

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

CRIMINAL APPEAL NO. 409 OF 2021

Santosh s/o Madhukar Kuralkar
aged about 46 years, Occupation –
Labour, R/o Madhapuri, Tq. Murtizapur,
Distt. Akola.

... **APPELLANT**

VERSUS

State of Maharashtra,
through P.S.O. Mana,
Tq. Murtizapur, Distt. Akola.

... **RESPONDENT**

Shri A.S. Londhe, Advocate for the appellant.
Shri I.J. Damle, A.P.P. for respondent/State.

CORAM : VINAY JOSHI, J.

DATE WHEN THE ARGUMENTS WERE HEARD : 29/10/2021

DATE WHEN THE JUDGMENT IS PRONOUNCED : 07/01/2022

JUDGMENT :

1. The present appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Akola dated 08.09.2021 by which the appellant is convicted for the offence

punishable under section 304 of the Indian Penal Code and directed to suffer rigorous imprisonment for a term of ten years along with fine of Rs.5,000/-. Though the appellant was charged for the offence punishable under Section 302 and 498-A of the Indian Penal Code, the Trial Court instead of Section 302, held appellant guilty for the offence punishable under Section 304 of the Indian Penal Code and passed aforesaid mentioned sentence. The appellant was acquitted by the Trial Court for the offence punishable under Section 498-A of the Indian Penal Code.

2. The respondent/State has not challenged the appellant's acquittal for the offence punishable under Sections 302 and 498-A of the Indian Penal Code. During trial, the Appellant was in jail.

3. The prosecution case in nut-shell is that the appellant got married with deceased Rekha and they had two issues from said wedlock. On 19.03.2015, in the afternoon, Rekha sustained burn injuries, hence she was admitted to the Irvin Hospital, Amravati. While she was taken to the Hospital, she made an oral dying declaration regarding cause of burns. While Rekha (deceased) was in the Hospital, her written dying declaration has been recorded by the Police Officer

under the supervision of the Medical Officer. In her statement, Rekha disclosed that, due to quarrel, appellant/accused poured kerosene at her person and set her on fire. On the basis of said written dying declaration, the Police have initially registered a crime No.25 of 2015 for the offence punishable under Section 307 of the Indian Penal Code. On the same day, i.e. on 19.03.2015, in the evening, Rekha succumbed to 95 percent burnt injuries, therefore, Section 302 of the Indian Penal Code, has been added.

4. It emerges from the charge-sheet that on 18.03.2015, there was a quarrel between the couple on the point of appellant's liquor addiction. On the following day, i.e. on 19.03.2015 in the afternoon, the appellant (accused) again consumed liquor and picked up quarrel with his wife – Rekha. At that time, Rekha advised him to quit his addiction on which accused poured kerosene from the stove at her person and set her ablaze with the aid of matchstick. The accused as well as neighboring persons extinguished fire and shifted Rekha to the Irvin Hospital, Amravati, Rekha sustained 95 percent burnt injuries. While Rekha was being taken to the Hospital, she made an oral dying declaration to several persons including her brother. While Rekha was in the Irvin Hospital, her statement came to be recorded by the Police

Officer around 6.00 pm. In said statement, she disclosed that accused had set her on fire. Then around 7.30 pm, Rekha succumbed to the burnt injuries.

5. On the basis of registration of crime, the Police commenced the investigation. Panchanama of the scene of offence was carried out. Post Mortem report was collected. Several articles were seized under the Panchanama. Samples were collected and sent for chemical analysis. After completion of investigation, final report has been submitted to the Court of concerned Magistrate. The Trial Court framed charges vide Exhibit 4. Since the accused denied the guilt, the prosecution endeavoured into examining as many as 11 witnesses to establish the guilt. The prosecution heavily relied on the written dying declaration (Exhibit 26) and some other documents. The witnesses to whom the oral dying declaration was made, have not supported the prosecution case. Solely relying on the written dying declaration (Exhibit 26), the Trial Court has convicted the accused. However, the Trial Court observed that the incident was without premeditation and was committed in the heat of passion upon sudden quarrel. The Trial Court held that the incident is covered under exception 4 of Section 300 of the Indian Penal Code, and accordingly convicted the accused

for the offence punishable under Section 304 of the Indian Penal Code.

