

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.398 OF 2014

Vasant Tipaji Jadhav,
Age 24 years, Occ. Nil.
R/o Ghungarla, Tq. Naigaon,
at Present Kumbhargalli,
Chikhalwadi, Nanded.

...Appellant
(orig accused.)

Versus

State of Maharashtra.

..Respondent

.....
Mr. S D Hiwrekar (appointed) advocate for the appellant
Mr. K. S. Patil, A.P.P. for respondent State
.....

**CORAM : V. K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.**

DATE : 15TH SEPTEMBER, 2021.

JUDGMENT (PER V.K. JADHAV, J.) :-

1. This appeal is directed against the judgment and order passed by the Sessions Judge, Nanded dated 22.1.2013 in Sessions Case No.172 of 2011.

2. Brief facts giving rise to the prosecution case are as follows:-

i) Deceased Jyoti was the wife of appellant-accused. They lived in tenanted room at Kumbhargalli, Chikhalwadi, Nanded. They had occupied the said tenanted room of P.W.6 Rajendrasingh Peshkar about one month prior to the incident. The appellant-accused was addicted to liquor and often used to beat deceased Jyoti under the

influence of liquor. The appellant-accused used to demand money to deceased Jyoti for consuming liquor. On 17.7.2011 at about 8.00 p.m. in the said tenanted room, the appellant-accused picked up quarrel with deceased and started demanding money from deceased Jyoti. The appellant-accused took the kerosene can and poured kerosene on the person of deceased Jyoti and set her ablaze. The appellant-accused thereafter fled away from the house. The neighbours came there and carried deceased Jyoti to Civil Hospital Nanded.

ii) P.W.5 Police Head Constable Sayyed attached to Vazirabad police station had received information about M.L.C. and rushed to the hospital and met P.W.7 Dr. Girish Umare. He had inquired with doctor about fit state of mind of deceased Jyoti to give statement and on certification of P.W.7 Dr. Girish Umare that deceased Jyoti was conscious state of mind to give the statement, P.W.5 PHC Sayyed had recorded the statement of patient Jyoti at 1.00 a.m. on 18.7.2011. The same was treated as F.I.R. Exh.32. In the said complaint/dying declaration Exh.32, deceased Jyoti has stated that the appellant/ accused poured kerosene on her person and set her ablaze. On the basis of said report Exh.32, crime No.139 of 2011 came to be registered for the offence punishable under section 307 of I.P.C. P.W. 8 A.P.I. Baban Karhale took over the investigation of the crime.

iii) During the course of investigation, on 18.7.2011, P.W.8 A.P.I. Baban Karhale has drawn the spot Panchnama Exh.37. He had seized burn pieces of Saree, burn pieces of blouse, mattress, plastic can from the spot in presence of the panchas. He has also arrested the appellant-accused vide arrest panchnama Exh.14. The appellant-accused had sustained two burn injuries on his little finger and on both ears. At the time of arrest, he had seized full pant and full shirt from the person of accused smelling kerosene. There were also holes of burn on the pant and shirt seized from the person of appellant-accused. The clothes came to be seized under seizure Panchnama Exh.38. P.W.4 Datta Navghare the Special Judicial Magistrate has recorded the statement of deceased Jyoti on 18.7.2011 at about 12.30 p.m. after confirmation from the doctor about fitness of the patient. The said dying declaration is marked at Exh.28. In the said dying declaration Exh.28 deceased Jyoti stated that appellant poured kerosene on her person and set her ablaze. On 29.7.2011 at about 7.40 a.m. deceased Jyoti succumbed to the burn injuries. P.W.8 A.P.I. Baban Karhale had prepared inquest panchnama and sent the dead body for post mortem examination. Deceased Jyoti had sustained 81% burn injuries on the dead body. On completion of investigation, P.W.8 A.P.I. Baban Karhale had submitted charge-sheet against the appellant-accused. It was transpired during the course of investigation that the appellant-accused had committed the murder of his wife deceased Jyoti by pouring kerosene on her person and setting her ablaze.

iv) Learned Sessions Judge has framed charge against the appellant-accused vide Exh.4 for the offence punishable under Section 302 of I.P.C. The appellant-accused pleaded not guilty to the charge and claimed to be charged. The prosecution in order to substantiate the charge has examined in all 8 witnesses. The defence, as emerged from the statement of the appellant-accused under section 313 of Cr.P.C. is that deceased Jyoti has sustained burn injuries while cooking the meals due to bursting of stove.

v) The learned Sessions Judge by judgment and order of conviction dated 22.1.2013 in Sessions Case No.172 of 2011 has convicted the appellant-accused for the offence punishable under Section 302 of I.P.C. and sentenced him to suffer imprisonment for life and to pay fine of Rs.1000/- i/d to suffer R.I. for six months. Hence, this appeal.

