

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

CRIMINAL APPEAL NO. 136 OF 2001

Shivaji S/o Yadav Kedar
Age : 23 years, Occ : Labour,
R/o Ranwadi, 80 Feet Road,
Dhule, Dist. Dhule.

..APPELLANT

VERSUS

The State of Maharashtra

..RESPONDENT

...
Advocate for Appellant : Mr. S.S. Jadhavar, Advocate (appointed) for
Appellant
APP for Respondent/State : Mr. K.S. Patil
...

**CORAM : S.S. SHINDE &
A. I. S. CHEEMA, JJ.**

**RESERVED ON : June 29, 2015
PRONOUNCED ON : July 7, 2015**

JUDGMENT (PER S.S. SHINDE, J) :-

This appeal is filed by the appellant, aggrieved by the Judgment and Order dated 9th March, 2001 passed by the Additional Sessions Judge, Dhule in Sessions Case No. 13/2000, thereby convicting the appellant for the offence punishable under Section 302 of I.P. Code.

2. The prosecution case, in nutshell, is as under :-

(a) It is the case of the prosecution that, Jamunabai was subjected to cruelty by the accused and her in-laws. Jamunabai and Rekhabai are the daughters of Rohidas Nanaji Wagh, resident of Lonwada, Tq. Malegaon, who is doing tailoring job and popularly known as Master. The marriage of the appellant with said Jamunabai (deceased) was solemnized on 30th April, 1999. After the marriage, Jamunabai was residing at Erangaon with her in-laws and accused at Dhule with his sister Ahilyabai. The appellant used to visit Erangaon frequently.

(b) It is the case of the prosecution that, the accused purchased the plot at Dhule and wanted to construct a house thereon. He asked Jamunabai to bring Rs. 20,000/- to Rs. 25,000/- from her father and Jamunabai visited the house of her parents. She did

ask for money from her father, however, he showed his inability to give money. It is further the case of the prosecution that, Rohidas was reluctant to send Jamunabai to the matrimonial house.

(c) As per the prosecution case, about 15 days prior to the incident, accused started residing at Dhule along with Jamunabai. He used to return home during late hours at night. Therefore, Jamunabai made inquiries with the accused about late coming by the accused. The fact that, accused used to come late at night to the house was narrated by Jamunabai to the sister of accused on 30th November, 2011. It is further case of the prosecution that, on 31st October, 1999 at about 7.30 p.m. accused returned home. The accused asked Jamunabai why she complained against him to his sister. Accused went out of the house and after some time, again returned back. He poured kerosene on the person of Jamunabai and set her on fire and left the house. Neighbourers extinguished the fire.

Jamnubai was admitted in Civil Hospital, Dhule at about 11 p.m. on that day.

(d) PW-2 - Balasaheb Mule, Police Officer received information from the Civil Hospital about the burns sustained by Jamunabai. He visited the said hospital and recorded the statement of Jamunabai at Exhibit-14. The said statement was treated as First Information Report. Accordingly, Crime No. 248/1999 under Section 302 and 504 of I.P. Code was registered. Another Dying Declaration of Jamunabai was recorded by PW-7 Waman Tulshiram Bhoi, who was working as Executive Magistrate. PW-8 Dr. Rawal was examined by the prosecution, so as to prove the Dying Declaration recorded by the concerned Executive Magistrate. PW-9 carried out the investigation. The charge-sheet was filed and after framing the charge, the trial Court after full-fledged trial, convicted the appellant for the offence punishable under Section 302 of I.P. Code and sentenced to suffer rigorous imprisonment for life and

to pay fine of Rs. 2,000/-, in default to suffer rigorous imprisonment for six months. Hence this Appeal.

3. The learned counsel appearing for the appellant invited our attention to the Dying Declaration at Exhibit-14 recorded by the Police Officer and another Dying Declaration at Exhibit-25 recorded by the Executive Magistrate and submits that, there is no consistency in the statements made in dying declarations. In both dying declarations, thumb impression of the deceased Jamunabai is not attested. According to the learned counsel appearing for the appellant, both the dying declarations suffer from serious infirmities and are not believable. It is submitted that, PW-4 and PW-5, who were examined as eye witnesses, did not support the prosecution case. It is submitted that, the alleged oral dying declaration with PW-1 has not been proved by the prosecution. It is submitted that, if the entire evidence of the prosecution is considered, it is not sufficient so as to convict the

appellant, and therefore, the appellant is entitled for benefit of doubt.