6. Heard Learned Counsel shri A.S. Londe appearing for appellant/accused and learned A.P.P appearing for respondent-State. Perused the reported judgments cited by learned Counsel appearing for the accused. It is primely argued that the Trial Court manifestly erred in basing conviction solely on the written dying declaration. The Trial Court failed to consider that the witnesses have not supported the prosecution case as regards to three oral dying declarations. It is argued that the deceased Rekha was admitted in the Hospital under precarious condition. She was not in a position to give a statement. The dying declaration (Exhibit 26) is highly suspicious as it does not bear proper endorsement of the Medical Officer. It is argued that the entire medical case papers were not produced before the Court. The Medical Officer's endorsement about fitness of Rekha does not specify about her mental fitness to give a statement. It is extremely doubtful whether the deceased gave the statement regarding cause of death and therefore, conviction is unsustainable in the eyes of law.

7. On the other hand, learned A.P.P has strongly supported the impugned judgment and order of conviction. According to the

learned A.P.P, the appeal has no merit and is required to be dismissed. According to him, the Trial Court has rightly relied on the dying declaration (Exhibit 26) of deceased Rekha. He would submit that there is no rule of law that conviction cannot be based on dying declaration. He would submit that the recorder of dying declaration has satisfied about mental fitness of the deponent, therefore, dying declaration being a credible piece of evidence, conviction is proper.

8. The prosecution has examined in all 11 witnesses, however, the conviction was based solely on the written dying declaration (Exhibit 26). Though there were three oral dying declarations, however, the witnesses did not supported to the said evidence. In the circumstances, it is necessary to carefully examine the evidence on the point of written dying declaration, which is decisive factor.

9. Learned Counsel appearing for the appellant-accused argued that, it is highly risky to convict the accused solely on the basis of dying declaration. He would submit that the maker of dying declaration was not in a position to give a statement. The evidence of the recorder and Medical Officer is not acceptable. To substantiate said

contention, he placed reliance on the decisions in cases of *Ajay s/o Hiranman Katore vs. State of Maharashtra 2017 CJ (Bom) 781*, *Vasanta Shrawan Gajbhiye vs. State of Maharashtra 2007 CJ (Bom) 1638*, *Surinder Kumar vs. State of Haryana 2011 CJ (SC) 163*, *Latabai Dinkar Sonawane vs. State of Maharashtra 2014 CJ (Bom) 2407*, *Mahesh Vasant Salunke vs. State of Maharashtra 2014 CJ (Bom) 1171*, *Vilas @ Bandu Punjabrao Misal vs. State of Maharashtra 2015 CJ (Bom) 3183* and *Prakash Bhau Soude and ors vs State of Maharashtra 2016 CJ (Bom) 1012*.

10. The basic principle which can be culled out from the above decisions is that, since the maker of dying declaration is not available to test the veracity, the Court shall be extremely cautious while appreciating the evidence of dying declaration. In these cases, on the different facts, it was held that the prosecution has failed to secure conviction on the basis of dying declaration. These decision were based on the then facts. The facts and evidence of the present case has to be independently assessed on the set parameters.

11. It is settled law that a conviction can be secured on the basis of dying declaration alone, provided that the Court finds the

dying declaration to be wholly reliable. Moreover, the Court shall find that dying declaration is absolutely free from any suspicious circumstances. The Supreme Court in case of ***Paniben Vs. State of Gujarat (1992) 2 SCC 474*** has summarized the law on dying declaration, which reads as below :

“18. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of M.P) (1976) 3 SCC 104.*
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P v. Ram Sagar Yadav, AIR 1985 SC 416; Ramawati Devi v. State of Bihar, AIR 1983 SC 164).*
- (iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring,*

prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramchandra Reddy v. Public Prosecutor, AIR 1976 SC 1994.

