

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 373 OF 2017

1. Nagnath s/o Mariba Ibitkar,
Age : 21 Years, Occ : Agriculture,
R/o : Karla (Kd), Tq. Biloli,
District Nanded.
2. Chandrabai w/o Mariba Ibitkar,
Age : 56 years, Occ : Household,
R/o : Karla (Kd), Tq. Biloli,
District Nanded.
3. Mariba s/o Hanmant Ibitkar,
Age : 61 years, Occ : Agriculture,
R/o : Karla (Kd), Tq. Biloli,
District Nanded. ... Appellant

Versus

The State of Maharashtra,
Through the Police Station,
Biloli, Tq. Biloli,
District Nanded. ... Respondent

.....

Mr. Amit A. Mukhedkar, Advocate for the Appellants.
Mrs. V. S. Choudhari, APP for the Respondent-State.

.....

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

DATED : 03.10.2023.

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Getting dissatisfied by the judgment and order of conviction passed by learned Additional Sessions Judge, Biloli in Sessions Case No. 13 of 2016 dated 02.05.2017, holding appellants guilty and

convicting them for the offence punishable under Sections 302 and 504 r/w 34 of the Indian Penal Code [IPC], instant appeal has been preferred on various grounds mentioned in the appeal memo.

2. Prosecution was launched against all three appellants on the basis of FIR lodged on dying declaration of deceased Vandana dated 02.02.2016 wherein she informed that on that day around 9.00 a.m., accused nos. 1, 2 and 3 i.e. parents-in-law and brother-in-law abused and beat her. Mother-in-law poured kerosene whereas accused brother-in-law ignited her and accused father-in-law instigated the occurrence. She suffered 83% burns and while undergoing treatment, her dying declaration was recorded by PW2 ASI Ramkishan Gardanmare, who registered crime. The said crime was investigated by PW7 PSI Vilas Navle who, on its completion and on gathering sufficient evidence, chargesheeted accused persons.

3. Offence being triable exclusively by court of Sessions, case came to be committed and accordingly, went on the file of learned Additional Sessions Judge, Biloli, who permitted prosecution to adduce evidence and after appreciating the same, heard both sides and on analyzing the evidence, reached to a finding that prosecution has established the charge against the accused persons and thereby,

vide impugned judgment, sentenced accused no.1 Nagnath to suffer rigorous imprisonment for life whereas accused nos. 2 and 3 i.e. Chandarbai and Mariba stood convicted for the same charge, but are sentenced to suffer rigorous imprisonment for ten years each.

4. It is the above judgment which is now taken exception to by filing instant appeal.

SUBMISSIONS

On behalf of the Appellants :

5. Criticizing the judgment under challenge to be patently illegal and perverse, learned counsel would submit that prosecution had miserably failed to establish the charge. He would submit that implication is apparently false and out of strained relations. That, prosecution had not been able to satisfy, by adducing clear evidence, on the point of motive or reason for alleged incident. He pointed out that on the contrary, the so called dying declaration, which is made the basis for registration of crime, is apparently in presence of relatives and as such, according to him, it cannot be by any stretch of imagination said to be voluntary one and is rather tutored one.

6. Learned counsel submitted that there are two dying declarations and taking us through the same, he pointed out that both are not consistent. Roles of appellants are not consistently stated in both the dying declarations. Therefore, according to learned counsel, learned trial court has committed error while appreciating the said dying declarations and the law on dying declarations has not been properly applied before reaching to the conclusion and hence he prays to allow the appeal by setting aside the judgment under challenge.

On behalf of the State :

7. In answer to above, learned APP would submit that admittedly crime is registered on the basis of dying declaration. That, deceased had named three accused i.e. her parents-in-law and brother-in-law to be responsible for the burns. Their presence has not been disputed. According to learned APP, dying declaration was recorded by police officer immediately. The same was inspiring confidence. Medical experts, who had examined deceased before recording her dying declaration, have also stepped into the witness box. Therefore, learned trial court has committed no error in accepting the case of prosecution and holding accused persons guilty. According to learned APP, there is no merit in the appeal and so, she prays to dismiss the same.

8. After hearing the submissions of both sides and on going through the record, here it is seen that apart from documentary evidence, prosecution is relying on the evidence of seven witnesses. Their role and status could be summarized as under:

PW1 Nagnath Naikwadse is the pancha to spot panchanama Exhibit 15.

PW2 ASI Ramkishan Gardanmare is the police official who recorded dying declaration Exhibit 18.

PW3 Arjun Sonkamble is father of deceased Vandana.

