

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

CRIMINAL APPEAL NO. 355 OF 2016

1. Shahrukh Salim Pathan,
Age : 20 years, Occu. : Labourer,
R/o. Khadka, Tq. Newasa,
Dist. Ahmednagar.
 2. Aminabee w/o. Salim Pathan,
Age : 42 Years, Occu. : Household,
R/o. As above.
 3. Samina Javed Shaikh,
Age : 23 years, Occu. : Household,
R/o. Ashvi, Tq. Rahuri,
Dist. Ahmednagar.
- ... Appellants.**

Versus

1. The State of Maharashtra,
Through API Newasa, Tq. Newasa,
Dist. Ahmednagar.
 2. Akhil Ganibhai Shaikh,
Age : 38 Years, Occu. : Labour,
R/o. Wambhori, Tq. Rahuri,
Dist. Ahmednagar
- ... Respondents.**

...

Mr. Nilesh S. Ghanekar, Advocate for Appellants.
Mrs. V. S. Chaudhari, APP for Respondent No.1 – State.
Mr. M.L.Devda h/f. Mr.A.D.Ostwal, Advocate for Respondent No.2

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

**RESERVED ON : 5th June, 2023
PRONOUNCED ON : 14th June, 2023**

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

1. Appellants - husband, mother-in-law and sister of husband are taking exception to the judgment and order of conviction passed by the learned District Judge-1 and Additional Sessions Judge, Newasa dated 03-05-2016 in Sessions Case No.140 of 2014, by which all three stood convicted for offence under Section 302 read with 34 of the Indian Penal Code (IPC) and thereby came to be awarded imprisonment for life and to pay fine of Rs.20,000/- each, in default to suffer further rigorous imprisonment for one year.

BRIEF FACTS OF THE CASE IN TRIAL COURT

2. Dying declaration recorded by the **PW1** Gorakshnath Ghugarkar, Special Executive Magistrate was made the basis of registration of FIR bearing crime no.I-183 of 2014. Deceased Parveen gave dying declaration on 28-06-2014 that husband (accused no.1), mother-in-law (accused no.2) and sister in law (accused no.3) were continuously ill-treating her. On 28-06-2014 in the morning, sister-in-law Samina poured kerosene, while mother-in-law caught-hold of her in presence of husband who was instigating and abusing her. Sister-in-law Samina ignited matchstick and set her on fire. Brother-in-law Alim rushed to her rescue and extinguished the fire and thereafter, husband took her to the hospital. On the strength of above dying declaration, crime came to be registered at Newasa Police Station and after investigation accused were charge-sheeted and made to face trial before learned District

Judge-1 and Additional Sessions Judge, Newasa who on appreciating the oral and documentary evidence including two dying declarations accepted the case of prosecution as proved and convicted all three appellants as stated above.

It is the above judgment and order of conviction which is assailed by convicts by invoking Section 374 of the Code of Criminal Procedure (Cr.P.C.) thereby praying to quash and set aside the impugned judgment.

RIVAL SUBMISSIONS

ON BEHALF OF APPELLANTS

3. Learned Advocate for the appellants would submit that case is based on circumstantial evidence and there is no direct eye witness account. According to him, prosecution examined eight witnesses and has heavily relied on two dying declarations. According to him, both the dying declarations are inconsistent and therefore, ought not to have been relied and accepted by the learned trial Court. Learned Advocate brought to our notice the degree and percentage of burns and would submit that at the threshold it is doubtful whether the deceased was fit and mentally stable to give dying declaration and that too not one but two dying declarations. He pointed out that here prosecution had utterly failed to establish very motive behind the alleged burns. Pointing out that alleged occurrence had taken place at around 06:00 a.m. to 06:30 a.m., it is stated that first dying declaration is recorded after