- (iv) *Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, [1974] 4 SCC 264).*
- (v) *Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P., AIR 1982 SC 1021).*
- (vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P (1981) 2 SCC 654).*
- (vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu AIR 1981 SC 617).*
- (viii) *Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar AIR 1979 SC 1505).*
- (ix) *Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P AIR 1988 SC 912).*
- (x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State U.P v. Madan Mohan, AIR 1989 SC 1519)."*

Likewise one may refer to the decisions of the Supreme

Court in case of *Laxman vs. State of Maharashtra AIR 2002 SCC 2973* which lays the parameters under which the dying declaration is to be assessed. Precisely, it rules that a great caution must be exercised in considering the weight to be given to the dying declaration. The Court has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court also must decide that the deceased was in fact in a fit state of mind and had the opportunity to observe the things. The Supreme Court further held that there is no necessity of law that a dying declaration must be made to the Magistrate and there is no specified statutory form for such a recording.

12. Resultantly, all evidential value or weight to be attached to the dying declaration necessarily depends upon the facts and circumstances of each particular case. The essence is that the person who records a dying declaration, must be satisfied that the deceased was in a fit state of mind. Keeping in view the aforesaid settled legal position, the relevant evidence has to be assessed. The prosecution is relying on the written dying declaration (Exhibit 26) given by patient Rekha while she was under treatment.

13. In order to establish written dying declaration (Exhibit 26), the prosecution has led evidence of PW4 Police Officer

Kantaprasad Mishra and PW10 Dr. Pankaj Diwane, who has certified the fitness of patient at the time of giving her statement. It is the evidence of the PW4 Police Officer that, on 19.03.2015 he was directed by the Police Inspector to record the statement of burnt patient. Accordingly, he went to the Irvin Hospital, Amravati and met the Medical Officer with a requisition letter. The Medical Officer has examined the patient and gave endorsement on requisition (Exhibit 25) that the patient is fit for giving a statement. Thereafter, he has inquired with the patient about her name and the cause for sustaining burns. The victim stated that her husband quarreled with her on 18.03.2015 as well as on 19.03.2015 under the influence of liquor. She advice him to quit the liquor habit on which her husband (accused) poured kerosene at her person and set her ablaze. She stated that thereafter, the people gathered and shifted her in the Irvin Hospital. The PW4 Kantaprasad Mishra - recorder of dying declaration has identified the statement along with his own signature and left hand thumb impression of the patient. So also, he has identified the endorsement and signature of the Medical Officer on said statement (Exhibit 26).

14. Contextually, I have gone through the evidence of PW10 Dr. Pankaj Diwane, who has examined the patient at relevant time. It is his evidence that on 19.03.2015, he received requisition letter (Exhibit

25) from the Police, on which he examined the patient (Rekha) admitted in Ward No.4 and found that her condition though serious, but she was conscious. He had a conversation with the patient, checked her Blood Pressure and found that her medical parameters were good. Accordingly, he gave endorsement that the patient was in a fit condition to give a statement. He has identified his signature on requisition letter (Exhibit 25) along with his endorsement. It is his specific evidence that he gave endorsement about the fitness of patient to the recorder of a statement. He has identified his endorsement and signature on dying declaration (Exhibit 26). The witness added that the statement was recorded in his presence and during the statement, the patient was well oriented and conscious.

15. The evidence of dying declaration is mainly challenged on the ground that the patient was not in a fit mental condition to give a statement. In this regard, my attention is invited to the evidence of PW6 Surendra Dhoke, A.S.I. who on the very day, around 3.15 pm, went to the Hospital with requisition letter (Exhibit 36). It is his evidence that on examination, the Medical Officer gave an endorsement that patient was not in a fit condition to give statement, therefore, the statement was not recorded. It is argued that the victim was admitted in the Hospital around 12.00 noon on 19.03.2015 and

was found unfit to give a statement around 3.15 pm. On such a background, it is canvassed that the patient who died on the very day about 7.15 pm, was not at all in a fit mental condition to give a statement therefore, dying declaration (Exhibit 26) allegedly recorded around 6.00 pm, is quite suspicious. It is argued that the medical case papers of the Hospital have not been produced to show the condition of patient and the treatment given. Moreover, it is argued that the patient sustained extensive 95 percent burnt including her both hands and therefore, it is quite impossible to obtain her thumb impression on the dying declaration (Exhibit 26).

