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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1284 OF 2003
(Through jail)

Prakash @ Nanasaheb Gangaram Tathawade .. Appellant

vs

The State of Maharashtra ... Respondent
(at the instance of Manchar police station)

Smt.Sarojini Upadhayay, Advocate appointed by Legal Aid for Appellant
Mr.H.J.Dedhia A.P.P.for Respondent-State

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CORAM: SMT RANJANA DESAI
SMT MRIDULA BHATKAR,JJ
Reserved on: 2nd February, 2010
Pronounced on: .....

JUDGMENT (Per Smt Mridula Bhatkar, J)

1. This appeal is preferred by the appellant-accused against the judgment of conviction dated 17th April, 2003 delivered by the Additional Sessions Judge, Pune.

The factual matrix of the case in brief is as follows :

2. The accused was married to one Mangala for 11 years. He used to assault her under intoxication and used to ill treat her. The mother of Mangala tried to settle quarrels between Mangala and her

husband i.e. the accused. However, the accused did not improve his behaviour and their married life remained disturbed throughout. On 31st May, 2002 at around 9-9.30 p.m. Sarubai, the complainant-mother, received information that her daughter Mangala had sustained severe burn injuries and therefore, she along with her son rushed to the house of the accused. She found Mangala lying outside the house near the road and the accused was standing there. Mangala was shifted to hospital by her mother and other relatives. Mangala had sustained 90 % burn injuries. On the next day i.e on 1st June, 2002 in the morning Mangala was conscious and at around 9 a.m. Mangala made a statement to a doctor that her husband had set her on fire and he bolted the door from outside and this is how she got burn injuries. Thereafter immediately the Special Judicial Magistrate recorded her dying declaration and she repeated the same reasons and the facts attributing the role of the perpetrator to the accused. Thereafter,an offence was registered against the accused and the police completed the investigation and the case was committed to the Court of Sessions against the accused. The accused was charged for the offences punishable under sections 498-A and 302 of the Indian Penal Code. He was acquitted of the

offence punishable under section 498-A but, was held guilty of the offence punishable under section 302 of the Indian Penal Code. He was sentenced to suffer R.I. for life and fine of Rs.1000/- in default to suffer R.I. for six months. Being aggrieved by the judgment and order the appellant-accused has preferred this appeal.

3. Smt.Upadhayay, appearing for the appellant-accused has submitted that the case is entirely based on the circumstantial evidence and nobody has seen the accused setting Mangala on fire. She has further submitted that no incriminating article was recovered from the accused but, the accused is involved in this case only on the basis of suspicion and on sole evidence of the dying declaration. She has submitted that the learned Judge ought to have taken into account the time and date of the death of the deceased as the Special Judicial Magistrate had started recording the dying declaration at 9 a.m.on 1st June, 2002. It got over at 9.35 a.m. and Mangala was declared dead at around 11 a.m. The learned counsel emphasised that such a short time gap between recording of the dying declaration and death of Mangala indicates that the physical and mental condition of the deceased Mangala had started

deteriorating much earlier and therefore, the dying declaration given by Mangala loses its credibility and should not have been relied upon.The learned counsel has further pointed out that Sarubai P.W.1 did not lodge complaint immediately but, she lodged the complaint seven days after the incident. The learned counsel has further argued that considering the nature of the evidence, it is not a case of conviction and the judgment passed by the learned Sessions Judge needs to be set aside.

4. The learned A.P.P. While opposing the defence has argued that Mangala has given two dying declarations and she has confirmed that she was set on fire by her husband i.e. the accused on that night and thereafter he bolted the door from outside and went away. The learned A.P.P. has submitted that both the dying declarations are consistent, cogent and truthful and there was no reason for the doctor or for the Special Judicial Magistrate to record any false statement against the accused. He has also pointed out that the conduct of the accused prior to the incident and after the incident discloses the motive and also the incriminating circumstances against the accused. Hence, the judgment of conviction is to be confirmed.

5. The two dying declarations are the basis of the conviction. Presence of the accused prior to the incident and after the incident is also proved. The prosecution has brought on record the history of the harassment and ill treatment at the hands of the accused to deceased Mangala during their unhappy married life. PW 1 Sarubai in her testimony has specifically deposed about the vices and the cruel behaviour of the appellant.

