

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 445 OF 2016

Baban Dadusrao Pakhare
Age 49 years, Occ. Nil,
R/o Revgaon, Tal. Jalna,
District Jalna.

... Appellant

Versus

The State of Maharashtra

... Respondent

.....
Mr. Nikhil S. Tekale, Advocate for the Appellant [appointed]
Mr. S. D. Ghayal, APP for the Respondent-State.
.....

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

DATED : 27.07.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. As a result of conviction recorded by learned Additional Sessions Judge, Jalna on 14.06.2016 for the offence punishable under Section 302 of the Indian Penal Code [IPC] in Sessions Case No. 62 of 2015, the appellant-convict has preferred the instant appeal.

2. Crime was registered on the basis of dying declaration given by Meerabai on 25.12.2014, wherein she has alleged that she was

married to appellant husband 10 years back. That, on 25.12.2014 she requested appellant husband to help her in cooking meals. Getting enraged by the same, appellant allegedly poured kerosene from a bottle and ignited her. In the backdrop of her said dying declaration, crime was registered by PW6 PSI Dnyaneshwar Sanap. While undergoing treatment, Meerabai succumbed to 63% burns. Appellant was arrested, investigation was carried out by PW11 PSI Sunil Gopinwar and on finding sufficient material, he was chargesheeted and made to face trial before learned Additional Sessions Judge, who on framing charge, recording evidence, appreciating the oral and documentary evidence and on hearing both sides, reached to a finding that accused is responsible for the homicidal burns and thereby held him guilty and convicted him to suffer imprisonment for life.

SUBMISSIONS

On behalf of the appellant:

3. Learned counsel for the appellant would submit that the judgment under challenge is patently perverse and illegal. He would submit that though there were allegations of ill-treatment, said charge has not been proved. Inviting our attention to the two dying declarations, he would submit that the same are not voluntary and

consistent and not inspiring confidence and therefore, the same ought not to have been relied by learned trial Judge while appreciating the evidence.

4. He pointed out that prosecution had utterly failed to establish on what count alleged incident took place. Inviting our attention to the testimonies of relatives, more particularly grandparents, it is submitted that neither of them has supported the accusations raised by prosecution. Moreover, according to him, they have reached after the occurrence and have no information. He would emphasis that in spite of these witnesses claiming about oral dying declaration and in spite of claiming to be accompanying deceased to the hospital and to be with her in the hospital, they have not lodged any FIR. Resultantly, it is submitted that there is no material whatsoever about how deceased suffered burns.

5. He would submit that case was set up by prosecution that while deceased was cooking, appellant allegedly poured kerosene. However, he submitted that scene of occurrence panchanama is silent about any cooking appliances or utensils at the scene of occurrence. Thus, it is submitted that false case has been built at the instance of relatives. Learned trial court ought to have correctly appreciated the evidence

adduced by prosecution. According to him, law on dying declaration has not been applied by learned trial court and thus, he prays for setting aside the judgment and order of conviction.

On behalf of the State:

6. Refuting the above submissions of false implication and perverse judgment, learned APP would submit that there are two dying declarations and the same are voluntary and inspiring confidence. Deceased Meerabai had particularly named husband for setting her on fire. He would submit that she had merely requested him to help her in preparing meals and accused, who was under influence of liquor, got annoyed and poured kerosene and ignited her. That, both the dying declarations are recorded promptly and even the authorities who have recorded the dying declarations and the medical experts who have issued certificate of fitness, are also examined. Their evidence has remained intact. There is no infirmity or discrepancy or variances in their versions. All witnesses have supported the prosecution and thus, it is his contention that, no fault can be found in the judgment under challenge and he consequently prays to dismiss the appeal.

7. Here, admittedly case is based on dying declaration. Before advertng to the veracity and credibility of dying declaration, it is desirable to give a brief account of the settled legal position.

8. 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 Supreme Court. Very recently the Hon'ble Supreme Court in the case of *State of Uttar Pradesh v. Veerpal and Another*, (2022) 4 SCC 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 and (ii) **Jagbir Singh v. State (NCT of Delhi)**; (2019) 8 SCC 779.