16. As noted above, recorder's satisfaction about mental fitness of a patient, is a prime consideration. Merely because the patient sustained 95 percent burnt, it cannot be *ipso facto* presumed that she was not in a fit mental condition to give statement. Always it depends upon the facts and circumstances of each case. Some time, the percentage of burns may be less, still the patient may not be in the position to give statement. Whilst in some cases despite extensive burns, the patient may be in oriental stage and would give a statement. Therefore, it is quite necessary to scan the evidence of the recorder to satisfy judicial mind whether at the time of giving statement, the patient was conscious and in fit mental condition to give a statement.

PW4 Kantraprasad Mishra - recorder has stated that after obtaining initial endorsement of the Medical Officer on requisition letter (Exhibit 25), he himself has inquired with the patient about her name and cause of burn. It has come in his evidence that after recording the statement, he had obtained left hand thumb impression of the patient, on the statement. Pertinent to note that, it has come during his cross-examination that he has personally verified that the patient was in a position to give a statement. He explained that he has inquired with the patient about her name and the incident. Thus, the answers given in cross-examination fortifies the prosecution case that the recorder of dying declaration has personally got satisfied himself about mental fitness of patient by putting preliminary questions. Notably, during the cross-examination, there is no denial that the patient has narrated about the cause of burns, that her husband poured kerosene at her person and set her ablaze.

17. True, the dying declaration is recorded by the Police Officer, however, as observed by the Supreme Court in case of ***Laxman*** (*referred supra*) it is not a legal requirement that dying declaration must be recorded by the Executive Magistrate. Always it depends upon the facts and circumstances of each case. Certainly, when the dying declaration is recorded by the Police Officer, the Court must be on

guard while appreciating his evidence. It emerges from prosecution case rather it is undisputed that on 19.03.2015, the patient was admitted in the Hospital about 12.00 noon and died on the same day around 7.15 pm meaning thereby, it was a very short span and therefore, there was no sufficient time to summon Executive Magistrate to record the statement. Having regard to said special feature, one cannot doubt the dying declaration only on the premise that it has been recorded by the Police Officer.

18. Coming to the evidence of Medical Officer PW10, he deposed that on receipt of requisition letter (Exhibit 25) he has examined the patient and found that she was conscious, he has checked her Blood Pressure and noted that her medical parameters were good. Hence, he gave an endorsement to that effect. It is his specific evidence that patient's statement was recorded in his presence and during the statement she was well oriented and conscious. Thus, there is dual assurance from the evidence of PW4 Police officer and PW10 Medical Officer about mental fitness of the patient. Perusal of dying declaration (Exhibit 26) indicates that it bears endorsement of Medical Officer that statement is recorded in his presence. True, there is no specific endorsement on the statement that the patient was throughout conscious, however, the same has been stated by the Medical Officer in

his evidence. In case of *Laxman (referred supra)*, the Supreme Court expressed that even absence of certificate of the Doctor as to the fitness of patient would not render dying declaration unacceptable. Thus, the accused cannot muster any benefit from the cryptic endorsement given by the Doctor on dying declaration. The evidence of both recorder of dying declaration and Medical Officer is consistent on the point that the deceased was in a fit and conscious state to make declaration. Particularly, recorder of dying declaration has explained in the cross-examination that by putting preliminary questions, he assured about the consciousness of patient while recording her statement.

19. It is argued that since the deceased sustained 95 percent extensive burns injuries, it is impossible to obtain her thumb impression on dying declaration. In this regard, learned Counsel for the appellant took me through the Post Mortem notes (Exhibit 38) coupled with inquest panchanama to impress that there were extensive burns at both hands of the deceased. The inquest panchanama contains description of the dead body including both hands of the deceased. It reveals that both hands of the deceased were burnt. There was a white bandage on the right hand till arms whereas further part of upper right limb was burnt till the fingers and there was peeling of the skin. However, while describing the position of left hand it is stated that there was white

bandage till the wrist of the left hand and the fingers were also seen to be burned. Though left hand fingers were seem to be burned, however, it does not specify that the skin of the fingers was peeled like right hand. Pertinent to note that in Column No. 17 of the Post Mortem report (Exhibit 38) percentage of burnt injuries was given with specific reference that there was ink on left thumb. The said specific circumstance accentuates the evidence of the recorder of dying declaration that, he has obtained left hand thumb impression on dying declaration.

