

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

CRIMINAL APPEAL NO. 58 OF 2014

Sandu Maruti Dhamale,
Age : 35 years, Occu. Labour,
Convict No. 7660, Central Prison,
Aurangabad, R/o. Aurangabad,
Tq. Kannad, Dist. Aurangabad.

... Appellant

VERSUS

The State of Maharashtra,
Through Police Station,
Pishor, Tq. Kannad,
Dist. Aurangabad.

... Respondent

.....
Shri. M. A. Tandale, Advocate (appointed) for the appellant
Shri. P. N. Kutti, APP for respondent/State
.....

**CORAM : S. S. SHINDE &
A. M. DHAVALA, JJ.**

DATE OF RESERVING THE JUDGMENT : 06.01.2018
DATE OF PRONOUNCING THE JUDGMENT : 05.02.2018

JUDGMENT (PER A. M. DHAVALA, J.) :-

1. The accused convicted for pouring kerosene on person of his wife and setting her on fire and thereby committing her murder and sentenced to suffer imprisonment for life and fine of Rs. 500/-, in default, RI for two months, has preferred this appeal against the Judgment delivered by Sessions Judge, Aurangabad, in Sessions Case No. 3 of 2013 dt.22.10.2013.

2. The relevant facts are as follows :

Deceased Kadubai was daughter of PW2 Chaturabai and sister of PW2 Kailas, who are resident of Varud Pimpri, Tq. Sillod. About 10 years before the incident dt. 23.02.2012, Kadubai married to the accused Sandu Ram Dhamale, r/o. Amarabad, Tq. Kannad and started cohabiting with him. She gave birth to one son and three daughters. She and her husband were doing labour work. On 23.02.2012 at about 06:00 p.m. Kadubai returned home after completing the labour work. That time, her husband was sleeping in the house and three daughters were in the house. She prepared tea and provided it to her daughters. Her husband got up. He had consumed liquor. He was in habit of consuming liquor. At 07:00 to 07:30 p.m. he told her to cook food. She told him that, she had just returned from her labour work and she would cook food. Her husband got annoyed and started abusing her as to why she had not cooked food. Then he threatened to set her on fire and poured kerosene from a can on her person and set her on fire. Due to fire, her clothes caught fire. As her girls watched fire, they raised shouts. She also raised shouts. The neighbouring ladies came there and extinguished the fire. She fell down and thereafter her husband's cousin Vishnu and other people reached her to the hospital. Her husband was in habit of assaulting her and used to demand money

for purchasing liquor. He always used to threaten her to set her on fire. On the same night, Head Constable Lagade from Ghati Hospital at Aurangabad sent a message about admission of burnt patient. His report show that, she suffered accidental burns. Then API Zote PW8 of Pishor Police Station came to the hospital, recorded dying declaration of Kadubai, which is as per the story narrated above. On the basis of the said dying declaration, on 24.02.2012, at 11:00 a.m. crime was registered at C.R. No. 19/12 u/s 307, 504 IPC. API Karbhari Zote wrote a letter to Tahsildar, Kannad (Exh.19) for recording her dying declaration. PW4 Special Judicial Magistrate - Ghorpade, on 24.02.2012 came to Ghati Hospital and obtained medical certificate about mental and physical fitness of the patient from on duty Medical Officer Dr. Abhijeet Chinchole (PW6). Thereafter, he recorded dying declaration (Exh.21). Kadubai again reiterated that her husband had poured kerosene on her person under the influence of liquor and had set her on fire. The dying declaration was read over to her. She admitted it to be correct. Then, thumb impression of left toe was obtained as she had burns all over her hands. During investigation, the spot panchanama of the house of the accused was drawn, which was consisting of a single room. One can of 2 ltr. capacity, one empty bottle of country liquor, one match box and some pieces of bangle were seized from the spot.

Statements of relatives of Kadubai were recorded which disclose that she made oral dying declaration before them similar to the two dying declarations (Exh. 21 & 41). The medical evidence discloses that, the deceased had sustained 60% burns. The deceased survived for about 2 months and on 27.04.2002, (after two months and four days) she died due to burn injuries. The police altered the charge and arrested the accused and submitted the charge-sheet in the court.

3. In due course, the case was committed to the court of sessions. The charge was framed at Exh. 5 against the accused. He pleaded not guilty. The prosecution examined eight witnesses. The defence of the accused is that, Kadubai died due to accidental bursting of stove. On the basis of the evidence on record, learned trial Judge convicted the accused u/s 302 IPC and sentenced him to imprisonment for life. Hence, this appeal.