4. On the other hand, the learned Additional Public Prosecutor appearing for the State relying upon the findings recorded by the trial Court and two dying declarations recorded by PW-2 and PW-7 submits that, both the dying declarations are consistent with each other, and therefore, rightly believed by the trial Court. It is submitted that, apart from two dying declarations, there was oral dying declaration and also the attending circumstances, unequivocally indicate the involvement of the appellant in commission of crime. Therefore, he submits that, the appeal may be dismissed.

5. We have given careful consideration to the rival submissions of the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State. With their able assistance, we have perused the entire evidence so as

to re-appreciate the same.

6. So far motive is concerned, the prosecution examined PW-1 Rohidas Nanaji Wagh, who in his deposition stated that, Jamunabai was her daughter. At the time of Desara festival, the accused went to Arangaon and then came to Lonwade at the place of this witness along with Jamunabai. At that time, his daughter told him that, her husband has purchased a plot at Dhule and now he is demanding Rs. 20,000/- to Rs. 25,000/- for construction of house. However, PW-1 showed his inability to pay such amount. It is also stated by him that, Jamunabai told him that, unless the said amount is paid to the accused, he will not allow her to live with him.

However, so far main incident is concerned, it is stated by PW-1 that, Jamunabai told him that, she was inquiring with accused for coming late at night and being annoyed by the said query, he poured kerosene

on her person and set her ablaze. When she shouted for help, one Santosh residing adjacent to their house extinguished the fire. Santosh gave the quilt for extinguishing the fire and also admitted her in hospital. However, during his cross examination, PW-1 stated that, it is the fact that, because of poor financial condition of PW-1 and accused, both of them agreed to spent expenses of the marriage. When the marriage was settled, the accused was serving as temporary sweeper in Dhule Municipality. It is further stated that, he did not state before the Police that, daughter demanded the amount for construction of house. He did not state before the Police that, at the time of marriage, the loan was taken by him.

If the evidence of this witness is considered in its entirety, it appears that, his financial condition was not sound. He himself has admitted that, expenses of marriage were borne by the accused and PW-1 jointly. Therefore, the question of demand of

Rs. 20,000/- to Rs. 25,000/- by the accused to PW-1 was highly improbable. Apart from that, the prosecution has not led any satisfactory evidence so as to prove that, the accused purchased a plot at Dhule and for construction of the said plot asked money from the father of deceased Jamunabai. The trial Court has recorded the finding that, the prosecution has failed to establish purchase of plot by the accused at Dhule and as a consequence thereof, there was no question of demand of Rs. 20,000/- to Rs. 25,000/- for construction on the said plot.

7. The prosecution examined Dr. Pravin Ramesh Salunke as PW-6. In his deposition before the Court, he stated that, on 1st November, 1999, he was working as a Lecturer in Department of Forensic Medicines and Toxicology in Bhau Saheb Hire, Government Medical College, Dhule. On the said day, at about 2.15 p.m. dead body of Jamunabai was brought to the hospital along with panchanama for

autopsy. He himself and Dr. Sandeep Thorat did that autopsy from 2.30 p.m. to 3.30 p.m. The alleged history was of burns. He found that, Jamunabai was having 96% burn injuries. Accordingly, in para 17 of the P.M. Report, it was clearly stated that, walls, ribs and cartilages were covered with burns. Lungs were congested and admaters, Abdominal wall was covered with burns. Stomach was containing Semi-digestic food. Lucaso was felt and no abnormal smell. Liver, wall badder, planteas, swim, kidney were congested. Vicera was not preserved. He opined that, the cause of probable death was shock following thermal burns. During his cross examination, he admitted that, looking to the injuries mentioned in column 17 of the P.M. Report Exhibit – 22, it is difficult to take thumb impression. He further stated that, he cannot comment if 96% burn injuries means it is a case of suicide.

8. The first dying declaration at Exhibit-14, which was treated as First Information Report, was

recorded by Balasaheb Sakharam Munthe, who was working as Police Sub-Inspector at the relevant time in Aurangabad Jawahar Nagar Police Station, Aurangabad. In his deposition before the Court, he stated that, on 31st October, 1999, he was informed by Head Constable Shirsath that, one Jamunabai resident of Ramwadi, Dhule was admitted in the Civil Hospital, having burn injuries. Therefore, he went to the Civil Hospital. He asked permission of Medical Officer for recording the statement of injured Jamunabai. Accordingly, he recorded her statement. It was as per her version, which bears thumb impression and signature of PW-2. However, he stated that, after recording her statement, he took the endorsement from the doctor on Exhibit-14 that, while giving the statement, she was conscious. That, endorsement does not bear the signature of doctor. On the basis of that statement, he registered Crime No. 248/1999 under Sections 307 and 504 of I.P. Code and he handed over investigation to P.S.I. Mali. Then he has narrated

details given by Jamunabai about her marriage and subsequent happenings. He further deposed that, Jamunabai stated him that, on 31st October, 1999 at about 7.30 p.m. the accused came home. He then asked Jamunabai what complaint she made to his sister. He went outside. He returned back at about 9.30 p.m. Again on the same cause, there was a dispute and then he lifted the kerosene can from the house and poured it on her person. He then set her on fire with the match box and ran away. After getting burns, Jamunabai started shouting and adjacent occupants assembled there. Then one Santosh adjacent occupant took Jamunabai in hospital in a rickshaw.

