



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 436 OF 2018

Santosh S/o Dadarao Bamne,
Age : 30 years, Occu. : Labour,
R/o. Anand Nagar, Bhayegaon Road,
Degloor, Dist. Nanded.

... Appellant.
(Orig. Accused No.1)

Versus

The State of Maharashtra

... Respondent.

...
Mr. Vikram R. Dhorde, Advocate for Appellant
Mr. S. D. Ghayal, APP for Respondent – State
...

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

DATED : 04th DECEMBER, 2023

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

1. Appellant, who, is convicted for murder of his wife and awarded imprisonment for life by learned Additional Sessions Judge, Biloli is hereby assailing judgment and order passed in Sessions Case No.44 of 2016 dated 28.05.2018.

FACTUAL MATRIX

2. Appellant and deceased are husband and wife and they had a four year son. According to prosecution, in spite of payment of dowry and jewelry, husband and in-laws were unhappy and they again demanded Rs.60,000/-, which, they expected deceased to

bring from her parents. On account of non fulfillment of demand, they subjected her mal-treatment.

3. On 06.08.2016, appellant Santosh returned home around 5:30 p.m. and again questioned deceased as to whether she had arranged the amount. When she expressed her inability to raise the amount because of poor financial condition of her parents, it is the case of prosecution that appellant poured kerosene and incinerated her. Parents-in-law did not come to rescue and rather allegedly said that let her die in house.

She was shifted to hospital at Biloli, where her dying declaration was recorded and on the basis of same, crime was registered, investigated and husband and in-laws were charge-sheeted and finally tried by learned Additional Sessions Judge, Biloli vide Sessions Case No. 44 of 2016.

4. During trial, prosecution was permitted to adduce evidence i.e. oral and documentary, and on appreciating the same and after hearing both sides, learned trial Judge held the charges proved, but only against appellant-husband and acquitted parents-in-law.

It is the above judgment and order of conviction, which is challenged before us by way of instant appeal on various grounds raised in the appeal memo.

SUBMISSIONS

5. Learned counsel for appellant would submit that, implication is apparently false and only on the basis of alleged two dying declarations, which are manifestly inconsistent and on fabricated version. According to him, there is no prompt recording and rather there is unexplained delay in recording dying declarations. He took us through both dying declarations and would point out that, *ex facie*, it is evident that, it is a clear attempt to falsely implicate husband and in-laws. He pointed out that at one place while recording dying declaration, the medical expert calculated burn suffered by deceased to be 100%, but the percentage is contrary to the one computed by autopsy doctor. Learned counsel also questioned the capacity of deceased to give dying declaration. Further according to him, husband has also suffered burns, but prosecution has deliberately suppressed the injuries suffered by him. He pointed out that prosecution's own evidence suggests that hands of the deceased were affected by burns, and therefore, she was not in a position to give thumb impression because of her hands being in bandaged condition.

However, surprisingly both dying declarations are carrying her thumb impression.

6. He further pointed out that on same set up evidence, in-laws are acquitted, but only appellant is implicated and held guilty. He pointed out that material witnesses, who allegedly shifted deceased to the hospital are not examined and according to him, it amounts to withholding of crucial evidence. Immediate neighbours are also not examined. He would point out that except dying declarations, there is no other incriminating material. That, learned trial Court has failed to appreciate the evidence in its correct perspective and according to him learned trial court has also not considered settled legal position while appreciating dying declarations. Consequently, he prays to set aside the impugned judgment by allowing the appeal.

7. In answer to above, learned APP would submit that, there was demand as well as ill-treatment, deceased had given consistent dying declarations. Role of appellant is clear in both dying declarations, which are recorded by two independent authorities, who have been examined in the witness box. There is no infirmity. According to learned APP, as there is acquittal of parents-in-law and guilt of only appellant husband is recorded for

the more reason there is correct appreciation and so he prays not to disturb the findings and the conclusions reached at by the learned trial Judge.

PROSECUTION EVIDENCE

8. We have re-appreciated, re-analyzed and re-examined the entire evidence adduced by the prosecution in trial court. It appears that, in support of its case, prosecution had examined 8 witnesses, whose status could be summarized as under :

PW1 Santosh is the spot pancha in whose presence spot panchanama was drawn;

PW2 Nirmala, neighbour has not supported prosecution.

PW3 PSI Dnyanoba Kale, who recorded first dying declaration (Exh.49);

PW4 Sk. Hameed Sk. Hyder, Special Judicial Magistrate, who recorded second dying declaration (Exh.53);

PW5 Dr. Mohan Ghushinge is the Autopsy Doctor, who conducted post mortem on dead body. His evidence is at Exh.57;

PW6 Panchfulabai is the mother of deceased. His evidence is at Exh.59;

PW7 API Prashant Aradwad is the Investigating Officer;

PW8 Dr. Shaikh Anis Ahmed is the Medical Officer in Sub District Hospital, Degloor.

