



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 490 OF 2017
WITH
CRIMINAL APPLICATION NO. 642 OF 2019**

- 1] Ravindra S/o. Yeduba Khetre,
Age : 32 years, Occu. : Agriculture,
- 2] Yeduba S/o. Ashruba Khetre,
Age : 60 years, Occu. : Agriculture,
- 3] Rukhmanbai W/o. Yeduba Khetre,
Age : 56 years, Occu. : Agriculture,

All R/o. Nimkheda, Tq. Phulambri,
Dist. Aurangabad.

... Appellants.

Versus

The State of Maharashtra,
Through the Police Inspector,
Police Station, Wadod Bazar,
Tq. Phulambri, Dist. Aurangabad

... Respondent.

...
Mr. Navin S. Shah, Advocate for Appellants.
Mrs. V. S. Choudhari, APP for Respondent - State.
...

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

RESERVED ON : 12th OCTOBER, 2023

PRONOUNCED ON : 23rd OCTOBER, 2023

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

1. Appellants-convicts, by invoking section 374 of the Code of Criminal Procedure (Cr.P.C.) are hereby questioning legality and maintainability of judgment and order passed by the learned Additional Sessions Judge, Aurangabad, dated 14.06.2017

in Sessions Case No.270 of 2015, holding them guilty for charge under section 302 read with section 34 of Indian Penal Code (IPC) and awarding imprisonment for life.

FACTS IN BRIEF GIVING RISE TO SESSIONS TRIAL

2. Deceased Rekha was married to appellant no.1 and they had children, namely Radhika and Ragini, aged 3 years and 2 months, respectively. Whenever deceased requested them to allow her to visit her parents, it is the case of prosecution that, they used to get annoyed and accuse her about ill character. They insisted her to join them for agricultural work in spite of her younger daughter to be barely two months old. When she refused for said reason, they used to abuse her.

On 28.08.2015, around 9:30 a.m., she sought permission to visit her parents, that time, all accused abused her, suspected her character. Father-in-law caught hold of her hands, mother-in-law caught hold of her both legs and husband after pouring kerosene ignited her and they all fled. Neighbour Gayabai douse the fire and she was taken to the hospital, where PW3 ASI Suresh Daud recorded her dying declaration (Exh.32), on the strength of which crime was registered. Second dying declaration was also recorded by PW2 Shivanand Bidwe, Naib Tahsildar (Exh.28).

3. After completing investigation, appellants were tried before Additional Sessions Judge, Aurangabad, who, on conclusion of trial appreciated the evidence, heard both sides and held charges to be proved by prosecution and convicted the appellants for offence punishable under section 302 read with section 34 of IPC.

It is the above judgment and order of conviction, which is now taken exception to by filing instant appeal on various grounds.

SUBMISSIONS

On behalf of the Appellants : -

4. Learned counsel for appellants would question the legality of judgment and order by submitting that, prosecution had miserably failed to prove the case beyond reasonable doubt. According to him, except dying declarations which are unworthy of credence, there is no iota of evidence either documentary or oral to hold accused persons responsible for the burns suffered by Rekha. Learned counsel invited our attention to both dying declarations (Exhs.32 and 28) and would submit that, they are apparently not only recorded at belated stage, but are also not consistent so as to act upon the same. According to learned counsel, motive is not established and there is no supportive evidence in that regard. He

criticized the dying declarations by submitting that it is doubtful whether deceased was in capacity to give any dying declarations.

5. Learned counsel would strenuously submit that, none of the accused were present in the house and there is no evidence suggesting their presence at the time of incident. According to him, it was either accidental burn or suicidal burn. He pointed out that in support of *plea of alibi*, defence had examined not only three witnesses, but their evidence has been totally overlooked by the learned trial court. Learned counsel would submit that, law on appreciation of dying declaration has been lost sight of by the learned trial Judge. There is non appreciation of evidence on behalf of defence, when even it is fairly settled law that evidence of defence has to be given equal weightage as like that of prosecution evidence. In support of such submissions, he placed reliance the judgment of Hon'ble Apex Court in the case of ***Jumni and Others v. State of Haryana***; (2014) 11 SCC 355. He also sought reliance the judgments of this Bench in the cases of ***Salim Kasam Shaikh Vs. State of Maharashtra***; 2023 (1) Bom.C.R.(Cri.) 905 and ***Sandip Prakash Rathod Vs. State of Maharashtra***; 2023(1) Bom.C.R.(Cri.) 140. Concluding his arguments, learned counsel for appellants submits that, strong case being made out on merits, impugned judgment is liable to be set aside.

On behalf of the State : -

6. In answer to above, learned APP would submit that dying declarations of deceased are promptly recorded. She has categorically and consistently stated in both dying declarations about conduct and behaviour of husband and in-laws towards her. That, she has specifically attributed particular role to husband and in-laws. Both dying declarations being consistent and truthful, have been rightly relied by learned trial court and consequently, she prayed that, there being no merits in the appeal, same be dismissed.

PROSECUTION EVIDENCE

7. It seems that to establish its case prosecution has examined in all 8 witnesses and also relied on documentary evidence like two dying declarations, FIR, inquest panchanama etc. The status and role of the prosecution witnesses can be summarized as under :-

PW1 Rameshwar is a pancha to seizure panchanama (Exh.19).

PW2 Shivanand Bidwe, Naib Tahsildar, who recorded second dying declaration at Exh.28.

PW3 ASI Suresh Daud is the police official who recorded first dying declaration of deceased Rekha at Exh.32.

