



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.322 OF 2018

Bhausahab s/o Ramrao Borde
Age 65 years, Occ. Agril.,
R/o Hilalpur, Tq.Vaijapur,
Dist.Aurangabad.

... Appellant

Versus

The State of Maharashtra
Through Police Inspector,
Police Station Shivoor,
Taluka Vaijapur,
District : Aurangabad.

... Respondent

.....
Mr.M.A.Tandale, Advocate for Appellant
Mr.S.D.Ghayal, APP for Respondent-State
.....

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

DATE : 19 OCTOBER, 2023

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

1. Instant appeal arises out of judgment and order of conviction passed by the learned Additional Sessions Judge, Vaijapur dated 31-03-2018 in Sessions Case No.98 of 2014 by which appellant has been held guilty for offence under Sections 302 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment of life.

PROSECUTION CASE IN BRIEF

2. Appellant and deceased Hirabai are husband and wife. Appellant was addicted to liquor and under its influence he used to beat deceased and even drive her out of house. According to prosecution on 08-06-2014 at around 06:00 p.m. accused was abusing his own son and brother and therefore, deceased questioned him for the same. Getting annoyed for being questioned, it is the case of prosecution that, accused brought kerosene, poured it on person of deceased Hirabai and incinerated her. She suffered 60 to 65% burns and was taken to Dongare Hospital, Vaijapur and thereafter, shifted to Pravara Rural Hospital, Loni, where PW9 Deshmukh, Head Constable at Loni Police Station recorded her dying declaration Exh.25 and on the strength of the same, crime bearing No.52 of 2014 was registered.

PW15 Choudhari (PI), who was entrusted with the investigation, after its completion, chargesheeted accused. Case being exclusively triable by the Sessions Judge, it came to be committed to Additional Sessions Judge, Vaijapur, who recorded evidence adduced by prosecution and after recording statement of accused under Section 313 of the Code of Criminal Procedure, heard both the sides and on appreciating evidence, learned trial Judge came to the conclusion that prosecution has proved guilt of accused beyond reasonable doubt and thereby convicted accused for offence under Section 302 of the IPC and sentenced him to suffer imprisonment for life, which is precisely questioned before us by appellant by filing instant appeal.

SUBMISSIONS

On behalf of appellant :

3. In support of relief, learned Counsel for the appellant submits that implication is apparently false and there is no cogent and reliable evidence. He pointed out that case of prosecution is solely based on dying declaration. However, according to him, same does not inspire confidence for several reasons. He pointed out that inspite of occurrence taking place on 08-06-2014, dying declaration Exh.25 is recorded after three days i.e. on 11-06-2014 and therefore, when the dying declaration is not promptly recorded, he expresses several possibilities of being tutored and false case being manufactured and accused being roped in. He pointed out that even when deceased was taken first to Dongare Hospital, Vaijapur, there is no record and no dying declaration was recorded at said hospital. He further pointed out that even dying declaration was not recorded on the very day inspite of MLC being issued.

It is his next submission that dying declaration of deceased ought to have been recorded in her own vernacular but according to him, going by language of the dying declaration, it is seen that it is not in her vernacular and according to him, the words used in the text are not of a rustic villager. For the said reason also it is his submission that the text of the dying declaration comes under shadow of doubt. He further pointed out that very near and dear ones of deceased have not supported prosecution and therefore, under such circumstance, it is his submission that when dying declaration was not worthy

of credence and there was no other supportive evidence, it is his case that learned trial Court ought not to have accepted the case of prosecution as proved. In support of his case, he seeks reliance on the following citations :

- (a) ***Puran Chand v. State of Haryana; 2010 ALL MR (Cri) 2625 (SC)***
- (b) ***Narendra s/o Vitthalrao Hingane v. State of Maharashtra; 2017 ALL MR (CRI) 5267.***

On behalf of State :

4. In answer to above submission, learned APP would submit that here deceased had died due to 60 to 65% of burns. According to him, admittedly, occurrence is of 08-06-2014 and dying declaration is recorded on 11-06-2014. It is his submission that mere delay or lapse on the part of authority, no benefit would accrue to the accused, more particularly when the dying declaration is not shown to be unworthy of credence. He submitted that though relatives have retracted, according to him, their entire testimony need not be discarded and part of testimony, which supports prosecution can definitely taken recourse to and relied. In support to his submission, he relied on following judgments of the Hon'ble Supreme Court :