almost 12 hours, whereas second dying declaration is recorded after two days of recording of the first dying declaration and therefore, according to him when it has come on record that parents and relatives of deceased are around, possibility of tutoring for false implication cannot be ruled out. He emphasized that infact no role whatsoever is attributed to the appellant husband nor there is any evidence to suggest as to what preceded the alleged incident of burns. It is his submission that burns are accidental. He pointed out that while answering questions posed under Section 313 of the Cr.PC., explanation has been given that there was stove explosion resulting into accidental burns. It is next submitted that there is no evidence about involvement of above persons in incinerating deceased Parveen. He also questioned the thump impression purported to be of deceased Parveen pointing out that medical evidence clearly suggested that even palms were affected by burns. In support of submission that both dying declarations are inconsistent, he pointed out that the first dying declaration at Exh.29 is rather cryptic and short but second dying declaration at Exh.48, recorded after two days, has detail narration raising doubt about its authenticity. It is also pointed out that in first dying declaration at Exh.29 presence of accused is marked but it is not so in second dying declaration at Exh.48. He pointed out that learned trial Court had already acquitted accused persons from charges under Section 498-A of the IPC and therefore, learned trial Judge ought not to have held accused persons guilty for the offence punishable under Section 302

of the IPC. In the last limb of his argument, he submits that except two dying declarations, which are inconsistent and not voluntary one, there is no iota of evidence against accused or regarding their involvement in the burns suffered by deceased Parveen and so he prays to allow the appeal.

ON BEHALF OF APP

4. Traversing above submissions, learned APP would point out that deceased had given both dying declarations only after medical certification about her fitness. The Doctor who examined and gave fitness certificate has also been examined by prosecution. There is no evidence about deceased being tutored. Both dying declarations are natural dying declarations narrated by her and duly noted by the Special Executive Magistrate and the Police official, which are at Exh.29 and Exh.48 respectively. That, whatever occurred has been narrated in both dying declarations. Deceased has named sister-in-law for pouring kerosene and igniting after mother-in-law caught-hold her and husband was present and he instigated both accused nos.2 and 3. That, both dying declarations are inspiring confidence. That, testimonies of medical witnesses and writer of dying declarations have remained unshaken inspite of extensive cross-examination. Therefore, learned trial Judge has correctly appreciated the evidence on record and has committed no error whatsoever in accepting both the dying declarations as truthful and voluntary version of deceased and acting on such evidence in recording guilt of the accused.

According to her, there is no infirmity in the judgment passed by the trial Court and so she prays to dismiss the appeal.

5. In the light of requirement of reappreciation, reevaluation, reanalyzation of the evidence, being first Appellate Court, we proceed to carefully undertake the said exercise by scanning the evidence available on record before the trial Court.

6. Admittedly, entire case of prosecution is based on dying declarations. There are two dying declarations which prosecution has pressed into service i.e. first dying declaration at Exh.29 and second dying declaration at Exh.48. First dying declaration Exh.29 is recorded on 28-06-2014 by the **PW1** Gorakshnath Dashrath Ghugarkar, Special Executive Magistrate, whereas second dying declaration Exh.48 is recorded on 30-06-2014 by Police official i.e. after almost two days of recording of first dying declaration. On one hand prosecution claims that both dying declarations are consistent, on the contrary accused appellants have come up with a case that both dying declarations are inconsistent, tutored and therefore unsafe to rely. That apart, appellants have come out with a specific case that deceased suffered accidental burns while cooking i.e. on account of stove explosion and to support such defence even witness has been examined by accused. In the light of availability of material and above submissions, it is to be seen as to whose

case is worthy of credence and can be accepted.

7. Before touching the dying declarations on merits, it would be desirable to throw light on the settled law on the aspect of evidentiary value of dying declaration and manner of its appreciation. Since the judgment of ***Khushal Rao v. State of Bombay; AIR 1958 SC 22***, on numerous occasions law on this aspect has been propounded and certain principles have been culled out from plethora of judgments by the Hon'ble Apex Court. Very recently the Hon'ble Supreme Court in the case of ***State of Uttar Pradesh v. Veerpal and Another; (2022) 4 Supreme Court Cases 741***, while deciding Criminal Appeal No.34 of 2022 on 01-02-2022, has reiterated the principles to be borne in mind while analyzing and accepting dying declaration. The settled principles are as follows :

“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.”

Other celebrated and water-shedding judgments on above aspects are

(i) *Laxman v. State of Maharashtra; (2002) 6 SCC 710* (ii) *Jagbir Singh v. State (NCT of Delhi); (2019) 8 SCC 779.*

EVIDENCE ON BEHALF OF PROSECUTION

DYING DECLARATIONS :

8. Keeping in mind the above legal position, we go through the alleged dying declarations which are at Exh.29 and Exh.48 respectively.