First Dying Declaration [Exhibit 21]

9. On re-examination and re-analysis of the evidence, we have found that here, first dying declaration is recorded between 17.45 hrs. to 18.15 hrs. on 25.12.2014. In the said dying declaration, deceased seems to have reported that after one year of marriage, husband started demanding ten to twenty thousand rupees for expenses and directed that she should not stay unless she brings the amount. Regarding the occurrence, statement is given that on the same day i.e. 25.12.2014, while she was cooking on account of Christmas festival, she requested her husband to help her in cooking. That time, husband refused and thereafter beat her and poured kerosene from a lamp and incinerated her. That, brother-in-law Sukanand came to her rescue, doused the fire and she was taken to hospital by sister-in-law Alesbai, uncles Daulat Jagdhane and Sunil Jagdhane and others in a private vehicle.

10. Above dying declaration seems to be recorded by **PW6** PSI Dnyaneshwar Sanap, who in his evidence at Exhibit 20 spoke about receipt of MLC on 25.12.2014 and he visiting Government hospital at 5.30 p.m. According to him, on his request, Dr. Kulkarni [PW7]

examined patient Meerabai and certified she to be fit to give statement and when he recorded her statement, she allegedly told him that she was married ten years back and had two daughters. That, for one year, she was treated properly by appellant husband. Thereafter he started beating her for bringing Rs.10,000/- to Rs.20,000/- from her parents. As there was Christmas, she was cooking. That, she was handicapped by one hand. Therefore, she requested accused husband to help her in cooking. At that time her husband assaulted her and poured kerosene on her person from a bottle of lamp and set her on fire. After recording dying declaration, he claims that he signed below the statement. He identified the dying declaration Exhibit 21.

Above witness in cross has answered that there were one or two persons sitting near Meerabai. He answered that Meerabai was disabled and her hands were covered with bandage. He admitted that there is signature of doctor near the thumb impression of Meerabai but he has not signed thereupon. According to him, though she was handicapped, she could give thumb impression of right hand.

11. Even Dr. Kulkarni, who allegedly examined Meerabai and certified fitness, is examined as **PW7**. His evidence is at Exhibit 23.

Second Dying Declaration [Exhibit 26]

12. **PW8** Yogita Khatavkar, who was working as Naib Tahsildar, claims in her evidence at Exhibit 24 that, she recorded dying declaration by visiting Government Hospital, Jalna. According to her, the lady told that at 12.00 noon while she was cooking, she told her husband that she would roll *puri* [fried bread] and he should fry it. At that time, husband was under influence of liquor. He poured kerosene and set her on fire. That, she further narrated that her husband used to ill-treat her at the instance of her mother-in-law.

Above witness in cross has admitted that when she went to the hospital, at that time Meerabai's relatives were present near her. She answered that she did not examine whether there was ink on her right thumb.

13. The dying declaration recorded by above witness is at Exhibit 26. It is in question answer form. It seems to be recorded between 07.45 p.m. to 08.08 p.m. on 25.12.2014. To a question as to how the incident happened, answer is noted that incident took place at 12.00 noon. She said to her husband that she would role *puri* and

requested husband to fry the same. Husband being under influence of liquor, poured kerosene and ignited her.

14. Dr. Santosh Jaybhaye, who examined Meerabai and issued certificate, is examined as **PW9**. In his examination-in-chief, he stated about PW8 Yogita Khatavkar, Naib Tahsildar approaching him for examination and certification and he accordingly carrying out the procedure and issuing certificate. He identified the certificate and endorsement.

In cross he admitted that general condition of Meerabai was appearing to be poor between 5.00 p.m. to 8.00 p.m. He admitted that both hands of Meerabai were burnt including palm.

