



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 404 OF 2019

Ganpati S/o. Sukhdev Kadam,
Age : 27 years, Occu. Labour,
Resident of Satala,
Taluka Ahmedpur,
Ahmedpur, Dist. Latur,
Maharashtra
(Presently lodged at Nashik
Central Jail, Nashik)

... Appellant
(Orig. Accused)

Versus

1. The State of Maharashtra,
Through, the Police Inspector,
Kingaon Police Station,
Latur, Taluka & District : Latur,
2. Kalindibai Apparao Jagtap,
Age : Major, Occ. : Nil,
R/o. Gotala, Tal. Ahmedpur, Dist. Latur.

... Respondents

...
Mr. Abhaykumar D. Ostwal a/w Mr. S. B. Madde, Advocates for Appellant.
Mrs. V. S. Choudhari, APP for Respondent - State.
...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 15th DECEMBER, 2023

PRONOUNCED ON : 22nd DECEMBER, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Appellant/convict is hereby taking exception to the judgment and order of conviction passed by learned Additional Sessions Judge, Ahmedpur, dated 11.10.2018, convicting

appellant for offence under section 302 of Indian Penal Code (IPC) and sentencing him to suffer imprisonment for life.

2. In brief, it is the case of prosecution that, deceased Varsha while taking treatment for burns at civil hospital, Latur, gave a dying declaration that, on 26.03.2015, her husband returned home around 4:00 p.m. in drunken condition and questioned her for talking with the villagers and thereafter, poured kerosene and incinerated her.

On above dying declaration, crime was registered, initially for offence under sections 307, 504, 506 of IPC. While undergoing treatment, deceased succumbed to the 55% burns, and therefore, crime was converted to section 302 and 498-A of IPC, and was thereby tried by learned Additional Sessions Judge, recording guilt for offence under section 302 of IPC. Hence, the appeal.

SUBMISSIONS

Appellant :

3. Learned counsel for appellant would brief us about the status of prosecution witnesses and would submit that, case is entirely based on dying declaration. There are two dying declarations. However, according to him, the same are not

inspiring confidence as firstly, according to him, there is inordinate delay in recording dying declarations. According to him, alleged occurrence is of 26.03.2015, but dying declaration is recorded on 01.04.2015, and therefore, when she was surrounded by her relatives, there is more possibility of tutoring. He laid stress on the very motive behind the incident as according to him, there is no evidence in that direction. He pointed out that, though mother and maternal uncle are examined and they claimed deceased to have made oral dying declaration before them, it is pointed out that, there is no complaint by any of them and Investigating Officer has admitted to that extent. He further submitted that, deceased had suffered extensive burns including her face and neck and therefore, he would thus submit that, it is doubtful whether she was in condition at all to give dying declaration.

He invited our attention to the cross of PW10 Police Head Constable Gangadhar Gudle and would submit that, when this witness answered in cross that entire body was in bandaged condition including hands, then he poses question as to how deceased could put signature. All such circumstances about recording dying declaration being suspicious in nature, it is his submission that, charge was not proved beyond reasonable doubt and would conclude by submitting that there is improper

appreciation of evidence as well as law and so he prays to allow the appeal by setting aside the judgment under challenge.

Prosecution :

4. In answer to above, learned APP would submit that both dying declarations are consistent. Role of husband is reflected in both dying declarations. He is responsible for the homicidal burns. Dying declarations are inspiring confidence and therefore, she submits that no fault can be found in the appreciation of evidence in the judgment under challenge.

5. While exercising powers under section 374 of the Code of Criminal Procedure (Cr.P.C.), we are called upon to re-appreciate, re-analyze, re-evaluate and re-examine the entire evidence on record. Here, case is based on dying declarations at Exhs.46 and 57.

6. Admittedly, case is entirely based on dying declarations and therefore before adverting to the merits of the dying declaration, we wish to give a brief account of the settled legal position regarding evidentiary value of dying declaration and manner of its appreciation as well as settled principles which are culled out by the Hon'ble Apex Court from the various landmark

cases like *Khushal Rao v. State of Bombay*; AIR 1958 SC 22, *Paniben v. State of Gujarat*; (1992) 2 SCC 774, *Laxman v. State of Maharashtra*; (2002) 6 SCC 710, *Ganpat Bakaramji Lad v. State of Maharashtra*; 2011 ALL MR Cri. 2249. *Surendrakumar v. State of Punjab*; (2012) 12 SCC 120, *Jagbir Singh v. State (NCT of Delhi)*; (2019) 8 SCC 779, *Madan v. State of Maharashtra*; (2019) 13 SCC 464.

Off late in the case of State of *Uttar Pradesh v. Veerapal and another*; (2022) 4 SCC 741 while deciding Criminal Appeal No.34 of 2022 on 01-02-2022, the Hon'ble Apex Court has reiterated the principles to be borne in mind while analyzing and accepting dying declaration. The settled principles are as under:

- “1. *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. *Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;*
3. *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. *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. *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. *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.”*

Similarly, in the case of ***Uttam v. State of Maharashtra;*** (2022) 8 SCC 576, again certain principles are enunciated which are to be borne in mind in a case wherein the evidence is in the form of dying declaration. These principles are as under :

“(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) The Supreme 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.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(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.

