

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.674 OF 2002

THE STATE OF MAHARASHTRA)...APPELLANT

V/s.

**PRABHAKAR VASANT KALKUTAKI)
Age : 32, Occupation : Labour,)
R/o.Plot No.31, Rajarampuri, Kolhapur)...RESPONDENT**

Mr.H.J.Dedhia, APP for the Appellant – State.

None for the Respondent.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 13th OCTOBER 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 This appeal is filed by the State challenging the judgment and order of acquittal dated 21st March 2002 passed in Sessions Case No.134 of 2001 by Ad-hoc Additional Sessions Judge, Kolhapur, for the offences punishable under Sections 302, 498A of the Indian Penal Code (IPC).

2 Narrated in nutshell, it appears from the evidence of PW9 Jotiba Malappa Malai (Exh. 28) that on 2nd March 2001, he was present in Rajarampuri Police Station and was asked to go to C.P.R. Hospital to record the dying declaration of Ujwala Kalgutaki (deceased). After verifying the mental state of the deceased, he recorded the dying declaration (Exh.23) of the deceased. It appears from Exh. 23 that the husband of the deceased i.e. respondent-accused had started beating the deceased after consuming liquor eight days prior to the incident. On 2nd March 2001, at about 10.45 a.m., the respondent-accused started abusing the deceased and slapped her. When the deceased requested him not to beat her, it is alleged, the respondent-accused in the fit of rage poured kerosene on her person and set her afire by means of a matchstick. The deceased sustained injuries all over her body and started crying. One Sushila Kalgutaki – neighbour of the deceased and her husband then threw water on her person and rushed her to the hospital.

3 On the basis of above dying declaration, PW11 Abdul Abbas Avalkar, the then Assistant Sub-Inspector of Rajarampuri Police Station, registered Crime No.19 of 2001 under Sections 302, 498A, 504 of the IPC and handed over the investigation to PW12 Manoj Govind Patil, Deputy Superintendent of Police, Kolhapur City.

4 PW12, accordingly, visited the scene of offence and drew panchnama, seized various articles lying there, recorded statements of witnesses and also recorded dying declaration (Exh. 31) of the deceased. PW12 also forwarded all the seized articles to Forensic Science Laboratory and after collecting the Chemical Analyser's Reports and on completion of investigation, forwarded the charge-sheet against the respondent-accused.

5 To substantiate the Charge against the respondent-accused, the prosecution has examined as many as twelve witnesses. The respondent-accused was questioned under Section 313 of the Code of Criminal Procedure about the incriminating evidence and circumstances and he denied all of them as false.

6 Mr.Dedhia, learned APP for the appellant-State, submitted that the case of the prosecution is based on two written dying declarations and two oral dying declarations given by the deceased. According to learned APP, despite there being ample and encouraging evidence, the learned trial Court wrongly rejected those dying declarations. Since the act of the respondent-accused is allegedly linked to the offence with which he was charged, he deserves to be punished in accordance with law by setting aside the order of acquittal, argued learned APP.

7 When the matter was called out, none appeared for the respondent-accused.

8 At the very outset, it may be noted from the postmortem report (Exh. 17) pertaining to the deceased, is duly admitted by the respondent-accused in the course of the trial. The cause of death, as opined by the concerned Autopsy Surgeon was “Shock due to 84% mixed burns.” Again, there is no dispute on this count.

9 The prosecution case rests on multiple dying declarations out of which two dying declarations are written while two dying declarations were made orally by the deceased to her brother (PW5) and maternal aunt (PW6). Before we venture and tread through those dying declarations, we deem it fit to outline the governing principles as to multiple dying declarations.

10 In the case of Nallam Veera Satya Nandam and Ors. vs. Public Prosecutor, High Court of A.P.¹, the Hon'ble Apex Court held that the trial Court erred because in case of multiple dying declarations each dying declaration has to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there are more than one dying declaration, it is the duty of the court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.