9. During his cross-examination, he stated that, he does not remember the name of doctor, who gave treatment to Jamunabai. he did not ask the medicine given to Jamunabai prior to recording her statement. No written permission was taken from doctor to record her statement. He further stated that,

he had not mentioned in writing what initial inquiries he made with Jamunabai to ascertain her consciousness. He further stated that, Jamunabai was having 96% burn injuries. She was demanding water. He again reiterated in his cross examination that, after her statement was recorded, doctor was called and then his endorsement was taken. Her thumb impression was not attested by the doctor or nurse from that ward.

10. Therefore, if the evidence of PW-2 is considered in its entirety, in the light of the contents of the original dying declaration, it is abundantly clear that, PW-2 admitted in his examination-in-chief that, he did not take permission from the doctor before recording the dying declaration. He recorded the dying declaration without permission of the doctor. He further admitted in examination-in-chief and reiterated in cross examination that, after recording statement of Jamunabai, the endorsement of doctor was taken.

Upon perusal of the original dying declaration at Exhibit-14, it is abundantly clear that, the thumb impression of Jamunabai is not attested by PW-2. It is fact that, Jamunabai sustained 96% burns. PW-6 in his cross-examination admitted that, after looking to the injuries mentioned in column no.17 of P.M. report Exhibit-22, it is difficult to take thumb impression of Jamunabai. It is true that, if the person, who records the dying declaration if ascertains himself about the consciousness, mental condition, orientation of patient that, declarant is in fit condition to give dying declaration, the requirement of examination of patient by the doctor can be ignored. However, in the present case, admittedly, PW-2 has not ascertained from Jamunabai about her consciousness, orientation and fitness to give such dying declaration. PW-2 himself has admitted in his examination-in-chief that, he did not ascertain about the consciousness and mental fitness of Jamunabai before dying declaration was recorded. In that view of the matter, the dying declaration at

Exhibit-14 recorded by PW-2 deserves to be discarded and cannot be taken into account so as to convict the appellant-accused for the offence punishable under section 302 of I.P. Code.

11. Dying declaration recorded by the Executive Magistrate is at Exhibit-25. In order to prove the said dying declaration, the prosecution examined Waman Tulshiram Bhoi as PW-7. In his examination-in-chief, he stated that, on 31st October, 1999, he was working at Tahsil office, Dhule as Avval Karkun. On 30th October, 1999 at about 12 night, the Police vehicle came to his house. They gave memo for recording dying declaration of Jamunabai. He went to the civil hospital along with police. He went along with doctor to burn Ward, where Jamunabai was admitted. According to him, doctor examined the patient and told that, the patient is conscious and her statement can be recorded. The doctor then endorsed the statement that patient is conscious to give statement. Then doctor

signed it, put the date and time below the said signature. Then he recorded the dying declaration as per version of Jamunabai. She told that, her husband comes late at home i.e. after 11 p.m. She asked him why he comes late. The husband got annoyed. He poured kerosene on her person and set her ablaze. She started shouting for help. Then neighbours extinguished the fire. Santosh, who is neighbour took her to the hospital. The contents of the dying declaration was read over to Jamunabai. She put her thumb impression on it. She was having burn injuries on her palm, when thumb-impression was taken.

12. During cross-examination, this witness stated that, he is working as Senior clerk in Tahsil office. His name was not gazetted by the Government declaring him as Executive Magistrate. There are two separate wards namely Casualty Ward and Burn Ward. There was rush in both these wards. He was not in a position to tell the name of doctor, who treated

Jamunabai. He saw that, Saline was given to the patient. He further stated that, Jamunabai was given Oxygen at the relevant time. He stated that, he did not ask doctor what type of treatment is given to Jamunabai. However, he stated that, doctor did examine Jamnunabai. However, he admitted that, thumb impression of victim was not attested.

