

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 279 OF 2022

1] Umesh s/o Mahadeo Warankar,
Aged about 35 years,
Occupation-Agriculturist.

2] Ganesh s/o Mahadeo Warankar,
Aged about 35 years,
Occupation-Agriculturist.

All are R/o. Manki (Degaon),
Tq. Balapur, Dist-Akola.

.. **Appellants**

..Versus ..

State of Maharashtra,
Through Police Station Officer,
Balapur Police Station, Balapur,
Tq. Balapur, Dist- Akola.

.. **Respondent**

.....
Shri S.V. Sirpurkar, Advocate for Appellants,

Shri S.M. Ukey, Additional Public Prosecutor for the Respondent-
State.

.....

Coram: Vinay Joshi and
Mrs. Vrushali V. Joshi, JJ.

Reserved on : 14.11.2022
Pronounced on : 09.12.2022

JUDGMENT (PER : Mrs. Vrushali V. Joshi, J.)

This is an appeal preferred against the judgment and order dated 24/02/2022 in Sessions Case No.31/2013 by the learned Sessions Judge, Akola thereby convicting and sentencing both the appellants-accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

2. Briefly stated the facts of the case are as under :

The deceased Suvarna Warankar died on 12/09/2012 due to burn injuries. When she was taken to the hospital, her statement was recorded. She has stated in her dying declaration that her husband and brother-in-law set her on fire as her husband was suspecting her character and asked her to give divorce and, therefore, in the morning on 12/09/2012 her brother-in-law caught hold her hands and the accused no.1, who is her husband, poured kerosene on her person and set her ablaze. She has specifically stated that she herself has not burnt her. The dying declaration was recorded by the Executive Magistrate i.e. Tahsildar. After recording the statement at about 8.30 pm, on the same day, she died. On the basis of said statement/dying declaration, the crime was registered by Sunil Solanke (PW-6), who was the in-charge of Balapur Police Station.

3. He has conducted the spot panchanama, recorded the statements of other witnesses and arrested the accused. The statement under Section 27 of the Indian Evidence Act was made by both the accused and their clothes, which were on their person on the date of incident, were recovered at the instance of both the accused. After completion of investigation, he has filed the charge-sheet before the Court and it was committed to the Sessions Court.

4. Both the appellants were charged for the offence punishable under Sections 498-A, 302, 504 r/w Section 34 of the Indian Penal Code. Both the accused were tried before the Sessions Court. On merits of the case, the learned Sessions Judge, Akola found that the offence of murder was proved beyond reasonable doubt. However, the charges under Section 498-A and 504 of the Indian Penal Code were not proved against both the accused and acquitted both of them from said offences and convicted both the accused for the offence punishable under Section 302 r/w 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- each, in default to suffer rigorous imprisonment for further period of one year. The said judgment and order is under challenge in this appeal.

5. We have heard Shri S.V. Sirpurkar, the learned counsel for the appellants-accused and Shri S.M. Ukey, the learned Additional Public Prosecutor for the respondent-State. We have carefully examined the record of the case.

6. The case is based on written dying declaration, and oral dying declaration made by deceased to her father i.e. PW-1 Gunwant Chandurkar and PW-3 Kokila Levatkar. The learned counsel for the appellants had stated that the trial court has convicted both the accused only on the basis of the dying declaration which was handed over to police belatedly after the death of the deceased. The deceased died on 12/09/2012 in the evening and the statement was recorded in the morning, it was handed over to the police after her death on 13/09/2012 and thereafter, the offence is registered, there is delay in lodging first information report. The dying declaration itself is doubtful, as there is scoring of timing in the dying declaration and the explanation is not given by the Executive Magistrate why there is scoring, which creates doubt about the dying declaration itself. Though the father of the deceased has given the statement about the burning by both the accused, he has not lodged the complaint on his own and his statement was recorded after five days. Nothing is mentioned by him as to why there was ill-treatment. He has stated that his daughter was with him for six to seven months and, thereafter, when he sent her back after few days,

the incident took place and he lost his daughter. As the dying declaration is not reliable and there is no corroborative oral evidence, prayed to set aside the conviction by setting aside the judgment passed by the learned trial court by allowing this appeal.