9. Admittedly, case is based on dying declarations and therefore before adverting to the merits of the dying declaration, we wish to give a brief account of the settled legal position regarding evidentiary value of dying declaration and manner of its appreciation 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 is thus settled 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. On carefully re-appreciating the evidence, it is emerging that, appellant is husband of deceased Sunita and they were married six years prior to the occurrence.

Let us first deal with both the dying declarations and for proper comprehension, both being in vernacular, we propose to reproduce the translated version of both dying declarations which are as under :-

First Dying Declaration

STATEMENT

DATED 06/08/2016

EXHIBIT 49

I, Sunita Santosh Bamane, aged 25 years, R/o Anand Nagar, Bhayegaon Road, Degloor, do hereby state in person in the Government Hospital, Degloor, that I have a daughter of four years. My marriage took place before 6 years with Santosh Dadarao Bamne, r/o Anand Nagar, Bhayegaon Road, Degloor.

Today, on 6-8-2016 at 5.30 PM, when I was at home, Santosh my husband came home and said that, “ I had asked you to bring money from your parents. Have you brought the money?” I replied him that my brother and mother are poor and from whom I should bring money? On this, my husband poured the kerosene, that was kept in a can in the house, on my person and set me ablaze with a burning match stick and ran away. My mother-in-law [Sumanbai] was in the house only and my father-in-law had gone to floor mill to get floor. I shouted loudly and fell down in a water pit in front of the house and therefore, the flames on my body extinguished. My father-in-law and mother-in-law kept me in the house with intention to get rid of me by not taking me to the hospital. After some time, Vitthal Bhosale and Nivrutti Bhosale brought me in the hospital in an auto-rickshaw.

My statement has been recorded as narrated by me and admittedly true and correct.

Signed/-

D S Kale,

PSI, Degloor Police Station.

Hence stated,

Thumb impression.

*PATIENT IS EXAMINED AND CONSCIOUS
AND CAN GIVE STATEMENT*

Signed/- 6-8-2016

Second Dying Declaration

Exhibit-53

Dying Declaration

*I introduce myself as Shaikh Hameed Shaikh Hyder, Special Judicial Magistrate and
I have come to record your statement.*

Question

1. Tell your full name, including your surname ?

Ans. My name is Sunita Santosh Bamane.

2. Are you married? For how many years you are married?

Ans. I am Married, I am married for six years.

3. Are your literate?

Ans. Yes, I have studied up to 6th standard.

4. What do your husband do? Is he a literate also?

Ans. My husband is a driver and drives Tata Sumo. Has studied upto 10th standard.

5. Where did the incident took place? When?

Ans. At my husband's house at 5.30 PM in Degloor Town on 06.08.2016.

6. Who were present at the Spot of occurrence ?

*Ans. I, My husband, Sumanbai- my mother-in-law, Dadarao Bamane- Father-in-law
and Santosh my husband [were present]*

7. When the incident took place? Please describe.

Ans. I do swear by God that, my husband Santosh, mother-in-law Sumanbai and

Dadarao Bamane, father-in law were harassing since last month. A dowry of Rupees One Lakh and Fifty thousand and 2 tolas of gold was given in the marriage. But they are not satisfied. My husband was nagging me for another 60,000/- Rupees from my parents. My parents-in law would instigate my husband. My parents in law and husband were harassing me over the demand of Rs. 60,000/-. My husband would abuse and beat me. My husband beaten and abused me everyday under influence of liquor over the demand of money. My husband brought kerosene in a bottle of 1 litre, threw kerosene on my person out of anger and by abusing me and saying "I will Kill you", he thrown a burning stick on me. Seeing this my mother-in- law went to another room and my father- in- law also left. I went and sat in the water in the pit of water tap and got the fire extinguished myself. Further, I shouted screamed but no one from the neighbourhood came. The big [main] door was closed and then my husband called my sister and my sister admitted me in the government hospital. I got admitted from Degloor to Nanded via an ambulance. My husband Santosh, father-in-law Dadarao Bamane and Sumanbai mother in law are entirely responsible for this incident, my final will is that all three shall be surely punished. I have stated under fully conscious state, without any pressure from anybody. The entire statement has been read over to me and admitted to be true and correct. After reading over the statement, I gave consent to put my right thumb.

The statement commenced at 9.55 AM and concluded at 10.25 AM.

Right thumb T.I of the Patient

Signed/-

(Sunita Santosh Bamane)

Sk. Hameed Sk. Hyder, Spl. Judicial Magistrate, Nanded

AFTER II ENDORSEMENT OF DOCTOR

I re-examined the patient and found conscious, oriented and mentally fit to give statement.

Signed/-

Dr. Satyajeet Aher.

Dying declaration is recorded as per say of the patient. He/she is admitted to be true and correct. It is stated at I endorsement of Doctor as a Time 9-55 AM on dated 7-8-2016 and conscious and concluded of II endorsement of Doctor as a time 10-25 AM on 7-8-2016.

*Sk. Hameed Sk. Hyder,
Spl. Judicial Magistrate, Nanded*

(As translated by Senior Translator, High Court at Aurangabad)

11. On comparing both dying declarations, it is revealed that, as regards first dying declaration, time at which it was recorded is not reflected on the statement, nor the time of its conclusion. Even thumb impression is not attested or identified. Apparently, the manner of certification of doctor clearly shows that it is obtained subsequently as it is appearing on the text of dying declaration.

