



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 245 OF 2017

Kalyan Gopinath Dube
Age 28 yrs., Occ. Labour,
R/o Datt Gally, Bidkin Tal. Paithan,
Dist.Aurangabad.

... Appellant

[Orig. accused no.1]

Versus

The State of Maharashtra
Through Police Station Bidkin,
Dist.Aurangabad.

... Respondent

.....
Mr.Madhukar M.Parghane, Advocate for Appellant
Mrs.V.S.Choudhari, APP for Respondent-State
.....

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

**RESERVED ON : 13 OCTOBER, 2023
PRONOUNCED ON : 27 OCTOBER, 2023**

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

1. Appellant Kalyan Gopinath Dube is hereby questioning the order of conviction passed by the learned Additional Sessions Judge, Aurangabad dated 24-11-2016 in Sessions Case No.278 of 2014 thereby holding him guilty for offence under Section 302 of the Indian Penal Code (IPC) and awarding sentence to suffer imprisonment for life.

CASE OF PROSECUTION IN BRIEF

2. On the strength of dying declaration of deceased Babita Kalyan Dube at Exh.25 recorded by Police Officer **PW2** Pathare (PSI), Bidkin Police registered offence under Section 307, 498-A of the Indian Penal Code (IPC). Deceased Babita had suffered in all 90% burns. While undergoing treatment, she succumbed to burns i.e. due to “septicemia due to thermal burns”. After arrest of accused, investigation was carried out and on its completion, he was duly chargesheeted and tried before learned Additional Sessions Judge, Aurangabad, who on appreciation of evidence adduced by prosecution, held case of prosecution as proved and thereby passed impugned judgment.

SUBMISSIONS

On behalf of appellant :

3. Learned Advocate for the appellant would submit that case of prosecution is based on dying declarations but according to him, dying declarations are not inspiring confidence and are not consistent and ought not to have been relied by the learned trial Court. He submits that even dying declarations are not recorded promptly. Therefore, there is doubt about its veracity. According to him, there are several defects in the dying declaration like (i) no identification of signature of deceased (ii) time of recording dying declarations is not noted (iii) there is no endorsement that after recording dying declarations they were read over to deceased (iv) no certificate of fitness

issued by Doctor prior to recording and subsequent to recording dying declarations (v) there is delay in recording both the dying declaration. According to learned Counsel, spot panchanama is not drawn immediately. That there is no motive attributed as to why deceased was set on fire. On the contrary, learned Counsel submitted that burns are accidental. Therefore, he prays to allow the appeal.

On behalf of State :

4. In answer to above, learned APP would submit that both the dying declarations are recorded promptly. The authorities / scribes, who have recorded dying declarations, are examined by prosecution. Both dying declarations are consistent about role of husband. That husband used to beat deceased and on that day also for the entire day he beat her and in the night set her on fire. That being husband, he is obliged to offer explanation for the burns suffered by his wife at odd hours, but no explanation is coming forth from him. That dying declarations are attributing role to him and therefore, it is her submission that learned trial Court has committed no error in recording the guilt and so it is prayed that appeal be dismissed.

5. In support of its case, prosecution has examined in all nine witnesses. Their status is as under :

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Ganpat Bhausahab Jadhav is brother-in-law of deceased. His evidence is at Exh.16.

PW2 Bhausahab Madhavrao Pathare is PSI attached to Bidkin Police Station, who recorded dying declaration Exh.25. His evidence is at Exh.16.

PW3 Mohanlal Reshmaji Harne is Naib Tahsildar (Special Executive Magistrate), who recorded dying declaration Exh.36. His evidence is at Exh.32.

PW4 Dattatraya Ganpatrao Vaidye is Pancha to spot panchanama. His evidence is at Exh.40.

PW5 Dr.Ramesh Tanaji Wasnik is the Autopsy Doctor. His evidence is at Exh.44.

PW6 Dattu Bhaurao Padul is father of deceased. His evidence is at Exh.51.

PW7 Mahesh Dattatraya Vaidye is Pancha to seizure panchanama. His evidence is at Exh.55. Seizure panchanama is at Exh.58.