Upon careful perusal of the statement of PW-7, it is abundantly clear that, his name is not gazetted by the Government declaring him as Executive Magistrate. At the relevant time, he was working as a Senior Clerk in the Tahsil Office. Therefore, it is crystal clear that, dying declaration at Exhibit-25 is not recorded by the Executive Magistrate. Upon careful perusal of the said dying declaration, as admitted by PW-7, the thumb impression of Jamunabai was not attested by PW-7. In fact, in first place, he was not gazetted by the Government declaring him as Executive Magistrate, and secondly, he has not attested the

thumb impression of Jamunabai. Therefore, question would arise, whether the dying declaration recorded by a person other than Executive Magistrate can be read in evidence in absence of attesting the thumb impression of Jamunabai on the said dying declaration ? The said question is squarely answered by the authoritative pronouncement of the Supreme Court in the case of **Laxman V/s State of Maharashtra**¹. The para 3 of the said judgment reads thus :-

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of

1 AIR 2002 SC 2973(1)

either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses 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 dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the

declaration can be established otherwise". [Underline supplied]

Yet in another exposition of the Supreme Court in the case of **Rajendra and others V/s State of Maharashtra²**, the Supreme Court held that, no law mandates that, dying declaration has to be recorded only by a Magistrate. More sanctity is definitely attached to a dying declaration recorded by a Magistrate since the statement has been correctly understood and truthfully recorded by an impartial person.

13. Therefore, dying declaration recorded by PW-7 in the present case can be read in evidence. Upon careful perusal of the contents of the dying declaration from the original record, it is abundantly clear that, there is an endorsement of doctor that, patient conscious to give statement. Prosecution examined Dr. Baban Ganpat Rawal as PW-8, who was working as Medical Officer in Medical Hospital, Shrigonda. He

2 (2006) 10 SCC 759

stated that, he did sign the dying declaration at Exhibit-25. He stated that, Jamunabai had sustained 95% burns on all over the body. He stated that, the patient was conscious while giving her dying declaration. He reiterated during his cross-examination that, he did give endorsement on Exhibit-14 and Exhibit – 25 after examining the patient. Therefore, it appears that, PW-8 medical Officer had given endorsement on dying declaration at Exhibit-14 and also on Exhibit-25.

14. The said dying declaration at Exhibit-25 has been proved by the prosecution by examining PW-7 and PW-8 beyond reasonable doubt. The said dying declaration also gets corroboration with the oral dying declaration made by Jamunabai with PW-1 Rohidas Nanaji Wagh. As per the prosecution case, Jamunabai made oral dying declaration with PW-1. We have already discussed the evidence of PW-1. In his evidence, he has stated that, Jamunabai told him that,

she was inquiring with her husband for coming late at night. Being annoyed with that query, the husband poured kerosene on her person and set her ablaze. The adjacent house owner Santosh extinguished the fire and took her to the hospital. Said Santosh was examined by the prosecution as PW-4. In fact PW-4 has not supported the prosecution case. He declared hostile and then he was cross-examined by the Public Prosecutor appearing for the State.

The prosecution also examined PW-5 Sindhubai Rajendra Wagh, however she did not support the prosecution case.

15. As already observed, dying declaration at Exhibit-25 has been proved by the prosecution through PW-7 and PW-8 beyond reasonable doubt and same gets complete corroboration from the evidence of PW-1, to whom Jamunabai made oral dying declaration. In that view of the matter, inevitable conclusion is that,

the appellant did commit the offence, as alleged by the prosecution. However, upon careful perusal of the contents of the dying declaration at Exhibit – 25, it appears that, on 31st October, 1999 at 11 p.m. accused came to house. He used to come house in between 11 to 12 p.m. When Jamunabai asked him why always he comes late at home, the appellant- accused got angry and poured kerosene on Jamunabai and set her ablaze and he went outside the house. On plain reading of this version from the said dying declaration, it is abundantly clear that, there was no premeditation on the part of the accused, neither there was preparation for such commission of offence. It appears that, the incident had taken place in a sudden provocation on query by Jamunabai that, why accused always comes late at home. Therefore, the accused committed offence on account of the said provocation and the act was committed by the accused without premeditation. In that view of the matter, taking into consideration aforementioned mitigating circumstances, 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.

16. 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.2000/-, in default, to suffer S.I. for one month.

Criminal appeal is accordingly partly allowed.

17. Trial Court shall secure presence of appellant-accused on Non-Bailable Warrant and ensure that sentence as above is carried out.

18. We appreciate the sincere efforts of Advocate Mr. S.S. Jadhavar (appointed) and we quantify Rs.6,000/- (Rs. Six thousand Only) towards his fees and expenses.

Sd/-
(**A. I. S. CHEEMA, J.**)

Sd/-
(**S.S. SHINDE, J.**)

sga/-