20. Learned Counsel for the appellant has submitted that in concern incident the appellant has also sustained minor burn injuries at his hands. He endeavored to impress that since it was a case of accidental burnt, the appellant tried to save his wife in which he sustained burnt injuries. It is not disputed that the appellant has sustained minor burnt injuries at his hands. There are various possibilities about sustaining burnt injuries. The accused may got frightened after setting her wife on fire and then tried to extinguish the same. On the canvass of convincing evidence on dying declaration, the said possibility strongly surfaced about sustaining burnt injuries by the appellant. However, on that basis, only the defence cannot be stated to be established. Therefore, I am not impress by the said submission for

the benefit of the accused.

21. The testimony of PW4 Police Officer, who recorded dying declaration proves that the declarant was fit to make the statement. The Medical Officer has also supported the said evidence. Ultimately, the test is about personal satisfaction of the recorder regarding mental fitness of the patient. It is evident from the evidence of these two witnesses that the deceased was mentally fit to give the statement, at relevant time. The statement was voluntarily made and it was truthful version. Merely, on the basis of conjunctures and surmises, the statement of a dying man cannot be thrown out. No specific material is brought on record to impeach the credible evidence of these two witnesses. Therefore, on careful examination of entire material, I find that the evidence is convincing and satisfactory about the truthfulness of the dying declaration.

22. As per the dying declaration, the accused has poured kerosene on the person of the deceased and set her ablaze. The Trial Court has considered the other circumstances while holding that the incident was without premeditation and outcome of sudden quarrel and therefore, it amounts to culpable homicide not amounting to murder. The finding recorded by the Trial Court is consistent with the evidence recorded during the Trial. The defence raised by the accused

about accidental burn, is improbable. Therefore, I have no hesitation to hold that the prosecution has duly established that the accused has poured kerosene on the person of the deceased and set her ablaze amounting to offence punishable under Section 304 of the Indian Penal Code.

23. The accused was arrested on 06.04.2015 and till date he is in jail. The offence of culpable homicide not amounting to murder is punishable with imprisonment for life, or imprisonment of either description for a term which may extend to 10 years along with a fine. The Trial Court while hearing the accused on the point of sentence, noted that the accused has two daughters and he has to take care of them in absence of their mother. The legislature has not provided minimum sentence for the offence punishable under Section 304 of the Indian Penal Code meaning thereby the judicial discretion is left with the Courts to pass appropriate sentence depending upon the facts and circumstances of the case. The accused is in jail for more than 6 years and 7 months. Ill-fated two minor daughters have already lose their mother and the father is in jail since long. The incident was the outcome of a sudden domestic quarrel. Having regard to the peculiar facts of this case, term of 8 years of imprisonment would meet the ends of justice. The Appellate Court is invested with the powers under

Section 386(b)(iii) of the Code of Criminal Procedure to alter the extent of sentence without altering the finding of guilt.

24. In view of the above, I concur with the finding of guilt recorded by the Trial Court, however, inclined to allow the appeal only to the extent of modification of sentence as stated above. In view of that, following order is passed :

(a) Criminal Appeal stands partly allowed.

(b) The appellant's conviction for the offence punishable under Section 304 of the Indian Penal Code is maintained. Instead of 10 years of imprisonment, the appellant (accused) is directed to suffer rigorous imprisonment for 8 years along with a fine of Rs.5,000/-, in default, to suffer simple imprisonment for 15 days.

(c) The impugned judgment and order dated 08.09.2021 is modified in above terms.

(d) Muddemal Property be dealt with in accordance with law.

25. The appeal stands disposed of in above terms.

(VINAY JOSHI, J.)