

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

CRIMINAL REVISION APPLICATION NO. 308 OF 2004

Sow Pushpabai W/o Bhanudas Nimbalkar	]	
Age 55 Years, Occupation : Household,	]	
Resident of Chikhalthana, Taluka and	]	
District Aurangabad.	]	... Applicant

Versus

- | | | | |
|----|---|---|--------------------------|
| 1. | Rajesh S/o Ramkishan Shejul |] | |
| | Age : 28 Years, Occupation : Agri. |] | |
| | At present Occu. : Security Watchman |] | |
| | R/o Shirsgaon, Ghati, Taluka, |] | |
| | Badnapur, District Jalna. |] | |
| 2. | Sau Chandrakalabaia W/o Ramkishan Sehjul |] | |
| | Age : 55 Years, Occupation : Agriculture, |] | |
| | R/o Shirasgaon Ghati, Taluka Badnapur, |] | |
| | District Jalna. |] | ... Orig. Accused |
| 3. | The State of Maharashtra |] | ... Respondents |

...

Mr. G. P. Darandale h/f. Mr. A. N. Kakade, Advocate for Applicant.
Ms. S. A. Kothari h/f. Mr. S. G. Ladda, Advocate for Respondent Nos.1 and 2.
Smt. G. L. Deshpande, APP for Respondent No.3 – State

...

CORAM : BHARAT P. DESHPANDE, J.

RESERVED ON : 04th AUGUST 2022

PRONOUNCED ON : 11th AUGUST 2022

JUDGMENT :

Vide order dated 25th July 2005 rule was issued.

2. By way of this Revision Application, the applicant who is mother of deceased and the informant, is challenging judgment of acquittal passed by the learned Ad-hoc Additional Sessions Judge, Aurangabad dated 13th May 2004 in Session Case No. 30 of 2002.

3. In nutshell, it is the contention of informant that deceased Jayabai was the wife of accused no.1 Rajesh. Marriage of Jayabai and accused no.1 Rajesh was performed on 06th March 1998. After some time of the said marriage Jayabai was subjected to cruelty with regard to the salary which she was handing over her poor parents. Jayabai succumbed to burn injuries on 15th March 1999. She poured kerosene on her person and then put on fire on 7th March 1999 in the latrine of her house, due to constant cruelty by respondent nos.1 and 2 i.e. husband and mother-in-law. Jayabai was admitted in hospital on 7th March 1999 and on the same day her statement was recorded by Head Constable (PW-4), wherein she specifically disclosed about the cruelty and the ill treatment given to her by respondent nos. 1 and 2. Accordingly F.I.R. was registered. Her dying declaration was thereafter recorded by the Executive Magistrate on 7th March 1999, wherein she also blamed respondent nos.1 and 2. On the same day, she succumbed to the injuries while undergoing treatment in the hospital.

4. Heard Mr. G. P. Darandale holding for Mr. A. N. Kakade, learned counsel for applicant, Ms. S. A. Kothari holding for Mr. S. G. Ladda, learned

counsel for respondent nos.1 and 2 and Smt. G. L. Deshpande, learned APP for State.

5. With the assistance of learned counsel for respective parties, I have perused the entire record including two dying declarations which were rejected by the learned Additional Sessions Judge, while acquitting the accused persons.

6. Learned counsel for applicant forcefully submitted that rejection of both dying declarations by the trial court is patent illegally and thereby caused miscarriage of justice. Such finding is perverse and therefore it needs to be interfered with.

7. Learned counsel appearing for respondent nos.1 and 2 on the other hand claimed that findings of the learned trial court is justified as both dying declarations cannot be relied upon and they were recorded in suspicious circumstances. There are no reports from the Medical Officer as to the condition of the deceased while giving such statement.

8. Learned APP appearing for the State claimed that the first dying declaration ought to have been accepted by the learned trial court as the doctor certified that she was fit to give statement. On this ground learned APP submitted that matter could be remanded back.

9. On perusal of entire record and more specifically dying declarations, it is necessary to first of all consider the settled proposition of law with regard to acceptance of dying declaration.

10. Learned counsel appearing for applicant placed reliance in the case of *Laxman Vs. State of Maharashtra*, reported in *2002 Cri.L.J. 4095*, wherein Apex Court discussed section 32 of the Indian Evidence Act, so also the certificate which is required by the doctor. In that matter, Hon'ble five Judges bench considered earlier decisions of the Apex Court and the conflict between three Judges benches which referred the question for the larger bench. It was observed that while considering evidence regarding dying declaration, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration, look upon to the medical opinion, however, where the eye witnesses state that deceased was in a fit and conscious state to make the declaration, medical opinion will not prevail, nor can it be said that since there is no certification of doctor as to the fitness of the mind of the declarant, 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. When a declaration is recorded, no oath is necessary. Similarly presence of a Magistrate is also not mandatory. 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 authority 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.

