

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 417 OF 2013

Sanjay s/o Dnyanoba Narwade,
Age 36 years, Occupation Agriculture,
R/o Waghalwadi Tq. Ambajogai
Dist. Beed.

...Appellant

Versus

The State of Maharashtra,
Through Police Station (Rural),
Ambajogai Dist. Beed.

...Respondent

Mr. S. D. Kaldate, Advocate along with Atul R. Kale, Advocate
with Mr. P. N. Mule, Advocate for appellant.
Mr. A.B. Girase, Addl. Public Prosecutor, for respondent/ State.

**CORAM : PRASANNA B. VARALE &
SMT. VIBHA KANKANWADI, JJ.
DATE : 20-01-2018.**

ORAL JUDGMENT (Per Smt. Vibha Kankanwadi. J.)

1. Present appeal has been filed by the original accused who has been convicted for murdering his wife.
2. The prosecution had come with a case that, deceased Shilabai was married to accused in the year 2004. After marriage she started cohabiting with the appellant-accused at Waghalwadi Tq. Ambajogai Dist. Beed. They have a daughter. There was quarrel between deceased and accused at about 09.00 a.m. on 29-07-2012;

on the ground that the agricultural land should not be sold. Accused was insisting that, he would sell the land but deceased was advising him not to do that. However, accused abused and assaulted deceased Shilabai under the influence of liquor and then brought kerosene can, poured the kerosene on her person and ignited the matchstick and put it on her. Because of the same she ablaze and received burn injuries to her chest, both the hands, legs. Her cousin mother-in-law Gayabai Baburao Narwade and others extinguished the fire. Her mother-in-law Anusaya Dnyanoba Narwade and others brought her in auto rickshaw to Government Hospital, Ambajogai.

3. When she was admitted in the Burn Ward No.6, Ward No.14 and was under treatment, her dying declaration came to be recorded between 01.00 to 01.20 p.m. by Police Head Constable. On the basis of her said dying declaration, offence vide Crime No. 72 of 2012 came to be registered for the offence punishable under Section 307, 323 and 504 of the Indian Penal Code.

4. It is the further prosecution story that, on the basis of the said FIR investigation was undertaken. Simultaneously Tahsildar, Ambajogai was requested to record dying declaration and accordingly dying declaration has also been recorded by Tahsildar, Ambajogai. The Investigating Officer visited the place of incident and executed spot panchanama. At the time of execution of the

spot panchanama, saree, blouse, plastic can containing kerosene, one matchstick, simple earth and kerosene smelled earth were seized from the spot.

5. Statements of witnesses were recorded. During the course of treatment Shilabai expired on 02-08-2012. Inquest panchanama has been prepared and then dead body was referred for post mortem. After the post mortem report was collected, offence under Section 302 of Indian Penal Code has been added. The clothes of the accused were seized under panchanama. The seized muddemal/ articles were sent for chemical examination. Further statements of the witnesses have been recorded, accused came to be arrested, and after the completion of the investigation, charge-sheet has been filed before Judicial Magistrate, First Class, Ambajogai.

6. After the committal of the case i.e. Sessions Case No. 90 of 2012, charge came to be framed for the offence punishable under Section 302, 307, 323, 504 of Indian Penal Code against the accused on 17-01-2013 by Additional Sessions Judge, Ambajogai. The contents of the charge were read over and explained to the accused in vernacular. He pleaded not guilty and trial has been conducted. Prosecution has examined eight witnesses and proved documents in order to bring home the guilt of the accused. After hearing both sides and perusing the evidence on record, the learned Sessions

Judge has come to the conclusion that the prosecution has proved that the accused has committed offence punishable under Section 302 of the Indian Penal Code, and therefore he has been sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/-, in default rigorous imprisonment for one month. The appellant-accused has challenged the said conviction in this appeal.

7. Heard the learned counsel Mr. S. B. Kaldate along with Atul R. Kale, Advocate with Mr. P. N. Mule, Advocate for appellant, and Mr. A.B. Girase, Addl. Public Prosecutor, for respondent/ State. Perused the entire record. Following points arise for our determination, findings and reasons for the same are as follows ;

POINTS

FINDINGS

- 1) Whether death of Shilabai is : In affirmative.
homicidal ?
- 2) Whether prosecution has proved that : In affirmative.
accused had poured the kerosene on
the person of Shilabai at about 9.00
a.m. on 29-07-2012 in his house at
Waghala Tq. Ambajogai Dist. Beed, and
ablaze her, thereby committed her
murder ?