4. Since the accused was unrepresented, ld. advocate Shri. M. A. Tandale was appointed for the appellant at state expense. Mr. Tandale has submitted that, most of the prosecution witnesses have turned hostile. Brother of the deceased PW1 Kailas and mother of the deceased Chaturabai have turned hostile. The earlier papers like the case papers show the history of accident. The inquest panchanama and report of police from Ghati Hospital disclose that it

was a case of accidental burns. The Investigating Officer has recorded dying declaration in the form of FIR but he had not obtained certificate from the Medical officer about mental and physical fitness of the deceased at the time of making a statement. The Special Judicial Magistrate has recorded dying declaration much later and it must be a tutored dying declaration. Neighbour Samadhan (PW5) has also deposed that Kadubai sustained burns due to accidental bursting of stove. PW6 Dr. Abhijeet has stated that she had given history to police of accidental bursting of stove. In the light of this evidence, both the dying declarations are highly doubtful. There is no reliable evidence that deceased Kadubai was physically and mentally in fit state of mind to give statement. The Id. trial Judge has not properly appreciated the evidence. He should have given benefit of of doubt to the accused. Hence, the appeal be allowed and accused be acquitted. He relied on **Shaikh Bakshu v State of Maharashtra (2007) 11 SCC 269**. The fact that, the dying declaration was read over and explained to the deceased must be clearly mentioned in the dying declaration. When some discrepancy regarding the person who brought her to the hospital and the place of occurrence were noticed, the dying declaration was held unreliable. In **Nilesh S/o. Nivrutti Jadhav Vs. The State of Maharashtra 2017 ALL MR (Cri) 5061**, the Division Bench of this

Court observed that, the dying declaration recorded without endorsement at the end of dying declaration by Medical Officer about the fit state of mind throughout the recording is untrustworthy. The said dying declaration cannot be said to be truthful. Absence of motive to commit murder by husband of his wife and non-examination of material witnesses were held to be circumstances creating reasonable doubt.

5. Per contra, learned APP Shri. P. N. Kutti strongly supported the judgment of the trial Court. He argued that, there was no inconsistency in the two dying declarations Exh. 21 and 41. One at Exh. 21 recorded by Special Judicial Magistrate who is an independent witness stands on highest pedestal and in absence of evidence of doubtful circumstances, the dying declarations should not be disbelieved.

6. The points for our consideration and with our findings thereon are as follows:

Sr. No.	Point	Finding
(I)	Whether deceased Kadubai met with a homicidal death?	Not proved.
(ii)	Whether the accused committed murder of Kadubai by pouring kerosene on her person and setting her on fire?	Not proved.

(iii)	Whether any interference is necessary in the judgment and sentence of the trial court?	Yes
(iv)	What order?	The appeal is allowed.. Conviction set aside.

REASONS

7. PW4 Jayprakash Ghorpade, Special Judicial Magistrate and PW8 API Zote are the material witnesses. They have recorded dying declarations Exh. 21 and 41, respectively. PW6 Dr. Abhijeet Chinchole was the Medical officer who had certified about the conscious state of deceased Kadubai at the time of both the dying declarations. He himself had also made inquiry about the history with the accused.

8. PW7 Dr. Ninal has conducted post-mortem and deposed about 60% burns found by him on the person of the deceased at the time of PM dt.27.04.2012. His PM notes are at Exh. 36. The other witnesses are as follows :

1. PW1 Kailas, brother of the deceased, not supported.
2. PW2 Chaturabai, mother of the deceased, not supported.
3. PW3 spot panch to panchanama Exh. 17, not supported.
4. PW5 neighbour Samadhan, not supported.

9. In the present case, it is not disputed that on 23.02.2012, at evening time, Kadubai, wife of the accused sustained 60% burn injuries in her house where the accused was also residing and she was admitted in the hospital immediately and she died due to burn injuries after two months and four days. The main dispute is how she had sustained burns. According to the accused, she had sustained burns due to accidental bursting of stove. Whereas; according to prosecution, the accused poured kerosene on her person and set her on fire.

10. PW8 API Zote of Pishor Police Station deposed that, on 23.02.2012, he received intimation of MLC case from Ghati Hospital at Aurangabad (Exh.40). He then went to Ghati Hospital and issued letter to the Doctor on duty (Exh.32). Doctor reported at 02:00 a.m. that the patient was conscious and was in position to give statement. He accordingly made endorsement on letter Exh. 32. Thereafter, he put some questions to Kadubai and was satisfied that she was conscious and able to give a statement. Thereafter, Kadubai had given him statement that at the night time when she was cooking food, the accused came under influence of liquor and accosted her why she had not cooked food and poured kerosene on her person and set her ablaze. He recorded her dying declaration as per her say. He read it over to her and she admitted the contents of the dying

declaration to be correct and thereafter he obtained her thumb impression as her both the hands were burnt to PW8 is at Exh. 41. On the basis of said dying declaration, crime was registered on 24.02.2002 at 11:00 a.m.