- (a) ***Neeraj Dutta v. State (Govt. of N.C.T. of Delhi); (2023) 4 SCC 731.***
- (b) ***Rajesh Yadav & Anr. Etc. v. State of U.P.; (2022) 12 SCC 200.***

According to him, death of deceased is because of “Septicemia due to extensive burn”. Role of appellant husband has been clearly reflected in the dying declaration and therefore, it is his submission that learned trial Court has committed no error whatsoever in accepting dying declaration as truthful version and guilt has been rightly recorded. Resultantly, it is his submission that there is no need of interference in appeal.

5. In support of its case, prosecution has adduced evidence of in all 15 witnesses. Their status is as under :

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Rajendra Bhausahab Borde is son of accused and deceased. His evidence is at Exh.10.

PW2 Sunita Rajendra Borde is daughter-in-law of accused and deceased. His evidence is at Exh.11.

PW3 Ashabai Appasaheb Borde is sister-in-law of deceased. Her evidence is at Exh.13.

PW4 Vimalbai Babasaheb Borde is another sister-in-law of deceased. Her evidence is at Exh.14.

PW5 Dipali Ganesh Borde is cousin daughter-in-law of deceased. Her evidence is at Exh.16.

PW6 Sagar Sanjay Borde is nephew of deceased. His evidence is at Exh.17.

PW7 Pandharinath Aasaram Zinjurde is Pancha to spot panchanama. His evidence is at Exh.18.

PW8 Dr.Siddharth Jaidev Banerji is the Doctor, who examined deceased and gave endorsement about her fitness to give statement. His evidence is at Exh.20.

PW9 Murtuza Mustafa Deshmukh (ASI) is Police Officer, who recorded dying declaration Exh.25. His evidence is at Exh.23.

PW10 Sambhaji Kachru Tambe is younger sister of deceased. Her evidence is at Exh.37.

PW11 Masood Abdul Tadvī is Pancha to seizure Panchanama of clothes of accused. His evidence is at Exh.11. Seizure Panchanama is at Exh.48.

PW12 Shivaji Kachru Tambe is brother of deceased. His evidence is at Exh.49.

PW13 Sudhir Bhimrao Patil (PI) is Police Officer who carried out spot panchanama. His evidence is at Exh.59.

PW14 Dr.Sachin Kautikrao Deore is Autopsy Doctor. His evidence is at Exh.62.

PW15 Shriram Tukaram Choudhari is the Investigating Officer. His evidence is at Exh.65.

6. Admittedly, here case is solely based on dying declaration.

Before proceeding to ascertain whether dying declaration is 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 **Rajesh Yadav & Anr. Etc. v. State of U.P.**; 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 to 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 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 declaration.

7. Keeping above legal position in mind while appreciating dying declaration, we proceed to re-appreciate dying declaration which has come on record.

8. We have tested the dying declaration on record, which is recorded by **PW9** Deshmukh. His evidence is at Exh.23.

PW9 Deshmukh, the then Head Constable stated that on receipt of MLC from Pravara Rural Hospital, Loni, he visited hospital, approached Doctor, on his request, Doctor examined the lady and thereafter, he recorded statement of deceased Hirabai and also obtained her thumb impression. He identified dying declaration recorded by him as well as MLC Exh.25 and Exh.24 respectively.

Above witness in **cross-examination** has admitted that MLC dated 08-06-2014 was received by Police Station on 09-06-2014 at 01:45 a.m. He further answered that he himself received MLC on 10-06-2014 in the morning. He is unable to give name of PSO, who was at Loni Police Station on 09-06-2014 and 10-06-2014. He gave distance between Pravara Rural

Hospital to Loni Police Station as 3 kms. He admitted that Doctor did not examine injured woman in his presence. He stated that he received MLC on 10-06-2014 in the morning but due to busy in his work, he recorded statement of injured on the next day. He answered that right arm, left wrist, stomach, chest and both thighs of the deceased had burnt. He is unable to state whether she has suffered 70% burns. He admitted that it is not mentioned below the thumb impression obtained on statement of injured that whether it was thumb impression or toe impression. He admitted that below thumb impression on the statement, name of the woman is not noted. He admitted that Doctor examined said woman only once and gave endorsement. Rest all is denied.