11 Similarly, in Sudhakar vs. State of M.P.², the Hon'ble Apex Court has held that in cases involving multiple dying declarations made

1 AIR 2004 SC 1708

2 2012 Cri.LJ 3985.

by the deceased, which of the various dying declarations should be believed by the Courts and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters. Each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is one more dying declarations, it is the duty of the court to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.

12 Having referred to the law relating to the dying declarations, now we may examine the issue in the present case involving multiple dying declarations made by the deceased and which of the various dying declarations should be believed by this court.

13 PW8 Pandurang Ganpat Chopade states in his evidence (Exh. 27) that on 2nd March 2001, he was officer on duty in C.P.R.Hospital, Kolhapur. On that day, at about 1.30 p.m., Dr.Manisha Patil (PW7) gave him in writing that Ujwala (deceased) has been admitted and had suffered burns to the extent of 75% and asked him to make further arrangement. He then went to the doctor, verified the mental condition of the deceased and after getting the certificate of fitness, he recorded the statement of the deceased. His version gets support from PW7 Medical Officer (Exh. 21) when she states that before commencing of recording of dying declaration, she again examined the deceased and found her fully conscious and oriented and that her

mental condition was stable. His evidence also shows that at the relevant time, the husband of the deceased was near her. He then proved the first dying declaration at Exh. 22.

14 We may mention here that PW8 recorded the first dying declaration (Exh. 22) in the hospital immediately after the admission of the deceased. Although, this witness has not revealed the contents of the dying declaration, but then the said dying declaration is very much available at Exh. 22 and we have an opportunity to go through the said dying declaration. It shows that on 2nd March 2001, at about 10.45 a.m., while she was heating the left over food of the previous night on a stove for her husband and was lighting the stove, her saree caught fire because of stoking flames. Her husband came running and extinguished the fire by pouring water on her person. She was, accordingly, shifted to the hospital. It further shows that she had no complaints or suspicion against any one and that she was fully conscious while making the statement.

15 Before reflecting on the contents of the first dying declaration, we note from the cross-examination of PW8 that while recording the dying declaration any police personnel or relation is not required to remain present near the declarant. However, in the instant case, when the accused was taken out of the ward before recording of her statement, the deceased was not ready to make the statement. It is only after her husband was called, that she started making statement. From this piece of evidence, one thing is very much clear and that is that there was no pressure or duress or any kind of coercion so as to make the deceased to make a statement which was against her wishes. Rather, the deceased was not prepared to make a statement until her husband was allowed to be there near her. Having regard to this clear position, in our considered opinion, the deceased was clear in her mind while completely absolving the respondent-accused. This is so far as first dying declaration is concerned.

16 PW9 Jotiba Malappa Malai states in his evidence (Exh. 28) that on 2nd March 2001, he was present in Rajarampuri Police

Station. At about 3.15 p.m., Protective Service Officer (P.S.O.) asked him to go to C.P.R.Hospital and record the dying declaration of Ujwala Kalgutaki (deceased) who had sustained 75% of burns. He then went to the said hospital and met Dr.Manisha Patil and expressed his desire to record the dying declaration of the deceased. At that time, Ujwala's parents were present with him. He, Dr.Manisha Patil and Ujwala's parents went there. He then recorded the dying declaration of the deceased. He then proved the dying declaration at Exh. 23.

17 From the cross-examination of this witness it appears that he was well aware of the recording of first dying declaration (Exh. 22) by Assistant Sub-Inspector Chopade. However, he did not ask the deceased about her first dying declaration. His cross-examination further shows that he had no reasons as to why he did not ask the deceased about her first dying declaration. His cross-examination further shows that he allowed the parents of the deceased to remain present as Ujwala had said that she was in fear and her mental condition was not that good.