3. Learned counsel for the appellant-accused submits that the prosecution case entirely rests upon the two dying declarations Exh.28 and 32 respectively. There is no direct evidence in this case. Learned counsel submits that the dying declaration Exh.28 and 32 are not consistent on material parts. There is glaring inconsistency in the dying declarations. Both the dying declarations, thus, do not inspire confidence. Learned counsel submits that in the dying declaration Exh.28 recorded by P.W.4 Datta Navghare, the Special

Judicial Magistrate, deceased Jyoti has stated that in the night, the appellant-accused picked up the quarrel for the reason that she did not serve him food. However, in the compliant/dying declaration Exh.32 deceased Jyoti has stated that appellant-accused had picked up quarrel on account of demand of money. Learned counsel submits that even in the complaint/dying declaration Exh.32, P.W.5 Police Head Constable Sayyed had incorporated certain facts on his own. Learned counsel submits that both the dying declarations Exh.28 and 32 thus are not believable. There is no corroboration to the said dying declarations. Learned counsel submits that the relatives of deceased Jyoti met her in the hospital and they were present in the hospital till her death. Thus, the possibility of tutoring cannot be ruled out. Learned counsel submits that P.W.4 Datta Navghare, Special Judicial Magistrate has not satisfied himself as to the conscious state of mind of deceased Jyoti before recording her dying declaration. Learned counsel submits that there is no evidence that deceased Jyoti was subjected to cruelty by the appellant-accused. The prosecution has not examined any witness on the point of cruelty at the hands of the appellant-accused. Learned counsel submits that the prosecution has failed to prove the case against the appellant-accused beyond reasonable doubt and thus the appellant-accused is entitled for the benefit of it.

Learned counsel for the appellant-accused in order to substantiate his submissions, placed reliance on the following

cases:-

- i) State of Gujarat Vs. Jayrajbhai Punjabhai Varu, reported in (2016) 14 Supreme Court Cases 151.
- ii) Manik s/o Vanaji Gawali Vs. State of Maharashtra, reported in 2013 (5) LJSOFT 125.
- iii) Nandu s/o Vitthal Sonawane Vs. State of Maharashtra, reported in 2017 DGLS (Bom) 1994.

4. Learned A.P.P. submits that the dying declaration Exh. 28 and 32 are reliable, consistent on material parts and inspiring the confidence. P.W.5 Police Head Constable Sayyed has recorded the complaint/dying declaration of deceased Jyoti Exh.32 after obtaining opinion from the treating doctor. P.W.7 Dr. Girish Umare has examined the patient and found to be conscious oriented and accordingly made endorsement to that effect on the complaint/ dying declaration Exh.32. Similarly, P.W.4 Datta Navghare, Special Judicial Magistrate has also obtained opinion from P.W.7 Dr. Girish Umare before recording the dying declaration Exh.28 and the said dying declaration Exh.28 also bears the endorsement of treating Doctor P.W.7 Dr. Girish Umare to that effect. The prosecution has also examined P.W.7 Dr. Girish Umare to corroborate the same.

5. Learned A.P.P. submits that spot panchanama Exh.37 was drawn during the course of investigation and P.W.8 A.P.I. Karhale

has seized the burn pieces of saree, blouse, bed sheet and plastic can having residues of kerosene in it. He has also seized clothes of accused. Learned A.P.P. submits that the clothes of the accused came to be seized during the course of house search panchanama Exh.38. Learned A.P.P. submits that as per the C.A. report Exh.39, result of detection of kerosene of partially burnt clothes i.e. pieces of saree, partially burnt bed-sheet and liquid in plastic can and also the clothes seized from the person of appellant-accused Exh.4 and 5 are positive. Learned A.P.P. submits that the accused has raised false defence of accidental death of deceased Jyoti while cooking the meals. There is nothing on the spot indicating that deceased Jyoti had sustained burns accidentally. Learned A.P.P. submits that P.W.3 Dr. Sanjay Buktar, who has conducted post mortem examination on the dead body of Jyoti has also observed that total burns on the dead body of deceased Jyoti was to the extent of 81% and in his opinion, injuries were ante mortem and sufficient to cause death in ordinary course of nature. Learned A.P.P. submits that there is no substance in this appeal and the appeal is thus liable to be dismissed.