PW4 Hanmant Mariba Ibitkar is the husband of deceased Vandana. He has not supported prosecution.

PW5 Sk. Hamid, Special Executive Magistrate recorded the dying declaration Exhibit 26.

PW6 Dr. Rahul Jadhav is the autopsy doctor who conducted postmortem and issued cause of death as 'septicemia due to burns'. He identified postmortem report at Exhibit 28.

PW7 PSI Vilas Navle is the Investigating Officer.

9. Here, there is no dispute that crime is registered on the basis of dying declaration. Therefore, before adverting to the merits and testing its credibility and ascertaining the truthfulness of prosecution witnesses, we propose to give brief account of settled legal position on

dying declaration.

10. 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 *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 and *Madan v. State of Maharashtra* ; (2019) 13 SCC 464.

11. In the light of above legal requirements, we proceed to scan the evidence on record.

12. PW2 ASI Ramkishan Gardanmare, a police official posted at Biloli Police Station, in his evidence at Exhibit 17 deposed that while he was on duty on 02.02.2016, he went to record statement of deceased Vandana at Civil Hospital, Nanded while she was taking treatment in burn ward. It is his evidence that he initially approached the doctor and after the patient was examined by doctor, he recorded her dying declaration wherein she narrated that accused nos. 1, 2 and 3 questioned her why she did not name her husband in the case and in such backdrop, she stated that, her brother-in-law beat her with slaps and fist blows, mother-in-law brought kerosene can and poured it on her person and father-in-law ignited her. According to her, there was ill-treatment and harassment to her at the hands of accused. Witness states that after recording dying declaration, he took her thumb impression. He identified dying declaration at Exhibit 18.

Above witness in cross answered that when he visited hospital at 7.00 a.m., except deceased, no other patient was admitted. He admitted that she was on intravenous [I.V.] therapy and she was

murmuring in pain. He admitted that relatives of the patient were present near her. He denied that she was not in a position to speak. Rest is all denial.

13. Said dying declaration at Exhibit 18 in translated form is reproduced as under for the sake of proper appreciation :

Statement

Date: 2/2/2014

Exh.18
2/2/16
6.45 pm
I have
examined
the pt.
and found
that pt. is
conscious
oriented
and
mentally
fit to give
statement
at present.
Sd/-
Dr.Vinayak

I, Mrs. Vandana W/o Hanmant Ibitkar, age 25 yrs, occupation – labour , R/o- Karla(Kd), Tq. Biloli, on being asked to record my statement at Government Hospital Vishnupuri, Burn Ward No. 9, states that I am a resident of the above place and I have two sons and one daughter. I reside with my husband.

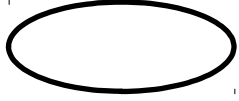
Today on 2/2/2016 around 9 o'clock when I was doing my household work, my mother-in-law Chandarbai, father-in-law Mariba and brother-in-law Nagnath these three persons came home and started abusing me saying 'why your husband's name is not included in the case'. When I ask them why are you abusing me without any reason, my brother-in-law Nagnath assaulted me with slaps and fist blows saying "This quarrel happened because of you". My mother-in-law Chandarbai said nothing would happen by slapping

*her and we should kill her and saying so, **she** brought a can of kerosene and **poured it on my person** and my **father-in-law Mariba** ignited a match stick and set me on fire. At that time my chest, right hand and leg was burned. When I screamed and shouted neighbours came and extinguished the fire. Soon my husband Hanmant came and brought me in auto rickshaw to Government Hospital at Biloli for treatment. But, from there I was brought to Nanded and admitted in Government Hospital at Vishnupuri where I am currently undergoing treatment.*

Therefore, appropriate action should be taken against my mother-in-law Chandarbai, Mariba, Brother-in-law Nagngath who set me on fire.

My above statement is true and correct as per my narration.

*Sd/-
R. N. Gardanmare
ASI, P.S. Biloli*


Thumb Impression (Right)

On dated 03/02/2016 at 13.15 hrs.
St. Diary entry taken at no. 30, Part 1
to 5 and crime Reg. no. 11/2016 u/s
307,323,504,34 of IPC and as per the
order of the Police Inspector the
investigation given to bit S.I. Shri.
Navale.

Sd/-

14. What is pertinent to note is that the alleged incident had taken place at 9.00 a.m. on 02.02.2016 and dying declaration is recorded on same date, however in the evening at around 6.45 p.m and surprisingly crime is shown to be recorded on 03.02.2016 i.e. on the next date, for which no explanation is forthcoming.