First dying declaration at Exh.29 seems to be noted by **PW1** Gorakshnath whose evidence is at Exh.26. According to him, on receipt of

information from Kotwali Police Station, Ahmednagar, he went to the Civil Hospital, contacted **PW3** Dr.Sonowane who on his request examined the deceased and gave fitness certificate and after putting up preliminary questions when deceased was asked as to how she suffered burns, it is stated that she disclosed that her husband, mother-in-law, sister-in-law, they all used to always raise quarrels. On the day of incident, in the morning, sister-in-law Samina poured kerosene, mother-in-law caught-hold her and husband, who was present there, was abusing her in filthy language. When she tried to escape, sister-in-law threw burning matchstick resulting into burns. Witness stated that **PW3** Dr.Sonwane was present throughout. As both palms of deceased were affected by burns, toe impression of her right leg was obtained upon which **PW3** Dr.Sonowane again examined her and gave certificate.

In **cross-examination**, this witness is questioned whether any relatives were present with deceased. He is asked about parts of bodies which were affected by burns. He denied that her ears, nose, lips and chest were burned. Then he is questioned about his native place and he is asked whether father of deceased was from same native which he answered in negative. He admitted that at the bottom of the dying declaration he did not mention the date and even admitted that Doctor did not authenticate the thumb impression.

9. Now let us go to the **second dying declaration** which is at Exh.48. On carefully going through this dying declaration, which is recorded on

30-06-2014 i.e. after two days after recording first dying declaration, it is noticed that this dying declaration is elaborate one and in detail. Substance of this dying declaration is that deceased was married to accused on 30-05-2013 and since marriage she was residing with her husband and mother-in-law. According to her, husband, mother-in-law and sister-in-law Samina regularly beat her and abuse her. Husband suspected her character and objected for wearing saree and she promptly informed about it to her parents. She further stated that since last Thursday, sister-in-law Samina had come to reside with them. On her instigation, mother-in-law and husband used to beat her. On 28-06-2014 at 06:00 a.m. while she was preparing tiffin for her husband, sister-in-law picked up quarrel with her. Thereafter, husband said that quarrel has become daily affair and saying so he instigated for setting her on fire upon which her mother-in-law caught-hold her and sister-in-law poured kerosene. Husband was abusing and while she was trying to escape, sister-in-law threw burning matchstick on her as a result of which she got burned. The above dying declaration is recorded by **PW7** Shashikant Govind Joshi, who was posted as Police Sub-Inspector at Newasa. According to him, after visiting Civil Hospital, he went to Burn Ward, approached attending Doctor who examined deceased and opined that she was in condition to give statement. He enquired with the deceased and recorded the statement as disclosed by the deceased. He identified the same to be at Exh.48.

10. Prosecution has also examined medical experts, who have examined deceased before and after recording statements. These witnesses are **PW3** Dr.Sahadev Sonowane, **PW4** Dr.Shrikant Pathak and **PW8** Dr.Supriya Jagtap.

ANALYSIS AND CONCLUSION

11. On carefully analyzing the above two dying declarations and placing them in juxtaposition it is noticed that, alleged occurrence had taken place on 28-06-2014 at around 06:00 a.m. but the first dying declaration at Exh.29 is recorded at 06:30 p.m. i.e. almost after 12 hours of occurrence of incident. Secondly, this dying declaration, which is recorded in Civil Hospital, Ahmednagar, is very brief and in question answer form. **PW1** Gorakshanth who is author of the first dying declaration at Exh.29, has admitted that it is undated. Secondly, toe impression of right leg is not identified. Whereas second dying declaration at Exh.48 is very elaborated one and in detail.

12. Learned Advocate for the appellants specifically pointed out that when second dying declaration at Exh.48 was recorded on 30-06-2014, relative of deceased was present at the time of recording and as such relative has signed as a witness.

On bare look at the foot of second dying declaration at Exh.48, one comes across signature of Isub Ganibhai Shaikh. **PW7** Shashikant Govind Joshi in his examination-in-chief in paragraph no.4 itself admits that he

obtained signature of relative on the statement. This fortifies the case of defence that at the time of recording dying declaration relative was around and therefore, possibility of tutoring cannot be ruled out. Therefore, in the light of such material, there are reasons to hold that second dying declaration at Exh.48 was recorded at a belated stage and that too in presence of relative. Such dying declaration at Exh.48, being very elaborate and in detail, there is reason to infer that the same is not voluntary and is rather tutored one.

