

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 27 OF 2016

Dilip S/o Sukhdeo Gaikwad
Age : 35 – Years, Occ. - Labour,
R/o. Waghari, Tq. Jamner,
Dist. Jalgaon

... **Appellant.**
(Orig. Accused)

Versus

The State of Maharashtra,
Through Jamner Police Station,
Tq. Jamner, Dist. Jalgaon

... **Respondent.**

.....
Mr. S. B. Bhapkar, Advocate for Appellant.
Mr. R. D. Sanap, APP for Respondent - State.
.....

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

DATE : 17th JANUARY 2023.

JUDGEMENT (ABHAY S. WAGHWASE, J.) :

1. Appellant/convict is taking exception to the Judgment and order of conviction passed by the learned Additional Sessions Judge, Jalgaon in Sessions Case No. 114 of 2014, by which appellant stood convicted for the offence punishable under section 302 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for six months.

CONSPECTUS OF PROSECUTION CASE

2. Deceased Tulsabai, daughter of PW-1 Danu – informant, was married to the accused 15 years back and she was cohabiting with him. After two years of marriage she conceived and gave birth to a son. When she had been for delivery to her parents' house and stayed there for two months, at that time, it is alleged that accused-husband developed extra marital affair and even performed "Gandharv marriage" with another lady, namely, Shobhabai. Therefore criminal action was initiated against him by deceased for performing second marriage during subsistence of first marriage. Subsequently, the matter was settled and compromised and deceased Tulsabai had come back to cohabit with the accused.

3. On 28.05.2014, there was a quarrel between deceased Tulsabai and accused which was followed by pouring kerosene and setting her ablaze and therefore, she was admitted in Civil Hospital, Jalgaon. **PW-1** Danu was informed, who accordingly reached there and after having talks with his daughter, he is set law into motion. Initially accidental death (AD) was registered. Deceased succumbed to the burn injuries and therefore report was lodged by father alleging murder, due to which crime against accused bearing No. 90 of 2014 was registered for commission of offence under section 302 of IPC.

4. Above crime was entrusted and investigated by **PW-6**, who took all necessary steps for completing the investigation and thereafter accused came to be charge-sheeted.

5. The case was assigned to the file of Additional Sessions Judge, Jalgaon, who conducted trial and after appreciating oral and documentary evidence adduced by both sides, recorded guilt of appellant and thereby passed order of conviction and sentence as stated above.

It is the above conviction, which is now questioned by the appellant-accused on various grounds raised in the appeal memo.

6. As required, this being the first appellate court, is expected to re-appreciate, re-evaluate and re-assess the entire oral evidence adduced before the trial Court and therefore, we proceed to do so.

7. Oral evidence which came up before the trial court comprises of evidence of **PW-1** Danu father, who had lodged complaint. **PW-2** Sanjay is the spot panch who did not support the prosecution, **PW-3** Dr. Sachin is the autopsy Doctor who conducted postmortem and issued opinion about the cause of death as 'due to cardio respiratory arrest (CRA) and hypovolumic shock due to 57% burns'. **PW-4** P.S.O. Subhash Pawar is the police official who recorded dying declaration of deceased Tulsabai by visiting Civil Hospital, Jalgaon and transmitted the same to the Investigating Officer (PW-6). **PW-5**

Dr. Swati Patil is the Doctor who issued fitness certificate of deceased to give declaration and **PW-6** A.P.I. Mohan Borase is the Investigating Officer.

8. **The sum and substance of evidence of above witnesses is as under :-**

According to father – informant (**PW-1 Danu**), his daughter was married to accused 15 years back. That, out of said wedlock, his daughter had a son, but he was staying with him. After marriage, his daughter went to cohabit with accused at matrimonial home situated at village Waghari, Tq. Jamner, Dist. Jalgaon. He deposed that after two years of marriage, when she came to his house for delivery, at that time, she stayed for two months and during such period accused married with another woman, namely Shobhabai and therefore, criminal case was lodged. Subsequently, it was compromised and his daughter went back to cohabit with accused. He stated that his daughter and second wife of accused both started residing with accused. Father speaks of receiving complaint from daughter about husband harassing her and beating her. That, he gave understanding to the accused.

9. On 28.05.2014, he received a phone call from the sister of accused about his daughter suffering burn injuries and about being admitted in Civil Hospital, Jalgaon. He went to see her and there she allegedly informed him that in the night period, accused – husband poured kerosene on her and ignited her with a match-stick. According to him, she stated that there

was quarrel between herself and second wife of accused, due to which accused set her on fire and so he lodged complaint (Exhibit-18).