8. Both the points are taken up together for the sake of convenience and to avoid repetition.

REASONS

AS TO POINTS NO. 1 AND 2 :

9. It has been vehemently submitted on behalf of appellant that

the case of the prosecution is based upon dying declarations. P.W.1 Santosh Yadav is the brother of the deceased. He has been examined to prove the alleged oral dying declaration given by the deceased on 29-07-2012. However, in order to rely upon the same it ought to have been proved undoubtedly by the prosecution that the deceased was in a fit state of mind. P.W.2 ASI Dinkar Yekal is the police officer who had recorded the dying declaration on 30-07-2012 (Exhibit 19). It is apparent that the said dying declaration has been recorded after the arrival of the brother of the deceased. So also the testimony of P.W.5 Naib Tahsildar S. K. Devale who had recorded the second dying declaration on 30-07-2012. It is to be noted that in both the dying declarations the deceased had made substantial improvement in the form that the father-in-law had also poured kerosene. When such an improvement has been made then it goes to the root and makes both the dying declarations untrustworthy. The prosecution has not examined any person from the village who was present immediately after the incident. Definitely after deceased had caught the fire and persons had come to extinguish the same, they would have ask the deceased about the reason and she would have answered those questions. Much weightage can be given to that oral communication by the deceased to the neighbourers. Instead of adducing quality evidence, the prosecution has tried to rely on the oral dying declarations which

have been taken after much gap of time.

10. The learned Addl. Public Prosecutor submitted that, there is absolutely no inconsistency in both the written dying declarations. Both the dying declarations i.e. recorded by ASI and Naib Tahsildar are consistent with each other. A minor improvement will not discard the dying declaration. Further the written dying declaration is also consistent with the oral dying declaration. Therefore, the reasons assigned by the learned Trial Court are proper and justifiable. The learned Addl. Public Prosecutor tried to rely on the decision in *State of Punjab Versus Parveen Kumar, AIR 2005 Supreme Court 1277*, wherein it has been held that,

"The mere fact on the basis of the same evidence another view is possible, is not a ground for setting aside Judgment and order though it was the order of acquittal yet the basic principle is the same."

In fact the same authority was relied by the learned advocate appearing for the appellant in order to point out that, when there are inconsistent dying declarations then it cannot be the basis of conviction.

11. The learned advocate appearing for the appellant has further relied on the decision in, *Suresh s/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra, 2005 All MR (Cri) 1599*, wherein it has been held that,

"In case of multiple dying declarations when acceptance of one dying declaration falsifies the other, then both the dying declarations have to be necessarily rejected. The dying declarations has to pass all the tests of reliability as the declarant is not available for cross-examination."

12. He further placed reliance on *Suresh s/o Shrirang Mandawgane Vs State of Maharashtra, 2010 All MR (Cri) 147*. In this case both the dying declarations were not in consonance with each other and are at variance. Under such circumstance evidence of the prosecution based on two dying declarations was rejected.

13. Further reliance has been placed on the decision in *Ramesh s/o Rangrao Walsange and others Vs State of Maharashtra, 2012 All MR (Cri) 1861*. This case was also on the line when material inconsistencies are there in two dying declarations and they are not in consonance with each other as well as role attributed to appellants, such dying declarations were not relied. Similar view has been taken in *Smt. Laxmibai w/o Dhanraj Moon and Another Vs. The State of Maharashtra, 2012 All MR (Cri) 3537*.

14. The learned Addl. Public Prosecutor has relied on the decision in *Ashabai and Another Versus State of Maharashtra, 2013 DGLS (SC) 9, equivalent 2013 (2) AIR Bombay R 321*. In this case, in the first dying declaration before PSI, the deceased had deposed that mother-in-law had poured kerosene on her and let fire. In the

second dying declaration which was recorded by Executive Magistrate, which was in the question and answer form, almost same facts were reiterated. The third dying declaration was also recorded by Executive Magistrate wherein two more names of other members were included stating that those persons had threatened the deceased. It was held that, this version itself does not mean that earlier two were unacceptable, because even in this fact victim had named accused No.1, 2 and 3 as main accused. Thus, the learned Addl. Public Prosecutor supported the Judgment and order passed by the trial Court.