Therefore, in our opinion, in the light of above infirmities and distinct features noted as above emerging upon comparing both the dying declarations, in our view, the said dying declarations cannot be said to be consistent one or voluntary and truthful one.

13. Apart from two dying declarations, prosecution seems to have examined **PW6** Akil Shaikh, father of deceased. It seems that information about occurrence was passed to him by his another daughter and thereafter he reached hospital. Though he stated that in the hospital his daughter gave him oral dying declaration, he has not taken expedient and prompt steps to set law into motion on the strength of such oral dying declaration. He has admitted that on 28-06-2014, he himself, his wife and relatives were all present in the Civil Hospital, Ahmednagar. Except father of deceased, no other relative is examined nor any immediate neighbour is examined by prosecution in support of their accusations.

On the contrary, here defence has adduced evidence of **DW1** Dr.Chandrakant Laxman Yadav, who was posted at Rural Hospital, Newasa . He spoke about deceased Parveen being brought to the Rural Hospital, Newasa at 07:15 a.m. on 28-06-2014 on account of burn injuries. He stated in his evidence at Exh.60 that he examined her. According to him, she gave history of stove burn injuries and that she was brought by her relative Amina Salim Pathan and Ismail Sadubhai Shaikh i.e. mother-in-law and maternal uncle. That entry to that extent is made in the MLC register. This witness stated that he also issued injury certificate on the strength of MLC register, which is at Exh.62.

Above witness is **cross-examined** by the learned APP wherein he answered that as it was an emergency case, he attended her before office hours. He stated that he immediately started treatment by applying Soframycine and giving I.V. fluid. He flatly denied that deceased was in fear and severe pains and that history was told by relatives i.e. her mother-in-law and husband.

14. Therefore, from above discussed material, it is emerging that defence has succeeded in probabilizing their case about accidental burns suffered by deceased while cooking. **DW1** Dr.Chandrakant Laxman Yadav, Medical Officer from Rural Hospital, Newasa is made to step-up in the witness box, who stated that deceased herself gave information about suffering accidental burns while

cooking. His evidence has not been impeached. Resultantly on the strength of such evidence of **DW1** Dr.Chandrakant and injury certificate issued by him at Exh.62, which is rather recorded shortly after an hour or so after occurrence, it is clear that burns are shown to be accidental one and not homicidal as alleged by prosecution.

15. Consequently on proper re-appreciation of evidence on record, patent infirmities which have surfaced are that, history of the occurrence given at the time of admission in the Civil Hospital, Ahmednagar, is not brought on record, Bed Head Ticket containing details of line of treatment is also not finding place and there is no prompt reporting of M.L.C. to the Police Chowki situated in the campus of Civil Hospital, Ahmednagar. Had it been done, steps for recording dying declaration at the earliest could have been taken. In spite of recording dying declaration Exh.29 at the Civil Hospital, Ahmednagar, **PW7** Shashikant Govind Joshi, a Police official, has himself not made enquiry with deceased for the best reasons known to him. Equally, **PW6** Akil Ganibhai Shaikh, father of deceased, in spite of claiming to have received oral dying declaration, surprisingly failed to report it immediately to Police. Therefore, the above discrepancies and shortfalls have rendered the case of prosecution weak.

16. We have carefully gone through the impugned judgment passed by the

learned trial Judge. In our opinion, while appreciating two dying declarations, the above salient features and discrepancies noted by us are totally overlooked. Law on appreciation of dying declaration has not been correctly applied. Learned trial Judge has apparently failed to consider and appreciate the evidence of **DW1** Dr.Chandrakant at Exh.60 and has thereby committed error in recording guilt. Therefore, we find it a fit case to interfere and accordingly, we pass the following order :

ORDER

- i) Criminal Appeal stands allowed.
- ii) The conviction awarded by learned District Judge-1 and Additional Sessions Judge, Newasa, District Ahmednagar on 03-05-2016 in Sessions Case No.140 of 2014 to the appellants i.e. accused No.1 Shahrukh Salim Pathan, accused No.2 Aminabee Salim Pathan and accused No.3 Samina Javed Shaikh, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code stands set aside. Appellants stand acquitted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.
- iii) Appellants be set at liberty, if not required in any other case.
- iv) Fine amount deposited, if any, be refunded to the appellants after statutory period.
- v) It is clarified that there is no change in the order passed by the learned District Judge-1 and Additional Sessions Judge, Newasa, District Ahmednagar, regarding disposal of Muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)