10. In cross-examination, he is asked about criminal complaint for second marriage and about compromise. He is asked whether he can place papers of criminal case, to which he has answered in affirmative. He denied that second marriage of the accused was consented by his daughter and that accused has two children from second wife. He has admitted that after marriage, accused visited his house along with second wife. Questions are put about son-in-law of informant to be a Mukadam and deceased working under him as a labourer. He has admitted that when he went to Civil Hospital, Jalgaon, at that time, the accused, his sister Sushilabai, sister-in-law were taking proper care of his daughter in the hospital.

11. **PW-2** - Sanjay, pancha to spot panchanama, has not supported the prosecution and has turned his back on the prosecution story and is therefore specifically cross-examined by prosecution, but nothing fruitful could be elicited therein.

12. **PW-3** Dr. Sachin Ahire is the autopsy Doctor who narrated the burns noticed by him during autopsy and its percentage and he identified postmortem report (Exhibit-27) to be under his signature.

13. This medical witness is cross-examined as to in which ward deceased was admitted and to what extent burns were suffered. He is asked whether burns were superficial and deep in nature and he has answered in affirmative. He has admitted that in a case of pouring kerosene on a person, if the person fails to protect his face, there would be more burns on the face and further admitted that if kerosene is poured over face, the burns reduces to the lower part of body. He has answered that in his opinion, death was not homicidal. But he has added that it was probably a suicidal one and denied having come across any protective injury.

14. **PW-4** P.S.O. Subhash Pawar is the police official who recorded statement of deceased by visiting Civil Hospital on 28.05.2014 and he testified that on receiving telephonic call from Civil Hospital he went there, met the doctor, requested her for examining the lady patient and to certify fitness to give statement and accordingly, the doctor noted that victim was in a fit condition to give her statement (Exh.37).

15. In cross-examination, he has answered that when he went to the hospital, at that time, sister of accused was present there. He is asked whether there was any physical examination before issuance of fitness certificate. He has admitted that Medical Officer stated him that victim is mentally weak. He denied that the statement was recorded as per the say of father.

16. **PW-5** Dr. Swati Patil is the Doctor who issued certificate of fitness and she accordingly deposed to that extent. She has added that victim in her presence stated that there was quarrel between her and her husband.

17. In cross-examination, she is asked whether she physically examined deceased Tulsabai and whether vital parameters like pulse, blood pressure, verbal response, motor response, eye response, hearing response were examined and whether any record to that extent has been maintained. She has categorically answered that patient was physically and mentally fit to give statement. She is questioned about meaning of hallucination. She is then questioned whether hands of the lady were burned and as to what is the impact of burns regarding imbalance of dehydration etc.

18. **PW-6** - A.P.I. Mohan Borase is the Investigating Officer.

ANALYSIS

19. Case in hand hinges on dying declaration. It is trite law that, sole dying declaration can be made basis of conviction, if at all it qualifies the test of truthfulness, voluntariness and if it is free from suspicion and doubt. There are various rulings of Hon'ble Apex Court regarding evidentiary value of dying declaration. It has been held time and again that accused being deprived of cross examination, court has to be very careful and cautious while assessing

dying declaration. It is expected that court should be on guard that the statement of deceased was not a result of either tutoring, prompting or product of imagination. It is further expected of the Court to satisfy itself that the deceased was in a fit state of mind to give dying declaration. In the case of *Paniben Vs. State of Gujarat; (1992) 2 SCC 474*, the Hon'ble Supreme Court has laid down the principles governing dying declaration, which are as follows :-

- (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 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.

The above principles are affirmed, relied, summarized and applied in various other rulings, namely *Surinder Kumar Vs. State of Punjab; (2012) 12 SCC 120, Madan Vs. State of Maharashtra; (2019) 13 SCC 464.*

20. Similarly, very recently Hon'ble Apex Court in the case of *Ganpat Bakaramji Lad Vs. State of Maharashtra; 2018 ALL MR (Cri) 2249.*, has also reiterated certain tests to be put to use before accepting that dying declaration. It has been held thus:-

“ In respect of the dying declaration, the general principles to be kept in mind are

(i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence, and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :

(a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,

(b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and

(c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires confidence to such an extent that it can be the sole basis of conviction?

The absence of an endorsement in the dying declaration - (a) by a doctor regarding the fitness of mind of the declarant, or (b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of Shaikh Bakshu 2007 ALL SCR 2407 and Kantilal (2009) 12 SCC 498, are based on the facts and would not, therefore, constitute a precedent or a ratio decidendi or even an obiter dicta to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials. ”

21. In the light of above discussed settled legal position, we proceed to examine the evidence in the case in hand, i.e. oral evidence discussed in aforesaid paras. As stated above, prosecution is banking on oral dying declaration of deceased recorded by PW-4 Subhash Pawar, who was then P.S.O. at Jilha Peth Police Station. His evidence indicates that after completing initial formalities by approaching Doctor (PW-5 Dr. Swati), Exhibit 37 - dying declaration was recorded.