15. At the outset it is to be noted that, the panchanama of the spot has been proved and it is at Exhibit 15. The contents of the panchanama would show, that the incident had taken place in one of the room where there was iron cot. The burnt pieces of saree, plastic can containing kerosene, matchstick are the articles amongst other articles which have been seized from the spot. There is a pursis produced at Exhibit 16 which shows that the defence has admitted the panchanama, and therefore, the panchas were discharged. Thus situation at the spot was admitted to the accused. However, as regards the said situation is concerned, it would give rise to three theories, one is accidental, another is suicidal and third is homicidal. Neither the prosecution has come with a case nor the accused has put a defence that, it was the suicidal case. Then only

two possibilities remain, one was accidental and another was homicidal. The prosecution has then examined P.W.4 Dr. Vishwajeet Pawar who had conducted the post mortem. He has deposed that, he had examined deceased Shilabai, it was a case of 30 % burnt injuries. Those were ante mortem. After noting the injuries he has come to the conclusion that the cause of death was septicemia due to 30 % of superficial and deep burns of total body surface area. The post mortem report is at exh.27. The only question that was asked to him in the cross was that where he had seen the treatment papers and he has answered it in the negative. Thus it is to be noted that, there is no cross as regards the opinion regarding cause of death. Again taking into consideration the said opinion, the two theories emerged, one is regarding homicidal and another is accidental. Therefore, when the prosecution has come with a case that it was a homicidal death, the prosecution should prove the same and rule out the possibility of accidental death.

16. The relationship between deceased and accused is not denied. Deceased was residing in the same house where accused was residing. In order to bring the evidence regarding homicidal death, the prosecution has relied on one oral dying declaration and two written dying declarations.

17. P.W.1 Santosh Yadav is the brother of the deceased. He has

deposed that deceased Shilabai got married to accused in 2004. He has stated that his sister was treated properly by the accused for initial two years and thereafter accused started ill-treating his sister. According to him accused was abusing and beating deceased after consuming liquor. It is to be noted that, no charge is framed under Section 498-A of the Indian Penal Code, and therefore, the said part of his deposition cannot be considered. The witness has further stated that, he was in his village at about 10.00 a.m. on 29-07-2012 when he was received telephone call from Waghalwadi from an unknown number. It was informed to him that, his sister has sustained burnt injuries and was admitted in Swamy Ramanand Teerth Rural Medical College and Hospital, Ambajogai. He immediately went to the hospital. He met his sister. His sister told him that, accused and his father were intending to sell the agricultural land, however she protested, the accused had consumed liquor at that time, he assaulted deceased and poured kerosene on the person of deceased and ablaze her. The fire was extinguished by aunt of the accused who resides in the neighbourhood.

18. It is to be noted that, except suggestion that his sister was not in a position to talk, there is nothing on record in order to discard whatever he had stated. No doubt the oral dying declaration is a very weak type of evidence but in order to disbelieve the said witness, though an opportunity was available to the accused, that

opportunity has not been exhausted. No doubt it was tried to be brought on record from his cross-examination that the funeral was performed at the village of the accused and the said funeral was attended by this witness and his parents. It was tried to be brought on record that the relationship was normal. Even if for the sake of arguments it is accepted that the relationship was normal yet as regards the incident is concerned, except one single suggestion there is nothing to disbelieve him.

19. It was tried to be pointed out that in his testimony P.W.2 ASI Dinkar Yekal has stated that when he went to hospital on 29-07-2012 after receipt of the information, he found that the witness was sleeping. Therefore it was submitted that there is less possibility that the patient was in a position to make a statement. We are unable to accept the said submission because it has not been extracted from both the witness as to what time they had gone to the hospital. The possibility of both these witnesses visiting the burn ward at different time and then when P.W.2 ASI Dinkar Yekal went, the possibility of the patient being asleep is not ruled out. Another fact is that, merely because she was asleep, we cannot presume that deceased was not in a fit state of mind for giving statement or talking with her brother. Therefore, in this case even the oral dying declaration is believable.

20. Much stress has been given on the alleged two inconsistent dying declarations. Dying declaration (Exhibit 19) was recorded by P.W.2 ASI Dinkar. He had in fact obtained certificate from P.W.7 Dr. Rupesh Thakare before he is proceeded to record Exhibit 19. The testimony of P.W.2 Dinkar and P.W.7 Dr. Rupesh on the point of examination of the deceased, in the beginning of the statement and at the end, is consistent. In fact the accused had declined to cross-examine P.W.7 Dr. Rupesh, and therefore, he cannot raise a doubt regarding the mental state of Shilabai when Exhibit 19 was recorded. Exhibit 19 has been duly proved through P.W.2 Dinkar Yekal. In fact it was rather extracted in his cross-examination that he had asked the relatives of Shilabai to go out of the room before he started recording Exhibit 19. Further the reason as to why he had obtained the toe impression of deceased has been extracted in the cross. He has stated that, as both the hands had received burn injuries, he had obtained toe impression. That means, whatever lacunae left in examination-in-chief, they have been filled up in the cross-examination. Under such circumstance we cannot doubt the procedure that has been adopted while recording the dying declaration.