18 Before we dwell on this second dying declaration, we may point it out here that PW7 Medical Officer was not only very much present but she again certified, before recording of the second dying declaration, that she found the deceased conscious and well oriented and mentally stable. However, this piece of evidence is contrary to what has been deposed by PW9, who recorded the second dying declaration, in his cross-examination. We say so, because according to PW9, the deceased was in fear and her mental condition was not that good and that is why the deceased had asked the PW9 to allow her parents to be there before recording of her second dying declaration. We are also alive to the mental state of the deceased when her first dying declaration came to be recorded, because at that point of time, not only she was in a fit state of mind but after securing the presence of her husband-accused, she voluntarily gave her first dying declaration, thereby completely absolving the accused. Whereas, at the time of the second dying declaration, she gave an altogether different dying declaration which we would be dealing shortly

here, showing her mental state to be not that congenial and comfortable and rather was full of fear and that is why she requested PW9 to allow her parents to be there. This being the questionable mental state of the deceased, how far her second dying declaration is to be believed, is a matter of great concern. Be that as it may, let us go through the second dying declaration.

19 While narrating the prosecution case, we have already extracted comprehensively contents of the second dying declaration (Exh. 23) and this dying declaration was made basis of registration of the First Information Report (FIR) against the respondent-accused. It alleges that the respondent-accused had started beating the deceased eight days prior to the main incident of 2nd March 2001 after consuming liquor and even on the day of the incident, at about 10.45 a.m., he slapped the deceased after abusing and when the deceased requested not to beat her, he got annoyed and doused the deceased with kerosene and set her afire. It is also apparent that immediately Sushila Kalgutaki -neighbour, after hearing her cries rushed and she and the husband of the

deceased then threw water on her person and extinguished fire and then she was removed to the hospital.

20 Surprisingly, Sushila Kalgutaki was not brought before the court by the prosecution for the reasons best known to it. She was the best available witness because she was the first to rush to rescue the deceased and certainly could have thrown light on the circumstances under which the deceased was allegedly burnt. It is also not clear from this dying declaration as to why the accused used to beat and abuse the deceased and what prompted him on the day of incident to again indulge in the beating. We have already pointed out the circumstances leading to the recording of this dying declaration in the presence of the parents of the deceased. Moreover, her mental state is also noted by us, which was certainly not healthy and in such circumstances, we would like to search for other corroborative evidence.

21 Before that, we propose to go through the evidence of PW12 Manoj Patil, Investigating Officer, who also recorded the

statement of the deceased on 3rd March 2001, at about 2.15 p.m. According to the prosecution, it is this statement, wherein, the deceased had explained as to under what circumstances she gave the first dying declaration, thereby absolving the respondent-accused. Therefore, that statement needs to be looked into.

22 PW12 Manoj Patil, Dy.S.P, Kolhapur City, states in his evidence (Exh. 34) that during the course of investigation on 3rd March 2001, he visited Civil Hospital Sangli and after satisfying the mental condition of the deceased, recorded her statement. Before recording the statement, he asked the deceased as to why she had made two dying declarations – one in the morning and the other in the evening, contradictory to each other and which one was true. According to him, thereafter, the deceased made a statement and he accordingly recorded it. He then proved the said statement at Exh. 31.

23 According to this statement (Exh. 31) the deceased referred her first statement and stated that whatever she had

stated in her first statement, nothing of that sort had happened. Before giving of first dying declaration, as her husband, brother-in-law and their close relatives were present and as they had pressurized her, out of that fear, she had given the first dying declaration accordingly. However, after arrival of her parents and other relatives, she properly gave the second dying declaration at about 4.00 p.m., which is correct.