Learned A.P.P. in order to substantiate his contentions placed reliance on the following cases:-

- i) Purshottam Chopra and another vs. State (Government of NCT of Delhi), reported in (2020) 11 SCC 489,

- ii) Laxman vs. State of Maharashtra, reported in 2002 AIR (SC) 2973,
- iii) Lahu Ramchandra Bandpatte vs. State of Maharashtra, reported in 2009 (2) Bom.C.R. (Cri.) 227

6. We have perused the material exhibits tendered by the prosecution, the evidence of the prosecution witness, the statement of the appellant-accused recorded under Section 313 of Criminal Procedure Code, the evidence of the appellant-accused himself and the impugned judgment. After giving our thoughtful reflection to the matter, we are wholly satisfied that there is no substance in this appeal and the same must be dismissed.

7. The prosecution case rests upon two dying declarations Exh.28 and Exh.32 respectively. Both the dying declarations are consistent on material parts. Deceased Jyoti had stated in both the dying declarations that the appellant-accused poured kerosene on her person and set her ablaze. So far as the so called discrepancy in the dying declarations Exh.28 and 32 respectively, as pointed out by the learned counsel for the appellant-accused is concerned, even in the dying declaration Exh.28 recorded by P.W.4 Datta Navghare, the Special Judicial Magistrate, deceased Jyoti had stated that the appellant-accused was addicted to liquor. In both the dying declarations, deceased Jyoti had consistently stated that the appellant-accused had picked up quarrel and consequently poured

kerosene on her person and set her ablaze.

8. P.W.7 Dr. Girish Umare, who was on duty in the Government Hospital, Nanded in burn ward on 18.7.2011. On 17.7.2011 at about 9.10 p.m. deceased Jyoti was admitted in the burn ward. P.W.7 Dr. Girish Umare has further deposed that on 18.7.2011 at about 1.00 a.m. P.W. 5 PHC Sayyed arrived in burn ward and informed him that he wanted to record the statement of patient Jyoti. P.W.7 Dr. Umare thus examined patient and informed to P.W.5 PHC Sayyed that the patient Jyoti was conscious and in a position to talk. He admitted his endorsement and signature to that effect on the statement/dying declaration Exh.32. P.W.7 Dr. Girish Umare has further deposed that on 18.7.2011 at about 12.30 p.m. the Special Magistrate P.W.4 Shri Datta Navghare has also come to the burn ward and enquired with him as to whether the patient was conscious and is in a position to give the statement. P.W.7 Dr. Girish Umare thereafter went to the burn ward and after returning, informed to P.W.4 Datta Navghare that statement can be recorded. P.W.7 Dr. Girish Umare has also put his endorsement and signature on the dying declaration at Exh.28 recorded by P.W. 4 Datta Navghare, the Special Judicial Magistrate.

9. We have carefully gone through the dying declaration Exh.28 and the compliant/dying declaration Exh.32. So far as the complaint/dying declaration Exh.32 is concerned, it was recorded in the form of complaint and on the basis of the said complaint, crime

No. 129 of 2011 came to be registered in the concerned police station for the offence punishable under Section 307 of I.P.C. However, on careful perusal of the contents of the same, we find that after completing the formality of recording the complaint in the usual way, P.W. 5 PHC Sayyed has recorded the dying declaration in the words of deceased Jyoti. In the dying declaration Exh.28 recorded by P.W.4 Datta Navghare, the Special Judicial Magistrate, we find that deceased Jyoti has also stated that the appellant-accused had started consuming liquor in excess and, therefore, they have shifted to Nanded from village Umare some time two months prior to the incident. We find both the dying declarations Exh.28 and 32 consistent, trustworthy on material parts. There is no discrepancy as such. Further, we also find that P.W.4 Datta Navghare, the Special Judicial Magistrate, has also satisfied himself about the conscious state of mind of deceased Jyoti before recording her statement. P.W.4 Datta Navghare, the Special Judicial Magistrate has put certain questions and deceased Jyoti gave answers to the said questions which he has recorded.