12. In first dying declaration deceased allegedly narrated that husband returned home, questioned her for not bringing money from her parents and on her expressing regarding inability because of financial conditions which she alleged, he poured kerosene and incinerated her. That time, according to her only mother-in-law was available in the house, whereas father-in-law, according to her, had been to the flour mill. Surprisingly, she again marks presence of both of them and that she herself doused the fire and being taken to hospital by Vithal Bhosale and Nivrutti Bhosale.

However, in **second dying declaration**, which is

recorded on the next day and is in question answer form, it is evident that, it is elaborated and in details about maltreatment by husband and parents-in-law since one month, in spite of giving Rs. 1.5 lakh dowry and 2 tola gold and still they to be dissatisfied.

In this dying declaration, she has also quoted the amount of demand of money allegedly raised by husband as Rs.60,000/- which is patently not stated by her in first dying declaration. Instigation by in-laws attributed in second dying declaration are not finding place in first dying declaration. Even allegations of abuse, beating are not attributed in first dying declaration, which are done in second dying declaration. In second dying declaration, she spoke about calling her sister and she shifting her to the hospital. Such material is not stated by her in first dying declaration, rather she has named Vithal Bhosale and Nivrutti Bhosale coming to her rescue and taking her to the hospital. Even thumb impression over second dying declaration is not identified or attested and it is not clear whether it is of right thumb or the left thumb.

13. The scribe to the **first dying declaration** (Exh.49) is examined as PW3 PSI Dnyanoba at Exh.48. He claims that, on receipt of MLC from Degloor Government hospital at around 11.05 p.m., he went to Degloor Government hospital, approached doctor,

who examined the patient and told that lady was in a position to give statement and he accordingly recorded the statement. He further claims that he recorded crime on the basis of the same.

In cross, he admitted that, he did not mention timings of starting and ending of the statement (Exh.49). He is unable to state whether relatives of the lady were present when he recorded the dying declaration.

14. The scribe, who recorded **second dying declaration** is PW4 Sk. Hameed Sk. Hyder and he deposed about visiting hospital, approaching doctor, taking endorsement and then recorded dying declaration in question answer form which he identified at Exh.53.

In cross, he has admitted that, below the thumb impression there is no noting as to whether it is right thumb or left thumb.

15. On carefully comparing both dying declarations Exhs.49 and 53, it is noticed that, they are not consistent. First dying declaration is very cryptic and second one is apparently in minute details with long history which is not appearing in first dying declaration. Both dying declarations though are carrying thumb impressions, they are neither identified nor are demonstrated of which thumb i.e. right or left.

16. Occurrence has allegedly taken place at 5:30 p.m. on 06.08.2016. Hospital papers of Degloor where she was first taken are not placed on record. It has been pointed by learned counsel for appellant that even hands of victim were affected by burns and therefore he doubts about thumb impression over the dying declaration. In support of above case, he invited our attention to the PM report wherein doctor has noted about bandage being applied to the upper limbs which had suffered 9% burns.

17. Learned counsel for appellant has also strenuously submitted that, the persons who allegedly shifted victim namely Vithal Bhosale and Nivrutti Bhosale are not examined. First dying declaration on close scrutiny shows that she has named these two persons for shifting her. However, they are not examined and learned APP is unable to assign reason for non examination of material witnesses. PW2 Nirmala neighbour has unfortunately not supported prosecution.

18. Though mother is examined as PW6 Panchfulabai, her substantive evidence is patently silent about ill-treatment and demand. Mother only attributed role to husband and not to in-laws. Mother admitted that husband also suffered burns and being treated at Government hospital. Therefore, it was expected of prosecution to explain the injuries on husband appellant.

Resultantly, in the light of above material, case of prosecution cannot be said to be full proof and beyond reasonable doubt. For above reasons, dying declarations which are recorded cannot be said to be consistent and they fail to inspire confidence.

19. We have gone through the judgment under challenge. Learned trial Judge seems to have discarded second dying declaration and has rather chosen to rely on first dying declaration alone, which is cryptic in nature.

20. Therefore, in our opinion, there is no proper appreciation of evidence. Learned trial Court has not appreciated that material witnesses are not examined. Dying declarations being inconsistent, ought not to have been accepted. Hence, the findings and the conclusion reached at by the learned trial Judge, being erroneous, interference is called for. Hence, we proceed to pass following order :-

ORDER

- I) The appeal stands allowed.
- II) The conviction awarded to the appellant - Santosh S/o. Dadarao Bamne in Sessions Case No.44 of 2016 by learned Additional Sessions Judge, Biloli, District Nanded on 28.05.2018 for the offence punishable under Sections 302 and 498-A of Indian Penal Code stands quashed and set aside.

- III) The appellant - Santosh S/o. Dadarao Bamne stands acquitted of the offence punishable under Sections 302 and 498-A of 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.
- 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.)