22. Dying declaration shows that deceased was residing with her husband and second wife of her husband. Regarding the occurrence, it is her version that husband came home in drunken state. At around 3.00 a.m. of 28.05.2014, there was minor quarrel on account of domestic count and in such backdrop, her husband beat her and thereafter poured kerosene on her and set her on fire. Thereafter, when she shouted, her elder brother-in-law and thereafter her husband, both doused the fire and she was taken to hospital. She has held husband responsible and as such, her complaint is against him. Both PW-4 P.S.O. Subhash Pawar-writer of the dying declaration and the PW-5 Dr. Swati Patil, who certified fitness, have accordingly deposed about deceased brought with burns, examined and dying declaration recorded.

23. At this juncture, we deem it fit to examine the evidence of father-informant (PW-1 Danu). His testimony before the court in the witness box is already reproduced by us in the aforesaid para. It is revealed that when deceased had come for delivery for a period of two months, it is alleged that husband performed second marriage with Shobhabai. From the manner of cross-examination, it is emerging that there are specific questions about second marriage and about deceased lodging complaint. Father claims that, at hospital he inquired with his daughter and she allegedly told him that there was quarrel between her and second wife of accused and in that backdrop, husband beat her and set her on fire. Deceased herself, in dying declaration,

has confirmed that second wife was residing jointly with them. Therefore, whatever incident took place at that night after husband coming in drunken state, has remained unshaken in spite of cross-examination of informant – father. Independent witness like certifying doctor also has stated in the witness box about victim stating in her presence that quarrel arose between her and her husband. Therefore, there is material indicating husband coming in inebriated state and after quarrel, setting her on fire. No infirmity in the dying declaration has been brought to our notice by learned counsel for the appellant.

24. The following are the defences raised before us by learned counsel for the appellant:

Firstly, dying declaration seems to be ambiguous on the point of what happened prior to the alleged episode of alleged setting her on fire. **Secondly**, in the very dying declaration, it has come on record that husband also tried to douse the fire. **Thirdly**, autopsy Doctor has opined that death was not homicidal, but he added, it was probably a suicidal case and **fourthly**, deceased was not in a fit mental state to give statement.

25. As regards to first objection is concerned, it is trite law that dying declaration need not be verbose, sketching or with any detailed narration. It is sufficient if there is substance as to what accused/assailant did or played what role. Therefore such objection holds no water.

26. As regards the second objection is concerned, that accused – husband tried to douse the fire, and though there is material to that extent, in the dying declaration it is informed by deceased that only after she raised shouts and cries, the husband tried to douse the fire, but according to her, it is he who has poured kerosene and had ignited her and therefore subsequent act or conduct will not come to his rescue.

27. As regards to third objection is concerned, true it is that autopsy Doctor, while under cross-examination, has opined that death was not homicidal and that rather it could be suicidal, it also can not be accepted. It is to be noted that evidence of autopsy Doctor is merely an opinion. Even otherwise, in the case of *Mayur Panabhai Shah Vs. State of Gujarat; (1982) 2 SCC 396*, the Hon'ble Apex Court has categorically held that there is no irrebuttable presumption that Doctor is always a truthful witness and his evidence has to be appreciated like that of any other witness. Therefore, taking clue from such legal proposition from the highest court of this land, mere agreeing with a suggestion of the defence, that too while under cross-examination, will not persuade us to act upon such opinion that death is not homicidal. Injury is clearly attributable to burns and it's author is husband and therefore, the above objection also fails into insignificance.

28. Lastly, even if there is admission in cross-examination regarding

weak mental state of the deceased, however, Doctor Swati Patil (PW-5) had already endorsed certification that patient was in a fit and conscious state to give statement. Therefore, we do not find any force in the above objection also.

29. To sum up, here, on evaluating the evidence on record, the solitary piece of evidence, i.e. dying declaration, is not shown to be doubtful. It has come on record that accused has performed second marriage in spite of subsistence of first marriage with deceased. There was quarrel between both the wives, who were jointly residing and thereafter alleged episode of incineration has taken place.

30. Therefore, husband cannot escape from the above liability and accountability. Incident had taken place in the house while accused was also shown to be incumbent of the house. This aspect has not been denied. Deceased has suffered burns while in the house and therefore in view of section 106 of the Evidence Act, there was burden on accused to rebut the presumption which had come into play. That being not done, his involvement is clearly made out.

31. We have considered the judgment under challenge. Learned trial Judge has taken into account the nature and quality of evidence placed before him. After hearing both sides at length and also taking into account series of

judgments relied by both sides, guilt has been recorded. No perversity has been brought to our notice so as to interfere in the same. Consequently, there being no merits in the appeal, we proceed to pass following order :-

ORDER

- (i) The appeal is hereby rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)