PW8 Dr.Vishram Sagar Pande is the medical officer attached to GHATI hospital, who examined deceased and certified that she was in position to give statement.

PW9 Gorakh Pundlikrao Khandalkar (PSI) is the Investigating Officer. His evidence is at Exh.67.

6. The case of prosecution is mainly based on dying declarations.

Before proceeding to ascertain whether dying declarations are voluntary and inspiring confidence, we wish to state in brief, law on manner of appreciation of evidence in the form of dying declaration 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 case 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]. These 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 that is settled is 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. Taking into consideration submissions of both the parties and the settled legal position on appreciation of dying declarations as enumerated time and again by the Hon’ble Apex Court in the aforesaid cases, we proceed to scan evidence of the prosecution.

8. Both the dying declarations are crucial and are the only piece of evidence. Learned trial Judge has already acquitted appellant from charge under Section 498-A of the IPC and therefore, we are only expected to see whether offence under Section 302 of the IPC is attributable to him.

FIRST DYING DECLARATION

9. First dying declaration on the basis of which crime is registered is at Exh.25 and it seems to be recorded by **PW2** Pathare, Police Officer attached to Bidkin Police Station. His evidence is at Exh.22. In his substantive evidence, he has stated regarding occurrence, that on that day husband of deceased came home and unnecessarily started abusing and beating her. That at around 07:30 p.m. he again assaulted her. According to this witness, deceased Babita told that appellant threatened to kill her and thereafter, picked up kerosene tin, poured kerosene on her person and ignited with match stick. That thereafter he locked the door from inside and allowed nobody to come inside to rescue her. This witness further stated that, she informed that husband has extinguished fire by pouring water and he carried her to hospital. For the sake of proper comprehension and analysis, we reproduce the translated version of dying declaration Exh.25 as under :

“EXHIBIT 25

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COMPLAINT

25-6-2014

I, Babita Kalyan Dube, aged 25 years, Occ.Household and farming R/o Datta Galli, Bidkin, Tq. Paithan, Dist. Aurangabad do hereby state in person while being treated in the Ward no. 22 of the Govt. Medical College and Hospital [GHATI] that I am the resident of above place and reside with my husband and parents-in-law.

My marriage took place on 2-5-2012 as per our rites and rituals. My husband is a temporary worker under the Survey Officer for

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agricultural lands. My father-in-law Gopinath Dube is paralytic and remains at home only. My mother-in-law Latabai Gopinath Dube works with me on the farmland and in the household.

After six months from my marriage, my mother-in-law Latabai has been abusing me and do not allow me to cook often. My husband Kalyan also used to come home drunkard and abuse and beat me.

Yesterday on 24-6-2014 at about two to half-past-two in the afternoon, I was seated in the Wada [mansion] only because of heat, my husband came and without any provocation he beaten me up and left. In the evening again my husband was beating me since seven-thirty in the evening. My father-in-law was trying to stop him in between and he was also beaten-up. **Between 12-00 to 12-30** in the night, my husband saying to me that he would kill me, brought the kerosene container that was in the house poured on me and set me ablaze. I shouted and screamed loudly but as the doors were latched from inside no one could come to save me. As the flares went up my husband himself poured water on me and doused the fire. When I was set ablaze, my mother-in-law was not at home. My mother-in-law had been to the village Samner, the matrimonial place of the sister of my husband Kalpana, on 24-6-2014 as she had delivered a baby.

In the night of 25-6-2014, at about 2 o'clock, my husband hired a TATA SUMO vehicle for admitting me in burnt condition in the Government Hospital and have admitted here. I am being treated in the ward A. I have been tolerating the beating from my husband till date. Today he has attempted to kill me by burning me, therefore, legal action may kindly be taken against him

The above said statement has been recorded as narrated by me and admitted to be true and correct when read over to me.

Before,
Signed

Signature of the declarant.

Exh. 25 in SC 278/2014 Filed by State
Exhibited in evidence PW2. R AND R Signed/- DJ-III and Addl. Sessions
Judge, Aurangabad.