11. The Apex Court further observed in para 5 as under:-

“5. The court also in the aforesaid case relied upon the decision of this court in Harjeet Kaur VS. State of Punjab 1999 (6) SCC 545 case wherein the magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in Paparambika Rosamma & Ors. vs. State of Andhra Pradesh 1999 (7) SCC 695 to the effect that ".....in the absence of a medical

certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh; 1999 (7) SCC 695 must be held to be not correctly decided and we affirm the law laid down by this court in Koli Chunilal Savji & Another Vs. State of Gujarat; 1999 (9) SCC 562."

12. Learned counsel appearing for respondent nos. 1 and 2 placed reliance the case of ***Bhagirath Bhaurao Kanade Vs. State of Maharashtra***, reported in ***1997 (2) Mh.L.J. 29***, wherein this Court has observed that when two dying declarations are recorded, one by the magistrate and another by the doctor in medical case papers which are conflicting, such declarations create serious doubt and therefore accused is entitled for benefit.

13. Learned Additional Sessions Judge while rejecting both dying declarations observed that the Head Constable who recorded first dying declaration failed to consider that Jayabai was in fit state of mind. Similarly, prosecution has failed to examine the attending Doctor/Medical Officer to put

his endorsement on the letter addressed by Head Constable for recording her statement. In fact, such statement of Jayabai recorded by Head Constable at Exhibit-15 was treated as a complaint. After her death, it has to be considered as dying declaration.

14. Learned Additional Sessions Judge then observed that second dying declaration recorded by the Executive Magistrate is very cryptic and he failed to certify from the doctor that Jayabai was in a fit state of mind before giving such declaration. The learned trial court further observed that a father of Jayabai clearly deposed before the court that from 7th March 1999 Jayabai was not in a condition to speak as there was swelling on her lips and it was a case of 100% burn. Her father has accepted/admitted that Jayabai was not able to speak from the time of her admission till her death.

15. PW-4 Namdeo Kisan Gawali, the Head Constable in his deposition claimed that on receipt of informant of MLC, he went to MGM hospital and recorded statement of Jayabai. He gave a letter to the Medical Officer which is at Exhibit-14. The Medical Officer gave his opinion “patient can give statement”. PW-4 then claimed that thereafter he recorded a statement of injured which he identified at Exhibit-15. First of all PW-4 nowhere disclosed that Jayabai was conscious and was able to disclose facts. Admittedly, she suffered 100% burn injuries which is clear from certificate produced at Exhibit-13 dated 7th March 1999 from the Casualty Medical Officer of MGM

hospital. The first and foremost aspect before recording any statement of such injured person, it was necessary for the police officer to find out whether she was in a fit state of mind to give any statement.

16. Remark of Doctor on Exhibit-13 is neither here nor there as according to the endorsement, it show that 'the patient can give statement'. Therefore, doctor himself was not sure whether patient was in a fit state of mind, conscious or otherwise.

17. The second dying declaration which is recorded by the Executive Magistrate is also suffering from similar irregularities. PW-5 Rameshwar Jadhav deposed that he received a letter from CIDCO police station, Aurangabad on 7th March 1999 itself with a request to record the statement of injured. Immediately went to the hospital and met the medical officer on duty. He inquired with the Medical Officer after examining Jayabai told him that she is conscious and in a position to give statement. At that time it was around 5:30 to 6.00 p.m.. Thereafter, he went to the patient and inquired with her. He then reduced her statement in writing and secured her impression of right thumb over it.

18. At this stage, deposition of PW-4 Head Constable again needs to be referred as this witness claimed that after recording statement of the injured on 7th March 1999, he secured impression of her toe on the statement

as her fingers were burned. However, the Executive Magistrate claimed that he obtained thumb impression on the statement, whereas, Head Constable says that since both hands were having burn injuries, he had to obtain her impression of toe.

19. If both these statement i.e. Exhibit-15 and 27 are considered, there is variation in it. Exhibit-27 nowhere mention that accused persons were objecting about handing over of salary of the deceased to her parents and on that count she was ill treated.

20. Both these witnesses nowhere stated that they verified personally whether patient was fit, conscious and was able to give her statement.

21. PW-5 Rameshwar Jadhav during cross examination admitted that he did not obtain any opinion of the Medical Officer in writing about condition of the said patient.

22. Thus observations in the case of ***Laxman*** (*supra*) will not be of any help to the applicant.

23. Though the learned Sessions Judge while rejecting evidence of prosecution witnesses and more specifically both dying declarations, assigned some reasons, same cannot be terms as perverse and against settled proposition of law. Each matter has to be decided on its own merit. In the

present matter, both these dying declarations are not found to be trustworthy. Therefore, it was not proper to rely upon it. In such circumstances, observations of the learned Sessions Court are neither perverse nor against settled proposition of law. Hence, such findings cannot be interfered with while deciding the present Revision.

24. Having said so, grounds raised in the present Revision are devoid of merit and hence Revision fails and thus I pass the following order :-

ORDER

- (I) Revision Application stands rejected.
- (II) Rule stands discharged.
- (III) Parties shall bear their own costs.

(BHARAT P. DESHPANDE, J.)