10. After going through the contents of the spot panchnama Exh.37 and the articles seized while drawing the spot panchnama, it appears that there is no possibility of sustaining burns by deceased Jyoti, accidentally. Furthermore, the burnt pieces of Saree and bed sheet were having smell of kerosene and C.A. report Exh.39 also confirms the same. Furthermore, the clothes of appellant-accused

seized during the course of search panchnama Exh.38 also having smell of kerosene and as per the C.A. report Exh.39 the result of test of detection of kerosene was positive above the said clothes of the appellant-accused.

11. In the case of ***Purushottam Chopra and another vs. State (Government of NCT of Delhi) (supra)*** relied upon by learned A.P.P. for the State, the Supreme court by referring the principles laid down by the Constitution Bench in the case of Laxman vs. State of Maharashtra, (2002) 6 SCC 710 and by referring the principles laid in various cases decided earlier, such as (i) Koli Chunilal Savji vs. State of Gujarat, (1999) 9 SCC 562, (ii) State of M.P. vs. Dal Singh, (2013) 14 SCC 159, (iii) Bhagwan vs. State of Maharashtra, (2019) 8 SCC 95, (iv) State of Punjab vs. Gian Kaur, 1998 SCC (Cri) 942, (v) Gopalsingh vs. State of M.P. (1972) 3 SCC 268, (vi) Dalip Singh vs. State of Punjab (1979) 4 SCC 332, (vii) Thurukanni Pompiah vs. State of Mysore, AIR 1965 SC 939, (viii) Uka Ram vs. State of Rajasthan, (2001) 5 SCC 254, summarized some of the principles relating to dying declarations and its admissibility and reliability in para 21 to 21.8 of the judgment, which are as follows:-

“21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability could be usefully summed up as under:-

21.1. A dying declaration could be the sole basis of conviction

even without corroboration, if it inspires confidence of the Court.

21.2. The Court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

21.3. Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

21.4. When the eye-witnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

21.5. The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement

21.6. Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.

21.7. As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

21.8. If after careful scrutiny, the Court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration."

12. In the case of **State of Gujarat Vs. Jayrajbhai Punjabhai Varu (supra)** relied upon by learned counsel for the appellant-accused, in para Nos. 15, 17 and 18 of the judgment, the Supreme court has made the following observations:-

- “15) *The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross- examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.*
- 17) *A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.*
- 18) *The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.”*

13. Learned counsel for the appellant-accused has also placed reliance on the judgments in the cases of Manik s/o Vanaji Gawali vs. State of Maharashtra and Nandu s/o Vitthal Sonawane vs. State of Maharashtra (supra) wherein principles have been laid down for appreciation of dying declarations.

14. It is well settled that the dying declaration could be the sole basis for conviction even without corroboration, if it inspires confidence of the court. The Court has to examine the dying declaration scrupulously to find out that the declarant was in a fit state of mind at the time of making the statement and it was a voluntary statement. We find that the complaint/dying declaration Exh.32 recorded by P.W.5 PHC Sayyed and dying declaration Exh.28 recorded by P.W. 4 Datta Navghare, the Special Judicial Magistrate, are truthful, consistent and made voluntarily. There is nothing contrary to indicate that the same is the result of tutoring, prompting or project of imagination. Further, both the dying declarations are corroborated by other evidence on record. Both the dying declarations Exh.28 and 32 are not suffering from any infirmity, such as want of fit state of mind of the declarant or like nature.

15. In terms of the ratio laid down by the Supreme court in the case of ***Purushottam Chopra and another vs. State (Government of NCT of Delhi) (supra)*** and also the cases relied upon by learned counsel for the appellant-accused, we find that both the dying

declarations Exh.28 and 32 respectively, are consistent on material parts and inspires confidence. The trial court has rightly held the appellant-accused guilty of the offence punishable under Section 302 of I.P.C. Thus, no case is made out for interference. Hence, the following order:-

O R D E R

- i. Criminal appeal is hereby dismissed.
- ii. Criminal appeal is accordingly disposed of.

16. Since Advocate Mr. S. D. Hiwrekar is appointed to represent the cause of the appellant/accused, we quantify his legal fees and expenses at Rs.10,000/- (Rupees Ten Thousand) to be paid by the High Court, Legal Services, Sub-Committee, Aurangabad.

(SHRIKANT D. KULKARNI, J.)

(V.K. JADHAV, J.)

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