PW4 Dr. Dharandale is the autopsy doctor who conducted postmortem. He identified postmortem report at Exhibit 35.

PW5 Kantabai is the mother of deceased. His statement is at Exh.37.

PW6 Dr. Pankaj Tongse is the treating doctor.

PW7 Namdeo Khetre is a pancha to seizure of clothes at Exhs.44 and 45.

PW8 ASI Deelip Sagar is the Investigating Officer.

8. Here, there is no dispute that deceased Rekha died due to 90% of burns in an event which allegedly took place on 28.08.2015 around 9:30 a.m. Issues are on the point of presence and involvement of respondents. Admittedly, there is no eye witness account and case is rested on two dying declarations (Exhs.28 and 32) and the same needs to be tested in the light of settled legal position.

9. 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.

10. In the light of above legal requirements, we have visited first dying declaration (Exh.32) recorded by PW3 ASI Suresh Daud and the same is made the basis of registration of crime.

In substantive evidence, PW3 Suresh Daud deposed about receipt of MLC (Exh.30), visiting Ghati hospital, approaching Medical Officer, seeking endorsement of fitness from doctor and

recording statement, wherein deceased informed that, her husband, parents-in-law used to raise suspicion of her character, quarreled with her and also insisted her to go for agriculture work. When she told that, she had two months old child and she was unable to go for work, she informed that, mother-in-law caught hold of her legs, father-in-law caught hold of her hands and husband poured kerosene and set her on fire and all of them fled from the spot. Gayabai a neighbour came to her rescue. Witness has identified dying declaration (Exh.32) to be scribed by him.

Above witness in cross denied that, relatives were present in the room at the time of recording statement. He denied that, statement was recorded at police chowky and endorsement of doctor was sought subsequently. He denied rest all suggestions.

11. In this dying declaration (Exh.32), deceased informed that, on 28.08.2015, around 9:30 a.m., when deceased informed that, she was going to her parents house, according to her, all three suspected her character and insisted her to accompany them to the field for agricultural work. When she refused, assigning reason of having two months old child, it is alleged that, mother-in-law, father-in-law caught hold of her limbs, respectively and husband poured kerosene and set her on fire.

12. Second dying declaration recorded by PW2 Shivanand Bidwe is at Exh.28. It seems to be recorded at 05.36 p.m. on 28.08.2015. In this dying declaration which is in question answer form, while answering question nos.2, 3 and 4, she answered that, parents-in-laws caught hold her and husband poured kerosene and set her on fire. While she was cooking, parents-in-law came there, raised quarrel with her, father-in-law caught hold of her hands and mother-in-law caught hold of her legs and thereafter husband poured kerosene on her person and ignited her. While answering question no.5, she informed that, husband and in-laws questioned her for repeatedly going to her matrimonial house, suspected her character and all three quarreled with her. While answering question no.6, she again reiterated that, parents-in-law caught hold of her hands and legs respectively and husband ignited her after pouring kerosene. When she came out, neighbour namely, Gayabai douse the fire. After short time, brother-in-law came and shifted her to the hospital.

13. If we juxtapose both dying declarations (Exhs. 28 and Exh.32), we have noticed that, both are consistent about deceased informing accused about her intention to visit her parents, and thereafter, accused persons quarreling with her, suspecting her

character and then asking her to join them for agricultural work. On her refusal in the backdrop of baby to be barely two months old, she has alleged that, parents-in-law disabled her by holding her legs respectively and husband poured kerosene and ignited her. Therefore, both dying declarations are apparently consistent about history as well as role of the each of the accused.

14. Though, accused have examined DW1 Satish, DW2 Gayabai and DW3 Narayan, evidence of DW1 Satish shows that, he claims to have gone and brought accused no.2 from field, but accused no.2 does not say so while answering in the statement under section 313 of Cr.P.C.. He speaks about he to be out of the house. In cross DW1 Satish has admitted that, he was in the village during investigation, but he has not given information to the police personally.

DW2 Gayabai, who has been named by deceased does not speak about she dousing the fire. On the contrary, her evidence shows that, on hearing commotion, she went to the spot, and thereafter, returned back to her home. She has not uttered the word about going to rescue of deceased, and moreover, she is sister-in-law of accused.

DW3 Narayan also stated about accused to be with him from 26.08.2015 to 28.08.2015. He has not placed on record anything in support of his occupation as contractor or about accused no.1 is to be in his employment. He is unable to give the phone number, which was allegedly received on his mobile regarding information meant for accused no.1 regarding the occupation. Therefore, there is doubt whether whatever they deposed is truthful or not.

15. To sum up, both dying declarations (Exhs.32 and 28) seem to be recorded on 28.08.2015 i.e. on 2.50 p.m. and 5:36 p.m. respectively, i.e. on the very day of occurrence. Therefore, dying declarations are prompt. Both are consistent. They seem to be not only voluntary, but even truthful version. Hence, no reason to disbelieve or doubt its veracity.

16. We have gone through the judgment under challenge. Learned trial Judge has correctly appreciated the evidence as well as dying declarations in the backdrop of legal requirements. No perversity is brought to our notice. Learned counsel for appellant has sought reliance on above rulings, but in our considered opinion, facts in those case and the judgments relied are distinct and hence cannot be taken recourse to. There being no merits, we proceed to pass following order :-

ORDER

- (i) The criminal appeal stands dismissed.
- (ii) In view of dismissal of the appeal itself, Criminal Application No.642 of 2019 does not survive and it is accordingly disposed of.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)