(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.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.”

Very recently certain principles of law with regard to cases involving multiple dying declarations are spelt out in the case of ***Abhishek Sharma v. State (Govt. of NCT of Delhi)*** [Criminal Appeal No.1473 of 2011, decided on 18-10-2023]. Those principles read thus :

- “9.1 The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind;*
- 9.2 All dying declarations should be consistent. In other words, inconsistencies between such statements should be ‘material’ for its credibility to be shaken;*
- 9.3 When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purpose of corroboration of the contents of dying declarations.*
- 9.4 The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances.*
- 9.5 Each declaration must be scrutinized on its own merits. The court has to examine upon which of the statements reliance can be placed in order for the case to proceed further.*
- 9.6 When there are inconsistencies, the statement that has been*

recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicion.

9.7 In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc.”

The ratio is thus settled that dying declaration must be firstly voluntary, truthful and secondly it should not be tutored and further the same should inspire the confidence of the Court. These are the basic principles which are to be borne in mind while appreciating dying declarations.

7. Let us first deal with both the dying declarations and for proper comprehension, both being in vernacular, we propose to reproduce the translated version of both dying declarations which are as under :-

First Dying Declaration

EXHIBIT 57

Date : 1-4-2015.

STATEMENT

I, Varsha Ganpati Kadam, aged 18 years, Occ. Labourer, Resi. Satala [Dhanora] Tq. Ahmadpur, Dist. Latur, do hereby state in person in the burn ward of the Civil Hospital, Latur that, I am the resident of the above village and my marriage took place three years ago with Ganapati, son of Sukhdev Kadam of Satala. I had begotten a deceased son from him. I have learnt upto 9th standard. All of us reside besides of each other. I and my husband reside in two

rooms. My brother Gajanan Sukhdev Kadam and his wife Kalpana reside separately from us. I and my husband reside jointly and my mother-in-law resides with my brother-in-law Gajanan. My husband Ganapati Sukhdev Kadam was abusing and threatening me often of taking my life over petty reasons under influence of liquor.

On 26-3-2015 at about 4.00 PM when I was at home, my husband Ganapati Sukhdev Kadam came home drunken and started quarelling me saying why I talk with the villagers? I will take your life and poured kerosene from the white can in the house and set me ablaze with a burning matchstick and as I started burning and shouting, my mother-in-law Gayabai, brother-in-law Gajanan and co-sister Kalpana came and have doused the fire caught by my body with water. I have received burn injuries on my hands, chest, stomach, face, buttocks and neck. I was taken, at first, to Civil Hospital, Ahmadpur for treatment and then I have been admitted at 12.00 o'clock in the night in the Civil Hospital, Latur on 27-3-2015. I have been treated in the burn ward at the Civil Hospital, Latur and I am fully conscious and making statement.

Hence, on 26-3-2015, when I was at home at 4.00 in the evening, my husband have attempted to take my life by saying, "I will not let you alive!" and setting me ablaze with a burning matchstick by pouring kerosene from a white can in the house. A legal action be taken against him.

My statement has been read-over to me and admittedly true and correct.

Signed/-
Varsha Ganpat Kadam.

BEFORE,
Signed/-
Investigating Officer,
Police Station, Gandhi Chowk
under the Civil Hospital, Latur.

1-4-2015
8-45 PM

I have examined this patient and found that she is conscious, well-oriented to time, place and person at end of the record of statement.

Signature/-
Dr. Noman Khan,

Received-
Police Station Diary Entry No. 93/2015
Entry No. 3

Time: 00.30 hrs.

Crime No.: 17/2015 u/s 307, 504, 506 of IPC has been registered and investigation have been taken up by me as per the order of the Assistant Police Inspector.

Signed/- SHO, Kingaon PS.

SC No. 15/2015 proved
by PW 10. Signed/- ASJ.

Second Dying Declaration

EXHIBIT 46
SESSIONS CASE NO. 15/2015
PW.NO. 7 PROVED
SIGNED/-
ASJ

This is to certify after complete medical examination that, Smt. Varsha Ganpat Kadam, aged 18 years, R/o Satala [Dhanora] Tq. Ahmadpur is completely conscious and fit for making statement.

Time: 9.30 AM

Dated 1-4-2015

*Signature with name of the Medical Officer
[Dr. Noman Khan]*

DYING DECLARATION

1. What is your full name?

Ans: Varsha Ganapati Kadam

2. What is your age?

Ans: 18 years.

3. Where do you live?

Ans. R/o Satala [D] Tq. Ahmadpur.

4. Are you married? If yes, when?

Ans. Yes; three years ago.

5. What is name of your husband?

Ans. Ganapati Kadam.

6. What do your husband do?

Ans. Some work.

7. How many children you have?

Ans. Nil

8. *Why you have been brought to the Hospital?*

Ans. Due to burning.