6. It is a settled proposition of the law that a dying declaration should be voluntary and truthful. Voluntariness and truthfulness both are required to be ascertained by the trial Judge on the basis of either direct or indirect evidence. The law on the point of dying declarations especially in cases of wife burning is much developed and the Hon’ble Supreme Court has laid down very clear ratio in the catena of judgments till now.

7. The law under section 32 of the Indian Evidence Act is founded on a universally accepted ethical notion in respect of human psychological behaviour and common belief that when death is impending the person speaks the truth. Principle behind the Law is

capsuled in the maxim-

NEMO MRITURES PROESUMITUR MENTIRI

(A man will not meet his Maker with lie in his mouth)

8. However, it cannot be said that every dying person always speaks the truth. It may amount to drawing fallacious conclusion, as our general experience reveals a person while dying though is expected to speak the truth may lie. Hence, the condition for its reliability is that it should inspire confidence in its correctness. Thus, a dying person speaks the truth is not a law of nature but, it is an outcome of human experience which is always subject to certain exceptions.

9. We place reliance on Supreme Court Judgments in **(LAXMI (SMT) vs. OMPRAKASH AND OTHERS)** reported in **(2001) 6 Supreme Court cases 118** in para 29 the Supreme Court has observed as under:

> "A dying declaration not being a deposition in court, neither made on oath nor in the presence of the accused and therefore not tested by cross examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. The weak points of a dying declaration serve to put the

court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances (see Tapinder Singh vs State of Punjab). One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. "

The Supreme Court in **P.V.RADHAKRISHNA VS STATE OF KARNATAKA) reported in (2003) 6 SUPREME COURT CASES 443** has observed in para 13 as under:

" The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

We have also placed reliance judgment in (2005) 5 **SUPREME COURT CASES 272 (RAJA RAM VS.STATE OF RAJASTHAN).**

Acceptance and admissibility of dying declaration is on two factors i.e.Law of necessity

and circumstantial probability of trustworthiness. Trustworthiness is tested on voluntariness and truthfulness. The maker of dying declaration is not available for cross examination. Thus, it is made admissible in extremity. Admissibility of a dying declaration is an exception to the rule of hearsay. An opportunity to cross examination is essential for eliciting the truth as on obligation of oath could be. While admitting a dying declaration such an obligation of oath is replaced by sanctity and solemnity of nearness of final silence. However, process of eliciting the truth does not end at that last point but, paradoxically in the legal system it is the starting point. **(RAM BIHARI YADAV VS STATE OF BIHAR AND OTHERS reported in 1998 Cr.L.J.2515 S.C**. The Hon'ble Supreme Court in para 6 has observed as under :

> "But,then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case."

The Judge therefore has to be more cautious and careful in analysing the voluntariness and truthfulness.

10. Voluntariness of a dying declaration can be

tested on the basis of available facts viz. whether the deceased is tutored, whether any relative has any access or was present when the dying declaration was made, whether there was any threat or coercion administered on the deceased, whether there was any such compelling circumstances which did not allow the deceased to come out with the true facts. In the present case, nothing is there to show on record that either Mangala was tutored or her relatives were present at the time of recording of dying declaration by the doctor and the Special Judicial Magistrate. Therefore, we have no hesitation to accept that Mangala‘s dying declaration was voluntary. We also accept the submissions of the learned A.P.P.that neither the doctor nor the Special Judicial Magistrate had any ill intention against the accused.

11. However, on the point of truthfulness, we take pause and probe circumstances and appreciation of the evidence by the learned Judge. Mangala had sustained 90 % burn injuries at 9.30 p.m. on 31st May, 2002. Next day in the morning at 9 a.m. to 9.35 a.m. her dying declaration was recorded by Special Judicial Magistrate though she was certified by the Medical Officer fit to give statement, the

fact, that she thereafter within two hours succumbed to the injuries and declared dead at 11 a.m., ought to be considered on the point of probabilities of her fitness to make statement. Moreover, she was admitted to hospital on the same day at about 31st May, 2002 by Dr.Bhagwan Narkhede PW 6 but, she did not disclose name of the accused as the culprit while giving history. Initially, the case was registered at 21/2002 as A.D.(accidental death)

12. In the dying declaration, deceased Mangala has mentioned that the accused had bolted the door from outside. However, witness i.e. PW 4 Santosh Sakharam Thorat who rushed there first in time found Mangala lying on the road with burn injuries and accused was present there. PW 1 Sarubai mother of the deceased has also deposed that Mangala was lying outside the house near the road. If Mangala’s dying declaration is accepted and as we construe the case of the prosecution then, a question poses in the mind as to who removed the bolt from the outside and who brought Mangala out of the room ? No witness of the prosecution could throw light on this important aspect of taking Mangala out of her house.