24 We are not prepared to place any sort of reliance on this statement (Exh. 31) for the reasons which we have adhered to while discussing the conduct of the deceased vis-a-vis the first and second dying declaration. In this statement (Exh. 31) she squarely blames the coercion played by the respondent-accused and his relatives whereas we have already pointed out from the evidence of PW8 Police Officer that it was only on the request of the deceased that her husband was summoned and it is only then the deceased gave her first dying declaration. Similarly, as far as the second dying declaration is concerned, at the cost of repetition, we have already narrated her disturbing mental state

and as also the presence of her parents. Therefore, for all these reasons, we do not find it safe to take into consideration her last statement (Exh. 31) recorded by PW12 Dy.S.P for any purpose.

25 After having cleared the nature of written dying declarations, we now move on to oral dying declarations.

26 PW10 Dr.Sangita Shrinivas Kate Deshmukh states in her evidence (Exh. 30) that on 2nd March 2001 the deceased was admitted at about 6.20 p.m. as a burnt patient. When she was asked history, the deceased told her that her husband had poured kerosene and set her on fire. Thus, this witness was the first available witness in the hospital in whose presence the deceased allegedly gave the history of burns. But we have already pointed out the circumstances leading to the making of first dying declaration (Exh. 22) which came to be recorded at about 1.45 p.m. on 2nd March 2001. Both these dying declarations i.e. the history given to PW10 and the first dying declaration (Exh. 22) excludes each other and are quite contradictory.

27 PW5 Prakash Wadal – brother of the deceased states in his evidence (Exh. 19) that after receiving the telephonic message, he, his mother and Kundlik Kunte visited the C.P.R. Hospital, Kolhapur. Respondent-accused, his brother and other relatives were present there. On seeing them, all of them went out. He then asked Ujwala (deceased) as to what had happened to which she replied that her husband lighted a matchstick and set fire to her clothes. She further told him that her husband and her relatives, by force and under pressure, took a writing from her. Thereafter, he went to the police station and narrated the events. The police came to C.P.R. Hospital and recorded statement of Ujwala.

28 From the evidence of PW5 it is clear that he reached only in the afternoon i.e. after recording of the first dying declaration i.e. after 1.45 p.m. Now if version of this witness is read carefully then it would be seen that he was told by the deceased of her clothes being set on fire by the respondent-accused. He, nowhere, says that he was told that the respondent-

accused had first doused her with kerosene and then set her afire. Thus, there is material inconsistency between his version and the contents of the second dying declaration.

29 PW6 Hausabai Kalgutaki, maternal aunt, is the next witness in whose presence the deceased allegedly gave an oral dying declaration. Her evidence (Exh. 20) shows that on the day of the incident, at about 10.30 a.m., when she was in her house, a girl came and told her that Ujwala had received burns. She went running to the house of the respondent-accused. She asked Ujwala as to what had happened to which Ujwala told that her husband poured kerosene on her head and set her on fire by striking a matchstick.

30 Having regard to the contents of second dying declaration, we notice that it nowhere attributes the presence of this witness immediately after the incident. We have already pointed out the presence of Sushila Kalgutaki who is admittedly not brought before the court by the prosecution for the reasons

best known to it. Even PW5 – brother of the deceased does not say that this witness had rushed to the house of the accused after having come to know about the burning of the deceased. No implicit reliance, therefore, can be placed on the testimony of this witness.

31 The prosecution has also examined PW3 and PW4 who are neighbours of the deceased but found them hostile to its case. There is nothing in their respective cross-examination to the credit of the prosecution.

32 Having scanned and scrutinized all the dying declarations on record, we find that there is absolutely no corroboration between the written dying declarations on one hand and the oral dying declarations on the other. None of the dying declarations is proved and substantiated by other evidence on record.

33 On the above nature of evidence and obtaining circumstances, the learned trial Court could hold that the prosecution has failed to prove its case beyond reasonable doubt. The finding of the trial court could not be said to be perverse. It was based on a proper appreciation of evidence.

34 As a result of above discussion, we find no infirmity in the appreciation of evidence and law in the judgment of the trial Court. Hence, we do not find merit in the appeal and pass the following order :

ORDER

Appeal is dismissed.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)