9. *When did the incident take place?*

Ans. On 26-3-2015 at 4.00 PM

10. *How did the incident happen?*

Ans. My husband returned home drunken and started quarelling me saying why I talk with the villagers? I will take your life and poured kerosene from the white can in the house and set be ablaze with a burning matchstick. Therefore, I have received burn injuries.

11. *Whether you had any quarrel prior to the incident?*

Ans. With my husband.

12. *Who were present at the time of incident?*

Ans. Only both of us were present.

13. *Can you identify the person responsible for the incident?*

Ans. Yes, my husband.

14. *If you can't identify the person, can you describe?*

Ans. Out of question.

15. *Who has brought you to the hospital?*

Ans. My mother-in-law and brother-in-law.

16. *Who has visited you in the hospital?*

Ans. My relatives.

17. *Whether they have instructed you?*

Ans. No.

18. *What is your education?*

Ans. Upto 9th standard.

19. *Can you make signature?*

Ans. Yes.

20. *Do you want to state anything further?*

Ans. Action be taken against my husband.

Signed/-

Varsha Ganpat Kadam.

I have put the questions personally and have recorded the statement and have read-over to Varsha and asked her to sign the same when admitted to be correct by her.

Signed/- 1-4-2015

SAUDAGAR TANDALE

Nb. Tehsildar cum Executive Magistrate,
LATUR

This is to certify that, I was present at the time of recording of statement and Smt. Varsha Ganpati Kadam was fully conscious and fit to make statement.

Time: 10.00 PM

Date: 1-4-2015

Medical Officer
Dr. Noman Khan.

(As translated by Senior Translator, High Court at Aurangabad)

ANALYSIS

8. On carefully analyzing both dying declarations, it is emerging that, occurrence has admittedly taken place on 26.03.2015 at around 4:00 PM. In both dying declarations, she has stated that husband came home drunk and questioned her for talking with villagers and thereafter ignited her. It is also emerging that, after incident even when she was taken to three hospitals, no dying declaration was recorded till night of 01.04.2015. It has also come in evidence of Investigating Officer that, initially deceased was taken to PHC Satla, thereafter referred to Ahmedpur and finally brought and admitted at civil hospital Latur and dying declarations relied by prosecution are of 01.04.2015. Therefore, as pointed out by learned Counsel, there is delay of almost a week in recording dying declarations. There is no explanation from prosecution for not recording dying declaration promptly at PHC, Satla or at Rural Hospital, Ahmedpur and even immediately upon

her admission at civil hospital Latur.

9. Evidence of mother and maternal uncle shows that they and other relatives had rushed to the hospital same day. Therefore, here, as pointed out, there is huge possibility of tutoring. Consequently, very aspect of voluntariness and truthfulness comes under shadow of doubt. Even medical papers of none of the above hospitals are gathered by Investigating machinery or prosecution, wherein actual history would have come. Here, appellant has also allegedly suffered burns to his hands.

10. The doctor, who examined and issued fitness certificate has deposed about victim being brought to the hospital on 26.03.2015, but he shockingly seems to have not reported her admission to police authorities i.e. police chowky located in the very civil hospital i.e. by issuing MLC upto 31.03.2015. The diligence and promptness required in a burn case has not been apparently shown either by medical authorities or police authorities. In cases of dying declaration, it is to be carefully tested whether the dying declaration is voluntary one or not. It is the duty of prosecution to show that possibility of tutoring has been completely ruled out, but above discussed material does not show the same as the relatives of the deceased are in her company since day one till recording of dying declaration after almost a week after

the occurrence.

11. Another distinct feature that is noticed is that though mother and maternal uncle claimed to have rushed to the hospital and have further claimed to have interacted with deceased, during which she allegedly gave oral dying declaration naming her husband, but none of them has promptly lodged FIR and Investigating Officer also admits to that extent in his cross.

12. Consequently, here, we have noticed that there is inordinate delay in recording dying declarations. Relatives being very much around deceased, there is larger possibility of she being tutored to name husband. Even when they were in the witness box, they are found to be silent about what deceased stated in the dying declaration regarding her husband questioning her for talking with villagers. Even deceased in her dying declaration is found to be silent regarding trouble by him to her for asserting share in the property of her parents as deposed by her mother (PW3 Kalindi).

For such reasons, dying declarations fail to inspire confidence and cannot be the sole basis of conviction.

13. After going through the impugned judgment and on rejudging the evidence on record, apparently, above aspects noticed by us seem to have been lost sight of by the learned trial Judge.

Hence, the findings and the conclusion reached at by the learned trial Judge, being erroneous, interference is called for.

Hence, we proceed to pass following order :-

ORDER

- I) The appeal stands allowed.
- II) The conviction awarded to the appellant – Ganpati S/o. Sukhdev Kadam in Sessions Case No.15 of 2015 by learned Additional Sessions Judge, Ahmedpur, District Latur on 11.10.2018 for the offence punishable under Section 302 of Indian Penal Code stands quashed and set aside.
- III) The appellant – Ganpati S/o Sukhdev Kadam stands acquitted of the offence punishable under Section 302 of Indian Penal Code.
- IV) He be set at liberty, if not required in any other case.
- V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.
- VI) We clarify that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)