7. The learned Additional Public Prosecutor for the respondent-State, opposed the arguments of the learned counsel for the appellants-accused. He has stated that the defence has not taken during the trial about the suicidal death. Now for the first time in appeal, he has taken the defence of suicidal death. Contradictory defence is taken by accused. The oral dying declaration is proved by PW-3. While answering the argument about non attestation of thumb, he stated that though the thumb impression is not attested and not mentioned whether it is the toe impression or thumb impression, however, in cross he himself has brought on record that it was toe impression of right leg. Accused has brought everything in cross-examination. The accused were absconded. They denied to take the body and perform the last rituals. The conduct of accused shows their guilty mind. They absconded and they were arrested from Balapur. The accused no.1 though has stated that he had burn injuries while saving the deceased has not stated in his statement under Section 313 of the Code of Criminal Procedure about it. The trial Court has rightly convicted both the accused persons. Hence, prayed for dismissal of the appeal.

8. The prosecution has placed reliance on the dying declaration. The solitary dying declaration on the basis of which crime is registered and the law is set on motion, the dying declaration is proved through the evidence of PW-2 Shriram Ukarda Raut (Tahsildar). In his evidence he has stated that on 12/09/2012, he has received the phone call from the Police Chouki of the hospital for recording the dying declaration of a burnt lady. He reached there at 8.30 am in the morning. He has accepted the dying declaration memo from the police, which is at Exh.43. After receiving the said dying declaration memo, he recorded the statement of the burnt lady, after taking the endorsement of Doctor about the fitness of the patient. Though the relatives were present, he asked them to go from there and then recorded the statement. He has recorded her statement, which is at Exh.44 and in sealed envelope, he sent it to concern police chouki.

9. During cross-examination, it is brought on record that dying declaration is not in question-answer form. The scoring of pm to am is also brought to the notice of the witness and there is no counter signature on said scoring is also admitted by this witness. The thumb impression is not attested is also brought on record. The Doctor has given endorsement about the fitness to give the statement but about the orientation it is not there.

10. The prosecution has examined PW-7 Dr. Sunil Deshmukh, in whose presence the statement was recorded. The Doctor has also stated that the statement was recorded in his presence and at the time of recording the statement, he examined the patient and thereafter by giving endorsement on it, he has signed it.

11. Oral dying declaration is there. PW-1 and 3 are the witnesses who have stated about narration of deceased. The evidence of PW-1, who is father of deceased, does not help in any manner as far as charge under Section 302 of the Indian Penal Code is concerned. From the evidence of this witness, it is brought on record that the marriage of his daughter was performed on 11/06/2011 and for five to six months, the accused persons behaved properly, but thereafter they harassed her. Though he has stated about harassment has not stated about the type of harassment, because of which, they went to her matrimonial house and brought her. He has also deposed that thereafter, accused no.1 and 2 went to bring her back, but they did not send her. The matrimonial dispute was settled and when the mother of the accused no.1 came with him, they sent her back. According to him, after going back for five to seven days, they behaved properly with his daughter and thereafter, he received phone call from the hospital that his daughter burnt. In the hospital his daughter informed him that she has given the

statement to Tahsildar. However, he did not enquire with her, again he has stated that his daughter narrated him that Umesh and Ganesh poured kerosene on her person and they ablazed her.

12. Though his daughter has narrated about the burning her by accused nos.1 and 2, PW-1 has not lodged any complaint. He did not on his own went to Police Station for lodging complaint. On fifth day the police recorded his statement and he has not narrated anything about harassment though allegations are made about harassing the deceased. The conduct of PW-1 creates doubt. If we consider that he was in a grief then also when his daughter narrated him about act of both accused then keeping quite by a father is not a natural conduct.

13. PW-3 Kokila Levatkar is the maternal aunt of the deceased. She has also stated that in her presence the deceased narrated to her mother that accused no.2 caught hold her hands and her husband poured kerosene on her person and set her on fire with matchstick. The statement of mother is not recorded, though deceased narrated her. There is no other evidence about oral dying declaration which supports the written dying declaration.

14. Other evidence on which the trial court has relied is the recovery of the clothes of both the accused at their instance and the

kerosene residues found on said clothes is the corroborative evidence according to the trial court. The accused were arrested from Balapur on 13/09/2012 and the memorandum statements of both the witnesses were recorded and both the witnesses have disclosed about production of their clothes which were on their person at relevant time. They produced their clothes which were kept in their house at the same place. The recovery is from both the accused from the same place. The kerosene residue were found on said clothes, but the recovery itself creates doubt in mind.