15. There is **second** dying declaration which is recorded by PW5 Sk. Hamid and he, in his evidence at Exhibit 25, stated that while he was working as Special Judicial Magistrate, he received letter from police chowki and thereafter he approached hospital at 6.00 p.m. on 02.02.2016. Doctor accompanied him, examined the patient and after endorsement, he claims to have put her questions wherein she stated that since last three days, in-laws and brother-in-law abused her and beat her. Father-in-law and brother-in-law were under influence of liquor. There was one liter kerosene in a plastic can on five liter. Mother-in-law poured kerosene on her person, brother-in-law ignited fire by throwing match stick on her person and father-in-law caught hold of her. She has named parents-in-law and brother-in-law responsible. This witness has identified dying declaration Exhibit 26.

Above witness in cross admitted that he commenced noting dying declaration at 6.30 p.m. According to him, there were no

relatives near the patient. He denied that false statement was recorded. The translated form of dying declaration recorded by this witness, for consideration, is as under:

Dying Declaration

I am Shaikh Hameed, Special Judicial Magistrate, I have come from Nanded Court to record your statement.

Question : What is your full name ?

Answer : Vandana Hanmant Ibitkar.

Question : Are you married? For how many years have you been married?

Answer : Yes, I have been married for 9 years.

Question : Are you educated?

Answer : I am educated. I have studied up to 10th standard.

Question : What do your husband do? Is your husband educated?

Answer : My husband is a farmer. He has studied up to 5th standard.

Question : Where and when did the incident took place ?

Answer : The incident took place at 9 am in the house of my husband at Karla.

Question : Who were present in the house when the incident took place?

Answer : Myself, mother-in-law, father-in-law and brother-in-law were present at the spot of occurrence.

Question : How the incident took place? Give details.

Answer : I do hereby swear to God and my children and state that; for the last three days my mother-in-law namely Chandrabai Mariba, father-in-law namely Mariba Hanmant, and broth-in-law namely Nagnath Mariba Ibitkar, all residents of Karla, were abusing in filthy language and beating me on the account of the marriage of my younger brother-in-law that was broken up within a year and in laws held me responsible for the dispute in marriage of my brother-in-law. My father-in-law and brother-in-law were under the influence of liquor and brother-in-law pushed me. There was one liter kerosene in a plastic canister of a capacity of five liter. My mother-in-law poured the kerosene on my person, brother-in-law ignited match stick and threw it on my person. Father-in-law caught hold of me. As soon as the fire broke out, my father-in-law left me and the three of them left the house and I was burnt.

Question : What was the motive of this burning?

Answer : My mother-in-law was saying to do away with me, because of me the in-laws of my brother-in-law had filed case against all of us. Therefore, the aforementioned three persons tortured me and set me on fire with intention to kill me, as they held me responsible for filing a case against them. After hearing my screams, neighbours rushed to my house, by the time I doused the fire with water. People also doused the fire with water. On knowing this, my husband, who was out of house, also came there and he immediately admitted me in the Civil Hospital Biloli by means of jeep and from there, by means of ambulance I was admitted in Civil Hospital, Nanded for treatment. All three persons are responsible for my this situation. All of them should be severely punished. This is what the patient said in her final statement.

I have made this statement voluntarily without succumbing to any pressure and the same is read over to me and admitted to be true and correct. My statement is read over to me and thereafter I put my right hand thumb mark on it. The said statement is true and correct and I narrated the actual situation in it. I have been suffering from these three persons since I got married, and after enduring them they made me suffer this condition.

This statement has been commenced at 6:30 pm. and concluded at 07:05 pm.

signed/thumb impression put before me.	Signature of patient/Name/Thumb Impression/hand/feet/right/left
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sd/-

Sk. Hameed Sk. Hyder

[Translation provided by Senior Translator, High Court, Bench at Aurangabad]

16. Apart from both dying declarations, prosecution has examined father Arjun [PW3], husband Hanmant [PW4] as well as Dr. Jadhav who conducted autopsy [PW6].

17. According to autopsy doctor PW6, deceased died due to 'septicemia due to burns', of which there is no dispute.

18. What we are now called upon to re-appreciate and re-examine is whether the dying declarations, which are the basis of registration of crime, are in fact voluntary and truthful versions and therefore, liable to be accepted and relied.