ANALYSIS

15. On carefully analyzing the above both dying declarations, it is emerging that both dying declarations are apparently recorded in a short span. The first dying declaration Exhibit 21, on the strength of which crime is registered, is recorded between 17.45 hrs. to 18.15 hrs. and immediately the second dying declaration Exhibit 26 is recorded at 7.45 p.m. Why second dying declaration was required to

be noted has not come on record. It is noticed that in first dying declaration there are details about she requesting her husband to help her in cooking and he refusing and thereafter beating her and bringing kerosene, pouring the same and igniting her. The said details are not stated in second dying declaration. In second dying declaration, she merely speaks about asking husband to help her by frying *puri*. She has alleged that husband was under influence of liquor and he incinerated her. It is also to be noticed that deceased had suffered 63% burns and PW9 Dr. Jaybhaye, who examined her before recording second dying declaration and certified her fitness to give statement, has admitted that both hands of deceased were burnt including palm. On carefully examining the first dying declaration [Exhibit 21], which is made the basis of registration of crime, it is revealed that it does not bear thumb impression of deceased. This is a major lacuna in such document. Therefore, in our opinion, taking the above features of dying declaration into consideration, there is doubt about recording first dying declaration on the strength of which crime has been registered. It is without thumb impression.

OTHER ORAL EVIDENCE

16. Now let us sift the oral evidence. **PW2** Petrus and **PW3** Vimalbai, who are examined at Exhibits 13 and 14 respectively, seem

to be the grand parents of deceased Meerabai. PW2 Petrus spoke about appellant demanding Rs.20,000/- and ill-treating Meerabai. However, he does not specify for what reason said amount of Rs.20,000/- was demanded and even nature of alleged ill-treatment is not clarified by him. Though he claims that at hospital deceased told about accused setting her on fire, he has admitted in cross that he did not lodge report regarding the same at that point of time. Even grandmother PW3 Vimalbai in similar manner has stated about demand and beating after consuming liquor. She has also stated that there was oral dying declaration, but there was no reporting of the same to the police.

Likewise, **PW4** Daulat, uncle of deceased, has apparently given amount of demand as Rs.25,000/- [Rupees Twenty Five Thousand only], which is not the case of prosecution also. He stated that while taking Meerabai to hospital, she named accused for pouring kerosene and setting her on fire, but he too has not taken steps for lodging FIR. His evidence indicates that even father of Meerabai had been to the hospital, but unfortunately he is not examined. No relative is examined. Even daughters of deceased Meerabai are not examined by the prosecution for the best reasons known to it.

17. It is noticed that as per dying declaration, deceased was reported to be set on fire while she was cooking, however, scene of occurrence panchanama is absolutely silent about any cooking appliances or utensils at the scene of occurrence. Even the spot seems to be outside the house and is not the place where deceased was proposing to cook meals. Therefore, the accusations are not reconciling with the circumstances of scene of occurrence. The Investigating Officer also has admitted in cross about non-seizure of cooking utensils. Therefore, there is a big question-mark as to on what count the incident had taken place. As stated above, we have already noted that the dying declarations are not voluntary versions of deceased as relatives were near her. The circumstances at the scene of occurrence belie the story of prosecution. Therefore, under such circumstances, when prosecution had not proved the case against the appellant beyond reasonable doubt, it is a fit case for extending benefit of doubt to the appellant.

18. We have carefully gone through the judgment under challenge. Above aspects noticed by us are apparently lost sight of by learned trial Judge. Answers given by prosecution witnesses in cross-examination are also apparently overlooked. Therefore, there does

not seem to be proper appreciation of available evidence. It seems that learned trial Judge has straightway accepted the case of prosecution and there is no exercise of careful analysis. Therefore, interference is called for. Hence, we proceed to pass the following order:

ORDER

- [i] The appeal stands allowed.
- [ii] The conviction awarded to the appellant – Baban Dadusrao Pakhare in Sessions Case No. 62/2015 by the learned Additional Sessions Judge, Jalna on 14.06.2016 for the offence punishable under Section 302 of the 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] The appellant be set at liberty if not required in any other case.
- [v] 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 disposal of muddemal.

[vii] The fees of the appointed Advocate for appellant is quantified at Rs. 10,000/- (Rupees Ten Thousand).

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]