15. There is no any other evidence other than the oral and the written dying declaration. When the case is based on dying declaration, it reminds us the judgment of the Hon'ble Apex Court in the case of **Khushal Rao .vs. State of Bombay, AIR 1958 SC 22**, in Para 16 the Hon'ble Apex Court laid down principles regarding appreciation of dying declaration as under :

"(16) On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made ; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker

kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions -and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character; and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the. circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

(17) Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the, death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that

it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case”.

16. Keeping in mind the above said principles, we have scrutinized the dying declaration, which is at Exh.44. We found that though it was recorded in the morning, there is striking about time i.e. am and pm on three places in the memo of dying declaration which was corrected by the Executive Magistrate. However there is no striking in dying declaration memo which is at Exh.43. As per said document, he received it at about 8.30 pm on 12/09/2012 which discloses the reason about striking in dying declaration, the document is received by PW-1 after the death of deceased. In the dying declaration, there is striking of pm to am at three places, which is at Exh.44. The buckle number of the constable is also corrected. Initially it was written as 1387 and thereafter it is written as 1535. Though there is correction and striking, there is no any counter signature of the Executive Magistrate. Moreover, though the statement was recorded at 8.32 am, it was handed over to the police on 13/09/2012, after the death of the deceased.

17. The learned counsel for the appellants relied on the judgment of this Court in the case of **Dipak s/o Chandrasing Kolhekar .vs. The State of Maharashtra, 2017 ALL MR (Cri) 1804**, held thus :

“Dying declaration – Credibility – Case of death of burns – Recording of DD shown to have commenced at 4.30 am and concluded at 4.50 pm or am - Initially it was shown to be 4.50 am and later on by over-writing it was shown to be 4.50 pm – No explanation regarding said over-writing and exactly what does it convey – That apart, thumb impression of deceased not appearing in full below DD – Deceased had sustained 82% burn injuries and only knicker shaped area of body left intact – Therefore, deceased really affixed her thumb impression, doubtful – Further, in DD deceased stated that she was admitted to hospital by Village Sarpanch – Whereas, Sarpanch stated that she came to know about incident when deceased’s mother visited her house at 9.10 p.m. when deceased was already taken to hospital – Prosecution failed to prove DD to have been made voluntarily and truthfully – Hence, DD held, not reliable.”

18. In case in hand also the striking about time is there and PW-1 has not given any plausible explanation about it. After death after near about 24 hours, PW-6 received dying declaration and thereafter the FIR was lodged. As such there are lot of mysterious circumstances which have remained unexplained. These unexplained circumstances create a reasonable doubt in our mind as to the correctness of dying declaration. It creates doubt about the

custody of said dying declaration for the period of near about 24 hours. In such circumstances, the prosecution has not been able to rule out possibility of creating a false dying declaration at the instance of the relatives.

19. In support of argument that the dying declaration is suspicious and cannot be relied, the accused has relied on the judgment of Hon'ble Apex Court in the case of **Uttam .vs. State of Maharashtra, 2022 SCC Online SC 749** and also relied on the judgment of the Hon'ble Apex Court in the case of **Jayamma and another .vs. State of Karnataka, (2021) 6 SCC 213**.

20. It is specifically mentioned in dying declaration that she herself has not burnt her also creates doubt about the burning by the accused persons as why it came in her mind at her last breath. Though the harassment is mentioned, none of the witness has stated about the type of harassment.

21. When the case is based only on dying declaration, then it must inspire confidence as to make it safe to act upon. Whether it is safe to act upon depends upon not only the testimony of the person recording the dying declaration, the evidence and the material available on record must be properly weighed in each case to arrive at a proper conclusion. It is also necessary that the court

must satisfy himself about the person making the dying declaration was conscious and fit to make the statement, therefore, the medical evidence is also required to be taken into consideration. It appears that though the doctor has stated that she was fit to give the statement, whether she was well oriented is not mentioned by the doctor.

22. The learned counsel for the appellants relied on the judgment of the Hon'ble Apex Court in the case of **Sampat Babso Kale and another .vs. State of Maharashtra, (2019) 4 SCC 739**, held thus :

“On perusal of entire evidence and the law on the subject, held, the trial court was right in holding that the prosecution had failed to prove its case beyond reasonable doubt – The judgment of the High Court is set aside – Acquittal restored – Evidence Act, 1872 – S. 32 (1) – Dying declaration – Reliability – Corroboration when necessary – Doubt as to whether victim was in a fit state of mind to make the statement.”