19. Here, first dying declaration is recorded by police officer and second one is by Special Judicial Magistrate, but on the same day. In the first dying declaration Exhibit 18, deceased had informed that in-laws and brother-in-law used to abuse and beat her. She has attributed role of pouring kerosene to mother-in-law and igniting to father-in-law and, according to the police official who recorded this dying declaration Exhibit 18, she has attributed role of incapacitating her by holding her from backside to her brother-in-law. In contrast, in the second dying declaration Exhibit 26, she seems to have attributed role of pouring kerosene to mother-in-law and role of igniting is surprisingly attributed to brother-in-law and not to father-in-law, as she has done in first dying declaration. Other inconsistencies noticed are that, in the first dying declaration, deceased has not informed that accused came to the house under influence of liquor. However, such material is narrated by her in second dying declaration; so also, in the first dying declaration she has narrated that her husband took her to

Government Hospital, Biloli in at auto, whereas in second dying declaration, she has mentioned the vehicle to be a jeep.

Therefore, here, apparently there is material contradiction. In the first dying declaration which is made the basis of registration of crime, PW2 ASI Gardanmare has candidly admitted that when the dying declaration was recorded, at that time relatives of the patient were around her.

20. Even as stated above, in spite of alleged occurrence taking place on 02.02.2016 around 9.00 a.m., dying declarations are recorded at around 7.00 p.m. There are no medical papers as to when she was brought to hospital and by whom. Even the background in which the incident took place has also not come on record. Even in dying declaration Exhibit 18, which is made the basis of registration of crime, there is no identification below the alleged thumb impression. In postmortem report, autopsy doctor has noted that fingers had suffered 8% burns. Therefore, there are reasons to suspect the so called dying declaration.

21. As stated above, there are material contradictions as to who caught hold and who ignited deceased. Though father PW3 Arjun is examined and he claims that he got information from his son-in-law

i.e. husband of deceased, he merely speaks of hearing about quarrel. He even claims to have received oral dying declaration but he has not on his own taken efforts to lodge complaint or FIR. Though he speaks about hearing about quarrel, para 3 of his cross-examination shows that there is omission to this extent.

22. Likewise, PW4 Hanmant i.e. husband of deceased, has apparently not supported prosecution as he has not attributed any role to his parents. He merely spoke about his wife suffering burns. According to him, one day prior to the incident, there were quarrels between his parents, brother and his deceased wife on account of criminal case filed by wife of accused Nagnath. However, he denied that in such case his sister-in-law had made any allegations against him and his wife. According to him, at the time of incident, he was standing in front of one grocery shop and on hearing hue and cry, he rushed to his house. He had not spoken about his parents or brother to be present there. He claims neighbours Gangaram and Maroti to be present there but unfortunately these two witnesses are not examined by prosecution.

In cross, he admitted that his parents and brother were residing separately. Therefore, here, husband of deceased has also not supported prosecution case.

23. To sum up, here, the dying declarations are shown to be recorded at a belated stage. Secondly, there is presence of relatives of deceased. Therefore, aspect of voluntary dying declaration vanishes. There are two dying declarations however, the same are not consistent for the reasons stated above and in our considered opinion, case of prosecution is not free from doubt.

24. We have gone through the impugned judgment. In our considered opinion, learned trial Judge has not appreciated the dying declarations in proper perspective. Material inconsistencies and contradictions have been apparently overlooked by learned trial Judge without assigning any reasons. The answers given by witnesses in cross have not been appreciated. Therefore, in our considered opinion, learned trial Judge has not appreciated and examined the evidence as required by law. Hence interference is called for. Accordingly, we proceed to pass the following order:

ORDER

(I) Criminal Appeal stands allowed.

(II) The conviction awarded to appellant nos.1 to 3 by the learned Additional Sessions Judge, Biloli, District Nanded in

Sessions Case No.13 of 2016 on 02-05-2017 under Sections 302, 504 read with 34 of IPC is hereby quashed and set aside.

(III) Appellant no.1 – Nagnath s/o. Mariba Ibitkar stands acquitted of the offence punishable under Section 302 read with 34 of the Indian Penal Code.

(IV) Appellant no.2 – Chandrabai w/o. Mariba Ibitkar and appellant no.3 – Mariba s/o Hanmant Ibitkar stand acquitted of the offence punishable under Section 302 read with 34 of the Indian Penal Code.

(V) Appellant nos.1 to 3 are acquitted of the offence punishable under Section 504 read with 34 of the Indian Penal Code.

(VI) The appellants be set at liberty, if not required in any other case.

(VII) Fine amount deposited, if any, be refunded to the appellants after the statutory period.

(VIII) It is clarified that there is no change as regards the order regarding disposal of Muddemal.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]