DATED 25-6-2014
Station Diary No. 176/2014
Entry no. 51 at 22.15 hrs
Crime No. I 115/2014 u/s 307, 498[A]
34 of IPC registered and under the
orders of the PI, investigation has
been taken up by PSI Khandalkar
Signed/- SHO, Bidkin Police Station.

Endorsement of the medical officer.”

(As translated by Sr. Translator, High Court, Aurangabad)

10. This dying declaration seems to be recorded at 07:40 p.m. on 25-06-2014. However, incident had taken place at around midnight of 24-06-2014. Therefore, as pointed out by learned Counsel for the appellant, apparently there is delay of 19 hours in recording this dying declaration. It is also noticed that in the same dying declaration, she has attributed beating and pouring of kerosene at around 12:00 night to 12:30 a.m. i.e. midnight of 24-06-2014.

SECOND DYING DECLARATION

11. Second dying declaration seems to be recorded by PW3 Mohanlal Harne, Naib Tahasildar (Special Executive Magistrate) and the same is at Exh.36, which is in question answer form. PW3 Harne deposed that on receipt

of letter from Police dated 26-06-2014, he visited GHATI hospital and recorded dying declaration after examination and certification by Doctor wherein deceased allegedly informed that on 25-06-2014 at about 12:00 night her husband throttled her, assaulted her, poured kerosene on her person and ignited with match stick. Witness stated that she informed that her husband was suspecting her character and demanding money for purchasing Tata Sumo vehicle and subjected her to mental cruelty. That she told that father-in-law extinguished fire by pouring water. For the sake of clarity, comprehension and analysis, the dying declaration is translated in English language, which is as under :

“Exhibit- 36

Pg No- 70

Dying Declaration

I made aware the injured that I am the Executive Magistrate and I came here to record her statement.

1) What is your Name?- **Babita Kalyan Dube**

age- **22 yrs.,** R/o- **Dattagalli, Bidkin**

Tq.- **Paithan** Dist- **Aurangabad**

2) What happened to you?

I am burnt. On 25/06/2014 at about 12.00 hrs in the night my husband beat me and strangulated me and poured Kerosene on my person, ignited the matchstick and set me on fire.

3) When the incident occurred and under what circumstances?

The incident took place on 25/06/2014 at 12.00 hrs. in the night. My father-in-law Gopinath Ramrao Dube was present at the time of

incident. My husband remained present in the house when he poured kerosene on my person, ignited the matchstick and set me on fire. My father-in-law poured water and doused off the fire.

4) Whether you have any suspicion and allegations against any person regarding the incident?-

I have suspicion and allegation against my mother-in-law namely Latabai Gopinath Dube and my husband Kalyan Gopinath Dube regarding the incident. They always harassed me mentally and physically over the demand of money from my parents to purchase 'Tata Sumo'. Therefore, I have suspicion and allegation against both of them.

5) Any intention or reason to harm/ injure you?-

They wouldn't let me go to my parental home. They always have suspicion on my fidelity and also, they would always demand money from my parents for purchasing 'Tata Sumo'. As my father's financial condition was weak, sometimes I told this matter to my father and sometimes not. My in-laws were always nagging for the same.

6) Who was present at the spot of occurrence and what did they do? -

My father-in-law and my husband were present at the time of incident. My great father-in-law Raju Keshavrao Dube, My maternal mother-in-law Sangita Babasaheb Jhalte, My brother-in-law Ganpat Bhausahab Jadhav, son of my maternal father-in-law Ganesh Babasaheb Jhalte and my husband admitted me in the hospital and they stayed at the hospital till dressing and then left.

My dying declaration is read over to me and it is true and correct as per my narration.

Statement Commenced at: 16.40 hrs.

Statement Concluded at: 17.10 hrs.