11. PW4 Jayprakash, Special Judicial Magistrate has deposed that, on 24.02.2012, he received intimation and request letter Exh. 19 from PW8 API Zote. Then he went to Ghati Hospital and issued letter to Medical Officer and obtained opinion about condition of Kadubai as to whether she was in position to give statement or not. Doctor Abhijeet PW6 has given endorsement and at 12:20 p.m. that patient was oriented and was in position to give oral dying declaration. He thereafter introduced himself to Kadubai and asked some questions to her and when he got satisfied that she was in position to give statement, he made inquiry with her as to how incident of burning has taken place and she told him the incident. He stated that, she told him that her husband had poured kerosene on her person and set her on fire. He stated that, he read over the contents to Kadubai and she admitted those to be correct and thereafter he obtained her left toe impression as her hands were burnt. The dying declaration recorded by him is at Exh. 21.

12. PW6 Dr. Abhijeet has not corroborated the evidence of PW8 API Zote and PW4 SJM Ghorpade. He stated that, on 23.02.2012, he was on duty in Ward No. 22 and 23 of Ghati Hospital at Aurangabad. Kadubai Dhamale was admitted in the hospital at 10:05 pm with burn injuries. He deposed that, she had told him that she sustained burn injuries due to accidental burstive of stove and he has taken entry to that effect in MLC register and in the case papers. The case papers are produced at Exh. 31.

13. PW6 Dr. Chinchole deposed that, on 24.02.2012 at 02:20 a.m. API Zote came to Police Station and sought his opinion about condition of Kadubai to give statement. He had written letter Exh.32 to him and examined Kadubai. She was conscious, oriented and in fit condition to give statement. He accordingly made endorsement in writing on letter Exh. 32. Thereafter, API Zote had recorded dying declaration of Kadubai and he had put his signature thereon. He stated that, Kadubai had sustained 70% burns. He also deposed that, he was not remembering about appearance of Special Judicial Magistrate on 24.02.2012 for recording dying declaration of Kadubai. When he was shown letter Exh. 20, he admitted that he had given endorsement that Kadubai was conscious, oriented and fit to give

statement. As against this, the defence has relied on following circumstances.

- (i) PW8 API Zote had received intimation (Exh. 42) showing that Kadubai sustained burns due to bursting of stove.
- (ii) PW6 Dr. Abhijeet Chinchole has recorded his admission form (Exh. 31) that Kadubai told him that she had sustained burns due to accidental bursting of stove. He has produced the case papers at Exh. 31 wherein the history is given as burn injuries due to accidental bursting of stove.
- (iii) Sister and mother of deceased Kadubai PW1 have turned hostile and stated that Kadubai told them that she sustained burns by burstive of stove. Their statements before police Exh. 46, 47 & 48 are contrary to their evidence.

14. PW5 neighbour Samadhan who had been to the spot immediately after the incident and along with others had taken Kadubai to hospital has turned hostile and has not supported her. As

per statement portion marked Exh. 50, Kadubai had told him on the way that her husband had poured kerosene on her person and set her on fire.

15. Learned Sessions Judge has relied on **Parasram Ingole Vs State of Maharashtra 2009(2) Bom.C.R. (Cri.) 43** and **Santosh Morale v State of Maharashtra 2007(4) Bom.C.R. 629** to hold that history recorded at the time of admission of the patient is not a dying declaration and it is not a part of investigation.

16. It is true that the dying declaration recorded by Spl. Judicial Magistrate, he being independent witness is more trustworthy and reliable. There is dying declaration recorded by Police Officer API Zote (Exh.41) which is materially consistent with the subsequently recorded dying declaration (Exh.21). However, besides the dying declarations, there is no other evidence to connect the accused with the crime. When the prosecution solely relies on the evidence of dying declaration, it should be free from any suspicion and should be found to be truthful, reliable and inspiring confidence.

17. In the present case, there are following suspicious circumstances.

- (i) There was no strong motive for the accused to pour kerosene on the person of his wife and to set her on fire. It is alleged that the accused got annoyed as his wife had not cooked food by 07:00 to 07:30 pm. It is difficult to believe that this can be a motive for such serious act.
- (ii) At the time of incident, three daughters of the accused and the deceased Kadubai were inside the house. As per dying declaration Exh.41, they had raised shouts and thereafter Kadubai had raised shouts and neighbours had gathered there. They had extinguished the fire by pouring water on the person of deceased. Her brother-in-law Vishnu Dhamale had taken her to the hospital. The evidence of PW1 Kailas shows that, son was aged 7 years and elder daughter was aged 5 years. Their statements should have been recorded and those should have been examined but they are not examined. The neighbours gathered on the spot who extinguished the fire are not examined. Vishnu is also not examined. While PW5 Samadhan who had taken the deceased to the hospital and before whom Kadubai had given oral dying declaration in transit had turned hostile.
- (iii) At the hospital PW6 Dr. Abhijeet had admitted Kadubai and he has recorded history as given by Kadubai that she sustained burns due to bursting of stove. The history given by the deceased is contradictory to the prosecution case. In **Parasram**