It appears from record that MLC Exh.26 dated 08-06-2014 issued by Pravara Rural Hospital, Loni is received at Loni Police Station on 09-06-2014 but apparently intimation is given to Police on 11-06-2014 requesting to record dying declaration.

9. In Dying declaration Exh.25, in first paragraph, deceased had informed that she resided with her husband Bhausahab. She gave names of her son Rajendra and daughter-in-law Sunita, who were residing separately. She stated that her husband was addicted to liquor and that in one month he behaved properly with her and in another month he beat her and drive her out of house. Regarding occurrence dated 08-06-2014, she stated that at

around 06:00 p.m. she was sitting on the platform in front of her house, at that time, Sanjay, her brother-in-law and her son Rajendra were abused by her husband and therefore, she questioned him. It is stated that husband got annoyed and he questioned her saying that he is abusing his brother and son and what business she has. He stated that he would finish her and he went inside the house, came back with kerosene and a matchbox, poured kerosene on her person saying that he would finish her and ignited her. Her clothes caught fire and therefore, her daughter-in-law namely Sunita, her cousin sister-in-law namely Dipali, sisters-in-law namely Vimal and Ashabai came to her rescue and a quilt was wrapped around her and taken her in a vehicle to Dongare Hospital, Vaijapur and from there she was brought to Pravara Rural Hospital, Loni. She has ultimately held her appellant husband responsible for burns.

ANALYSIS

10. On meticulous examination of dying declaration Exh.25, the following features are emerging that :

- (I) alleged occurrence is of 06:00 p.m. on 08-06-2014.
- (II) MLC Exh.26 is received by Police Station Loni on 09-06-2014.
- (III) PW9 Deshmukh has recorded dying declaration on 11-06-2014 at 05:30 p.m.
- (IV) below the thumb impression, there is no identification or attestation nor details of the thumb impression are noted on the dying declaration.

Therefore, what is emerging from above evidence is that inspite of occurrence taking place on 08-06-2014 at 06:00 p.m., dying declaration is recorded on 11-06-2014. Even time of recording dying declaration is not appearing on dying declaration. Endorsement of Doctor shows time at 05:30 p.m. on 11-06-2014.

11. **PW9** Deshmukh has admitted about he himself receiving MLC on 09-06-2014 but he has not approached Pravara Rural Hospital for two days i.e. 09-09-2014 and 10-06-2014 and has visited hospital on 11-06-2014 at 05:30 p.m. Taking into consideration above features, inordinate delay in recording dying declaration results into possibility of dying declaration to be not voluntary one.

12. Almost all relatives have retracted as pointed out by the learned APP but as rightly pointed out by him, their entire evidence cannot be discarded. Even if we take into account that much part of their evidence which inspires confidence, still here case is based on dying declaration and for above reasons, the dying declaration come under shadow of doubt.

13. The next argument of learned APP is that history given in Pravara Rural Hospital was of setting on fire, however, the Doctor, who noted the history, has not been apparently examined by prosecution and therefore, mere exhibited

MLC would not suffice. Further its contents are required to be proved. The contents are not proved and therefore, even such document cannot be given much significance.

14. The citations on which reliance is placed on by the learned APP are not applicable as the facts in those cases and facts in present case are quite distinguishable.

CONCLUSION

15. To sum up, here dying declaration is the solitary piece of evidence. It is not promptly recorded inspite of being taken to Rural Hospital, Vaijapur and thereafter even at Pravara Rural Hospital, Loni on the same day. Three days delay in recording dying declaration creates doubt and several possibilities. Therefore, in our considered opinion, said dying declaration, which is solitary piece of evidence, can by no means, be made basis of conviction when very near and dear ones have not supported prosecution. Accordingly, we proceed to pass following order :

ORDER

- (i) The appeal stands allowed.
- (ii) The conviction awarded to the appellant **Bhausahab s/o Ramrao Borde** by learned Additional Sessions Judge, Vaijapur, District Aurangabad in Sessions Case No.98 of 2014 on 31.03.2018 for offence punishable under Sections 302 of Indian Penal Code stands quashed and set aside.

(iii) The appellant stands acquitted of the offence punishable under Section 302 of the 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 is over.

(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.)

SPT