21. P.W. 5 S. K. Devale was Naib Tahsildar who has recorded the dying declaration (Exhibit 37). P.W.7 Dr. Rupesh was the same doctor who had given endorsements on Exhibit 37 regarding the

mental fitness of deceased to make statement. Independently also both the persons who have recorded the both the dying declarations have independently assessed and were satisfied about the fitness of deceased to give the statement. We would like to rely on the decision in, *Sher Sing and Another Vs. State of Punjab, (2008) 4 Supreme Court Cases 265*. It has been observed that,

"Since the accused had no power of cross-examination, the Court would 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 should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the Court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit."

Normally, the Court places reliance on the medical evidence for reaching the conclusion whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor it can be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration must be satisfied, that the deceased was in a fit state of mind. Thus, here independently also both the witnesses who recorded the dying

declaration got themselves satisfied about the mental fitness of the deceased before they had started recording her dying declaration. The medical opinion was supporting their statement and the medical opinion has gone unchallenged.

22. Now as regards the alleged inconsistency is concerned, except making allegation against father-in-law that he had also taken part in the act of ablaze, there is no inconsistency at all. The role attributed to the present appellant is the same in both the dying declarations.

23. As regards multiple dying declarations are concerned we would like to rely on the decision in *Mukesh and Another Versus State (NCT of Delhi) and others*, reported in 2017 (6) Supreme Court Cases 01. Here in this case there were more than one dying declarations and after considering the legal position laid down in various authorities it has been observed that, "In cases where there are more than one dying declarations, the Court should consider whether they are consistent with each other. If there are inconsistencies, the nature of inconsistencies must be examined as to whether they are material or not. In cases where there are more than one dying declarations, it is the duty of the Court to consider each one of them and satisfy itself as to the voluntariness of the reliability of the declarations. Mere fact of recording multiple dying

declarations does not take away the importance of each individual declaration. The Court has to examine the contents of the dying declaration in the light of various surrounding, facts and circumstances". Therefore, as regards present accused is concerned both the dying declarations are consistent. There is no material inconsistency in both of them.

24. The case laws which have been relied by the learned Advocate for the appellant are not helpful to him for the simple reason that the facts in those cases were different. In *State of Punjab Versus Parveen Kumar, AIR 2005 Supreme Court 1277 (Supra)*, the first dying declaration was not against either the mother-in-law, father-in-law or sister-in-law, but the allegation was solely against the respondent who was said to have sprinkled kerosene oil on her and set her on fire. In the second dying declaration the roles assigned to them were different. The allegation was that the mother-in-law sprinkled kerosene oil and husband set her fire with a matchstick. It was found that the attribution of separate role was the material inconsistency. In *Suresh s/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra, 2005 All MR (Cri) 1599 (Supra)*, taking into consideration the material inconsistencies, the benefit was given to the accused. It was found that, though in the two dying declarations, there was consistency in respect of name and number of accused, the prelude to the incident there was variance. There

was also variance in respect of incident itself. In *Suresh s/o Shrirang Mandawgane Vs State of Maharashtra, 2010 All MR (Cri) 147 (Supra)*, there were different versions regarding the incident which were totally inconsistent with each other. *Ramesh s/o Rangrao Walsange and others Vs State of Maharashtra, 2012 All MR (Cri) 1861 (Supra)* and *Smt. Laxmibai w/o Dhanraj Moon and Another Vs. The State of Maharashtra, 2012 All MR (Cri) 3537 (Supra)* also the dying declarations were found to be not in consonance with each other and role attributed to the appellants were totally different.

25. Thus what emerges from the discussion is that, each of the dying declaration will have to be considered independently and this has also been laid down in *Nallam Veera Stayanandam And Others Vs. Public Prosecutor, High Court of A.P., 2004 (10) SC 769*. It is observed that,

"Each dying declaration has to be considered independently on its own merits as to its evidentiary value and one cannot be rejected because of the contents of the other."

The consistency in oral as well as dying declaration is that, the accused-appellant had consumed liquor and when there was dispute between him and the deceased, after deceased raised objection for selling agricultural land, accused poured kerosene upon her person and ablazed her. This fact is therefore established beyond

reasonable doubt by the prosecution.

26. Definitely act of pouring kerosene and throwing burning matchstick would cause fire and would kill a person, would be in the knowledge of any person, and therefore, said act which was done by the accused was with an intention to cause her death, and therefore, it is a murder punishable under Section 302 of the Indian Penal Code.

27. The learned trial Court has rightly appreciated the evidence on record and has come to the right conclusion thereby holding the accused guilty of committing offence punishable under Section 302 of Indian Penal Code. Definitely merely because a second view is possible this Court cannot take the second view in the appeal. Resultantly there is no merit in the present appeal, it deserves to be dismissed. Hence, following order.

ORDER

Appeal is hereby dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

(PRASANNA B. VARALE)
JUDGE

vjg/-.