Ingole v State, the history was recorded as assault by someone and name of the accused was not there. In that context, it was held that the history recorded in the hospital papers is neither dying declaration nor a statement of person or relative who had admitted the patient in hospital for treatment. In the present case, the history was given by the burnt patient and she had only 60% burns. Thereafter, a Police Constable deputed in the Ghati hospital has sent a message to the Police Station (Exh. 40) and as per said reports also Kadubai had sustained burnt by accidental bursting of stove.

18. As far as two dying declarations are concerned, there is some variance. As per dying declaration recorded by PW4 Jayprakash, the accused was not with deceased Kadubai in the house. He came from outside by consuming liquor at 7:00 p.m. Whereas in the dying declaration before PW8 API Karbhari Zote, the accused was sleeping in the house and he had consumed liquor in the house and after he got up, he picked up quarrel with the deceased Kadubai as the food was not ready.

19. Besides, both the dying declarations do not bear the endorsement of Medical Officer about the physical and mental fitness of the deceased Kadubai. Both PW4 Spl. J.M. Ghorpade and PW8 API Zote have obtained such endorsement on separate papers (Exh.20

and Exh.32). PW4 Ghorpade has obtained the endorsement at the beginning of the statement. Similarly, Shri. Zote has also obtained the endorsement at the beginning.

20. Mr. Zote has deposed that, he put certain questions and verified the condition of Kadubai to give statement but the same is not recorded in dying declaration (Exh.21).

21. Mr Tandale, learned counsel for the appellant relied on Shaikh Bakshu (supra), wherein it is laid down the fact that the dying declaration was read over and explained to the deceased must be stated in the dying declaration. This cannot be presumed as held by trial Judge and High Court. In the present case, in both the dying declarations it has been recorded that the statement was read over and it was admitted to be correct. However, as far as dying declaration Exh. 21 recorded by Special Judicial Magistrate. recorded is concerned, it is a printed material and not recorded in writing.

22. Reliance is also placed by ld counsel for appellant on Nilesh Jadhav (supra) wherein it is observed that,

It is quite settled position in law when there are multiple dying declarations and there are inconsistencies and discrepancies in such dying declarations, it is unsafe to rely upon such dying declarations to convict the person. It is therefore, incumbent upon the prosecution to prove that the dying declaration as relied is untainted and truthful. So also the Court has to be on guard that

the statement of deceased was not a result of tutoring prompting or stretch of imagination. The Court is also expected to see that the deceased was in fit state of mind. Only in the case wherein the Court is satisfied that the declaration was true and voluntary, it can base its conviction without seeking further corroboration. However, the Court has to take such decision based upon facts of the case before it. When it is found that contradictory and inconsistent stand was taken by the deceased himself or herself in different dying declarations, then as a rule of prudence, Court should not accept such dying declaration and if situation demands, insist for corroboration from other evidence brought on record.

No endorsement recorded at end of dying declaration by Medical officer to the effect that deceased was found in a fit state of mind throughout its recording. Though date and time of recording statement has been mentioned below his signature but no such date and time mentioned in photo copy of same dying declaration. Such dying declaration, held, unreliable.

23. Though there can be no precedent on question of fact, the legal principle is well settled and dying declaration to form sole basis must be found to be reliable, truthful and inspiring confidence. In the light of the facts stated herein above, we find that the dying declarations are surrounded by suspicious circumstances not explained by the prosecution. The concept of fair trial expect that the prosecution ought to have examined the person before whom dying declaration showing accidental burns was given and then appropriate explanation should have been provided as to why the same should be disbelieved. In the light of the above facts, we find that there is reasonable doubt that Kadubai might have sustained burns by accident and therefore the judgment of conviction and sentence are not sustainable. We answer the points formulated accordingly and allow the appeal. We appreciate the valuable assistance provided by

Advocate Shri. Tandale, on our request. Hence, the order.

ORDER

- (i) The appeal is allowed.
- (ii) The conviction and sentence of the appellant is set aside and he is acquitted of all the charges.
- (iii) He shall furnish bail bonds u/s 437A Cr.P.C. and PR bond of Rs. 15,000/- with like solvent sureties.
- (iv) Fine if deposited be refunded to the appellant.
- (v) Fees of Advocate Tandale is quantified at Rs. 7,000/-.

[A. M. DHAVAL]
JUDGE

[S. S. SHINDE]
JUDGE

Punde