So far as the law on the point of medical fitness is concerned, there is no dispute. It is not necessary that a dying declaration must have support of a certificate of fitness issued by the Doctor. The only requirement of law is that a person who records the statement must be satisfied that deceased is in fit state of mind to make a statement and certificate of Doctor is only a rule of caution.

23. The learned counsel for the appellants has also relied on the judgments in the case of **Ajay .vs. State of Maharashtra, 2020 SCC Online Bom. 783**, wherein the court has rejected the evidence of dying declaration. In this context if we consider the evidence of PW-1 Gunwant and also dying declaration, we find that PW-1 did not put any question to deceased to ascertain her state of mind to make the declaration. There is nothing on record even the certificate of Doctor about her state of mind. Therefore, such a declaration cannot be relied upon and it would be risky for this court to give any credence to a dying declaration. The evidence in nature of dying declaration is rejected by us. On the same point the accused relied on judgment of **Laxman .vs. State of Maharashtra, (2002) 6 SCC 710**.

24. The facts discussed above would create reasonable doubt about the truthfulness of the dying declaration at Exh.44. It makes the doubt about the mental and physical fitness of deceased Suvarna to make the statement. According to PW-7 Dr. Sunil Deshmukh, her condition was examined before and after recording the dying declaration and during the course of recording of dying declaration, the doctor was also present. It is not mentioned in dying declaration, whether it is based on thumb impression or toe impression.

25. The accused no.1 had received the burn injuries. The spot panchanama shows that the burnt half wet quilt was found which proves that he tried to save her by pouring water. The burn injuries were caused as he tried to save her. Therefore, the dying declaration which was received after 24 hours of its recording and the crime was registered after the delay of near about 12 hours creates doubt. The learned counsel for accused argued that the accused no.1 received burn injury and he has explained it in his statement under Section 313 of the Code of Criminal Procedure that while extinguishing fire he received it. He relied on the judgment of this Court in the case of **Hemant Kawadu Chauriwal .vs. State of Maharashtra, through PSO Police Station Ghatanji, Tahsil-Ghatanji, District-Yavatmal, 2012 SCC OnLine Bom. 868**, in support of his argument that the explanation in his statement under Section 313 of the Code of Criminal Procedure is probable.

26. All these discrepancies, in our view, would be sufficient to push the dying declaration at Exh.44 into manner of doubt and therefore no reliance could be placed upon this dying declaration recorded by Tahsildar PW-2. It cannot be said that the prosecution has proved its dying declaration to be made voluntarily, truthfully by deceased Suvarna and beyond reasonable doubt. Such inconsistent and discrepant evidence of material prosecution witnesses cannot

be accepted to be of trustworthy nature and it creates doubt about being told by deceased Suvarna that she was ablaze by her husband and brother-in-law. These doubt could have been clear by the prosecution, had the prosecution examined the neighbours and the mother of the deceased. The cumulative result of the consideration of the evidence of all the prosecution witnesses and important lacuna in prosecution case would be the failure of prosecution to bring home the appellants guilt for the offence of murder punishable under Section 302 r/w 34 of the Indian Penal Code beyond reasonable doubt.

27. This prosecution evidence does not rule out the possibility of deceased Suvarna committing an act of self immolation in a fit of anger. Disagreeing with the submissions of the learned Additional Public Prosecutor for the respondent-State and accepting the contentions of the learned counsel for the appellants, we are of the view that the appellants deserve to be acquitted of the offence of murder punishable under Section 302 r/w 34 of the Indian Penal Code by holding that the prosecution has failed to prove beyond reasonable doubt the offence of murder with which the appellants have been charged. The impugned judgment and order therefore cannot be sustained in eyes of law and thus appeal deserves to be allowed. Hence we pass the following order :

O R D E R

- (1) Criminal Appeal is allowed.
- (2) The conviction of the appellants under Section 302 r/w 34 of the Indian Penal Code by the learned Sessions Judge, Akola delivered on 24/02/2022 in Sessions Case No.31/2013 is quashed and set aside. They are acquitted of the said charge.
- (3) Fine amount, if any, deposited by accused, be refunded to them after appeal period.
- (4) They be set free if their custody is not required in any other matter. Muddemal property be dealt with as directed by the learned Sessions Judge, after appeal period is over.

(Mrs. Vrushali V. Joshi, J.)

(Vinay Joshi, J.)

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