Date: 26/06/2014

Signature/Thumb Impression
Signed/-

[Babita Kalyan Dube]

**Before
Signed/-
[26/6/14]
Executive Magistrate
Aurangabad**

**Seen
Signed/-
SDPO, Paithan
[26/6/14]”**

(As translated by Sr. Translator, High Court, Aurangabad)

12. On close scrutiny of dying declaration Exh.36, it is seen that it is apparently recorded on 26-06-2014 at around 04:40 p.m. i.e. almost after 43 hours. As pointed out by the learned Counsel for the appellant, said dying declaration does not carry any certification of fitness from Doctor. Even signature of the deceased is not attested.

SUMMATION

13. On comparing both dying declarations Exh.25 and Exh.36, we are of the opinion that they are not consistent. In dying declaration Exh.25, no reason for beating, quarreling has been attributed by deceased and she has directly attributed role of pouring kerosene at midnight, but for what reason she was set on fire has not been informed by her.

Whereas the details given in second dying declaration Exh.36 regarding suspicion of character, strangulation, demand of money for purchase of Tata Sumo, in-laws always nagging, are not finding place in the first dying

declaration Exh.25 on the basis of which crime has been registered. Admittedly in the dying declaration itself it is stated that husband has extinguished the fire. Therefore, taking such evidence into consideration, in our considered opinion, the dying declarations are recorded after inordinate delay. Prompt recording of dying declaration inspires confidence whereas delayed recording of dying declaration creates suspicion about voluntariness. Here occurrence is of midnight of 24-06-2014 but the dying declarations Exh.25 and Exh.36 are recorded on 25-06-2014 and 26-06-2014 i.e. almost after 19 hours and 43 hours respectively. Therefore, there are reasons to hold that dying declarations are not voluntary one apart from being inconsistent.

Resultantly, above dying declarations cannot be made basis of conviction.

14. Apart from above dying declarations, prosecution has examined near and dear ones of deceased i.e. **PW1** Ganpat, brother-in-law of deceased and **PW6** Dattu, father of deceased.

PW1 Ganpat in his evidence stated that on receipt of telephonic information from Raju Dube, he alongwith his friend Ganesh Kakade went to the GHATI hospital. He claims that deceased told him that her husband assaulted her 2-3 times in the day and in the night he poured kerosene and set her on fire. He claims that she told him this when her husband Kalyan had been went aside.

However, in **cross-examination** he admitted that husband of deceased had accompanied deceased while taking her to hospital. He admitted that he himself did not lodge any report. Therefore, inspite of claiming about receiving oral dying declaration on that day itself i.e. 25-06-2014, he himself did not lodge report or gave statement about receiving oral dying declaration. Neither Raju Dube nor his friend Ganesh allegedly accompanying him are examined.

Similarly **PW6** Dattu, father of deceased, inspite of claiming to have reached hospital at 03:00 a.m. on 25-06-2014 and claims to have received oral dying declaration, he himself has not lodge FIR nor given statement about receipt of oral dying declaration.

Therefore, silence of **PW1** Ganpat and **PW6** Dattu leaves room to doubt their claim about receiving oral dying declaration.

15. We have gone through the judgment under challenge. In our opinion, learned trial Judge has not examined evidence scrupulously and meticulously to ascertain whether dying declarations are consistent. It was expected from the learned trial Court to undertake such exercise when there were two dying declarations. Findings and reasons given by the learned trial Judge are not in consonance with material on record. There is no proper appreciation of

evidence and therefore, interference at the hands of this Court is called for. Accordingly, we proceed to pass following order :

ORDER

- (I) Criminal Appeal No.245 of 2017 stands allowed.
- (II) Conviction awarded to appellant / original accused no.1. - Kalyan Gopinath Dube by the learned Additional Sessions Judge, Aurangabad in Sessions Case No.278 of 2014 on 24-11-2016, after holding him guilty for committing offence under Sections 302 of the Indian Penal Code, stands quashed and set aside.
- (III) The appellant stands acquitted of the offence punishable under Sections 302 of the Indian Penal Code.
- (IV) The appellant be set at liberty, if not required in any other case.
- (V) Fine amount deposited, if any, be refunded to him after the statutory period is over.
- (VI) We clarify that there is no change in the order passed by the learned Additional Sessions Judge, Aurangabad regarding disposal of Muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)