellant came home drunk, suspected character, poured kerosene filled in a mug and ignited her. Neighbours Sitaram Mali and Gangaram Mali extinguished the fire and she was taken to hospital and she had complained against husband.

13. The doctor who issued certification on above dying declaration is PW3 Dr. Ravindra. This witness stated that ASI Raje (PW5) approached him at around 4:35 p.m., he examined the patient and gave endorsement that she was conscious and able to give statement. On completion of writing, he again examined the patient and issued endorsement.

In cross-examination, he is unable to state whether there was ink to the thumb impression of the patient and when it

was taken. He admitted that he did not give treatment to the patient. He admitted that burns could be suicidal. He is questioned about consequences of burns, which he has candidly admitted.

SUMMATION ON DYING DECLARATION

14. On carefully analyzing both dying declarations, we have noted that occurrence has taken place around 11:00 a.m. on 04.10.2015. Medical papers show that deceased was admitted in hospital at around 1.00 p.m. itself. History seems to be reported only about burns. Patient is shown to be brought by one Popat and father. Popat is said to be uncle of deceased. However neither of them seems to have lodged FIR immediately. It is pertinent to note that PW5 a police official has received intimation from CMO of the civil hospital but he himself does not seem to have approached for recording dying declaration, rather he seems to have spent time in communicating and intimating Special Executive Magistrate, who seems to have visited hospital after 2:00 p.m. Testimony of this witness also goes to show that he was also very much accompanying Special Executive Magistrate who noted dying declaration and handed over to this witness. However, even at that point of time he does not seem to have got FIR registered i.e. around 2:30 p.m. It seems that in spite of being equipped with dying declaration recorded by Special Executive Magistrate, he for

the best reasons known to him, himself again visited hospital and himself recorded second dying declaration and thereafter crime is registered. Therefore, unusual procedure has been adopted by a police official resulting into delay in registration of FIR. Reason for recording second dying declaration being unexplained, case becomes doubtful.

15. On carefully comparing both dying declarations the following features emerge :-

Firstly, dying declarations are not recorded promptly.

Secondly, history is only reported as burns.

Thirdly, first dying declaration is very cryptic and answers are in telegraphic manner and no FIR is registered on the same.

Fourthly, second dying declaration on the strength of which crime is registered and seems to be recorded while relatives of injured were around her and as such there are reasons to hold it to be after due deliberation.

Fifthly, details of suspecting character, abusing, beating are not reflected in the first dying declaration.

Sixthly, first dying declaration is without signature of the doctor on the certification.

Seventhly, examining doctor himself has admitted in

cross that condition of victim was critical as she has suffered 87% burns and there is admission that face was also burnt.

Eighthly, first dying declaration is silent about kerosene poured from **mug** of which reference is made in a second dying declaration recorded after 5 hours of the occurrence. Said mug is not seized as a muddemal.

The above features prompt us also to hold that dying declarations are not voluntary and for above reasons are failing to inspire complete confidence.

ORAL EVIDENCE

16. Here, father has been examined as PW9 Anna. However, according to him, on the day of incident, husband-appellant returned home at 10:00 a.m. to 10:30 a.m. this witness stated that he saw accused sitting at the temple and after some time, a lady rushed towards him and informed about Sharda catching fire. He rushed there and found his daughter sitting outside the house in burnt condition. Within minutes ambulance came. He and others shifted her to the civil hospital, Ahmednagar and on the way, according to him, his daughter told that accused suspected her character, assaulted her and set her on fire. Next day, she died.

In cross-examination he stated that, a lady told him

about the fire. He claimed that while he was going, appellant was passing and in spite of given call, he did not stop. According to him, at that time also, appellant was drunk, but he admitted that he had not stated portion marked "A" i.e "त्याचे तोंडाचा वास येत होता" to the police and he is unable to state why such material is appearing in his statement. He stated that he did not meet Sitaram Mali. He is also unable to state why portion marked "B" i.e. "सिताराम माळी वगैरे लोक म्हणाले तो घाई घाईने मोरगव्हाण रोडकडे जाताना दिसला आहे" is appearing in his statement. He admitted about portion marked "C" and "D". He admitted that, deceased was fed up with addiction of accused. Rest is all denial.

17. PW6 Sitaram Mali, a landlord to whom even deceased named for extinguishing fire, merely speaks about Sharda suffering burns, hearing shouts and therefore going for extinguishing the fire. No oral dying declaration to him or in front of him. He stated that appellant came there and he might have tried to extinguish the fire. That, relations between accused and deceased were normal and deceased was upset for not having issue. Therefore, this witness has not supported prosecution.

18. The residue on critical analysis of both dying declarations is that, evidence of father is full of improvement and

material omissions. In spite of claiming to be in ambulance with daughter who during the journey allegedly give him oral dying declaration regarding husband setting her on fire, he has not lodged FIR at police chowky located at civil hospital. Neighbour is not supporting. Uncle Popat, who extinguished the fire and shifted deceased to hospital, has also not been examined. Therefore, the above short falls and discrepancies render allegations about husband setting deceased to fire, doubtful.

For above reasons, even oral evidence is also not inspiring confidence.

SUMMATION

19. To sum up here, crime is not registered promptly. Dying declarations are not inspiring confidence for the reasons stated in aforesaid paras. Mug allegedly used for pouring kerosene is unfortunately not seized. Father fails to lodge report in spite of receiving oral dying declaration in the ambulance itself. Therefore, there being weak and fragile evidence on behalf of prosecution, in our opinion, prosecution has not discharged its burden of proving the case beyond reasonable doubt.

20. We have gone through the judgment passed by learned trial court. It is seen that dying declarations are not appreciated as required by law. The discrepancies and inconsistencies noted by

us, which are apparent on careful scrutiny of dying declarations are lost sight of by learned trial Judge. There is non appreciation of oral evidence in correct spirit. Conclusion seems to have been drawn on the basis of conjectures and surmises. Therefore, such judgment cannot be allowed to be sustained. Hence, appellant succeeds and we proceed to pass following order :-

:: ORDER ::

- I. The criminal appeal stands allowed.
- II. The conviction awarded to the appellant Balasaheb S/o Asaram Sonowane by District Judge-1 and Additional Sessions Judge, Newasa on 05.11.2016 in Sessions Case No. 29 of 2016 for the offence punishable under Section 302 of IPC stands set aside. Appellant stands acquitted of the offence punishable under Section 302 of the IPC.
- III. The appellant be set at liberty, if not required in any other case.
- IV. Fine amount deposited, if any, be refunded to the appellant after statutory period.
- V. It is clarified that there is no change in the order passed by the learned District Judge-1 and Additional

Sessions Judge, Newasa, regarding disposal of muddemal.

- VI. Fees of the appointed Advocate for appellant is hereby quantified at Rs.10,000/- to be paid by the High Court Legal Services Sub Committee, Aurangabad.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)