13. Moreover, Sarubai did not lodge a complaint

immediately after the incident but she gave the complaint to the police after one week i.e. on 7th June, 2002. Learned A.P.P. while explaining delay submitted that Sarubai was in grief and therefore, there was delay in lodging the complaint. However, in her evidence she did not say about having any conversation with her daughter and also how the incident had happened. On the contrary, in cross-examination she admitted that she had no talk with her daughter about the incident till her death. She has admitted that she had informed the police that she did not lodge complaint against the accused. She has further accepted in cross-examination that she has lodged complaint with the police against the accused of ill treatment to Mangala prior to the incident. If at all PW 1 Sarubai had lodged complaint previously against the accused then, Sarubai had no inhibition to lodge complaint against the accused when her daughter was killed and if he was the real culprit. Sarubai's complaint dated 7th June, 2002 is taken on record and is marked Exhibit 10 by the Judge. So we went through Exhibit 10 the said F.I.R. We came across the narration given by Sarubai that one boy by name Jadhav was present when Sarubai saw her daughter in a burnt condition near the road side and he informed her that he took out

Mangala by removing the bolt inside of the said room and he also informed that he went inside the house of Mangala and removed the bolt from inside enabling Mangala to come out and Jadhav extinguished fire by pouring water on her. We would like to point out that in fact, this is not the First Information Report. The dying declarations were recorded by the police next day on 1st June, 2002 the inquest panchanama was also drawn on 1st June, 2002. Thus, the investigation had commenced much prior to the complaint given by Sarubai on 7th June, 2002 and therefore, the said complaint loses its character as the First Information Report recorded under section 154 of the Code of Criminal Procedure but, falls within the scope of statement recorded by the police under section 161 of the said Code. In fact such a statement cannot be exhibited and cannot be looked into. Statement of Jadhav is also hearsay. However, we went through the statement of Sarubai which is wrongly treated as F.I.R.and we came across all together different story which is very important fact but, ignored by the Investigating Officer and overlooked by the Judge. This might have explained the conduct of Sarubai of not giving the complaint against the accused immediately. This fact coupled with our previous querry that if as per the dying

declarations the accused locked the deceased from outside and went away is true then the prosecution should have brought evidence of the person who saw Mangala first in time and took her out and who opened the door. However, such evidence is not available. We find that chain of circumstances is not complete and we also observe that the dying declaration is shadowed on the point of truthfulness.

14. As we have stated earlier the veracity of the dying declaration is subject to the proof of its voluntariness and truthfulness. If a person is tortured earlier by somebody and if he/she holds grudge, animosity or vengeance against the said person, then while dying in a given case he/she may frame the person who caused him to commit suicide. In the present case, there was constant torture and harassment at the hands of the accused and it unfortunately resulted in death of Mangala. In the absence of evidence as to who opened the door from outside and who took out Mangala outside of her house the prosecution evidence in all cannot present a complete chain of circumstance. The details given by the deceased in her dying declaration are not consistent with the evidence on record. The evidence

tendered by the prosecution should always support all the major details in the dying declaration. The conviction can be based on uncorroborated evidence of dying declaration if it is found truthful and voluntary is a settled principle of law. However, if there is any evidence or fact present or absent which creates doubt in the mind of a Judge about the truthfulness of a dying declaration and the dying declaration cannot withstand the scrutiny of the court then it is unsafe to accept such a dying declaration to base a conviction. The conscience of the Judge should give none but only assurance that there was not a single possibility of the deceased committing suicide and the contents of the dying declaration are beyond any doubt and worthy to be relied upon. The evidence of Sarubai, admissions in cross examination, fact of delay in lodging the F.I.R. create doubt about the truthfulness of the dying declaration on the point of involvement of the accused. Hence, we are of the opinion that false involvement of the accused in the present case may be possible. Therefore, we think that interference in the sentence given by the Sessions Judge is required. Benefit of doubt must be given to the accused. We set aside the conviction of the accused and direct that the appellant-accused be released

forthwith if he is otherwise not required in any other case.

Appeal is allowed.

Smt.Ranjana Desai, J

Smt.Mridula Bhatkar, J