

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 423 OF 2017**

1. Jijabai w/o Ashok Dongre,  
Age 47 years, Occ: Household,  
r/o Kadethan (Bk), Tq. Paithan,  
District Aurangabad.
2. Ashok s/o Shankarrao Dongre  
Age 52 years, Occ: Agriculture,  
r/o Kadethan (Bk), Tq. Paithan,  
District Aurangabad. ... Appellants

Versus

The State of Maharashtra ... Respondent

.....  
Mr. Nilesh S. Ghanekar, Advocate for Appellants  
Mr. S. D. Ghayal, APP for Respondent-State  
.....

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

Reserved on : 21.09.2023  
Pronounced on : 27.09.2023

**JUDGMENT [ABHAY S. WAGHWASE, J.] :**

1. On account of conviction recorded by learned Additional Sessions Judge-8, Aurangabad in Sessions Case No. 114 of 2015 dated 07.08.2017 for offence punishable under Section 302 r/w 34 of the Indian Penal Code [IPC], the appellants are questioning the legality, maintainability and sustainability of the said judgment by preferring the instant appeal.

2. In brief the case of prosecution is that the appellants, who are parents-in-law of deceased Pramila, picked up quarrel with her in the evening of 25.01.2015 for not bearing child and they asked her to leave. According to prosecution, mother-in-law, on instigation of father-in-law, poured kerosene on Pramila and ignited her. On account of 93% burns, she was taken to hospital where she gave dying declaration naming both in-laws to be responsible for the burns and resultantly, PW3 PSI Pawar recorded the dying declaration and registered crime on the strength of the same. The said crime was investigated by PW11 PSI Khune and after completion of investigation, he chargesheeted the appellants. In support of their case, prosecution adduced evidence of in all 11 witnesses and also relied on documentary evidence like dying declaration, inquest panchanama, FIR and postmortem report etc.

At trial, on hearing both sides and after appreciating the evidence adduced by prosecution, learned trial court accepted the case of prosecution as proved on the basis of dying declaration, holding it to be inspiring confidence. Resultantly, such judgment is now taken exception to by way of filing instant appeal on various grounds mentioned in the appeal memo.

3. This being appeal under Section 374 of the Code of Criminal Procedure [Cr.P.C.], we have re-appreciated, re-examined and re-analyzed the entire oral and documentary evidence adduced by prosecution in trial court.

4. The role and status of the prosecution witnesses is as under:

**PW1** Parmeshwar Bhukele and **PW2** Sunil Tawar are the panchas to spot panchanama and seizure of articles. They have not supported prosecution.

**PW3** PSI Sampat Pawar is the police official, who, on receiving MLC Exh. 43, approached Ghati Hospital and after obtaining certificate regarding fitness of patient to give statement, recorded the same at **Exhibit 45** and registered crime.

**PW4** Kacharu Sonawane, brother and **PW5** Bebika Narwade, sister of deceased claim to have received oral dying declaration from deceased on the next day.

**PW6** Dr. Anil Shinde is the Gynecologist who had treated deceased for infertility.

**PW7** Santosh Phate is the photographer who took photographs at the spot.

**PW8** Dr. Manish Jagtap is the doctor who gave certification of fitness on dying declaration Exhibit 45.

**PW9** Dr. Balaji Phalke is the autopsy doctor who conducted postmortem and issued report Exhibit 70. According to him, cause of death is “shock due to thermal burns”.

**PW10** Ravi Gaikwad is the pancha to inquest panchanama Exhibit 75.

**PW11** PSI Ramesh Khune is the Investigating Officer.

### **SUM AND SUBSTANCE OF THE ARGUMENTS**

5. In favour of the relief sought, learned counsel for the appellants would submit that the only piece of evidence in this case is the so-called dying declaration. However, according to him, the dying declaration is not voluntary one and is not inspiring confidence as it is shown to be recorded in the midst of relatives. Even MLC papers and hospital papers carry history of accidental burns. That, such crucial factors ought to have been carefully appreciated by learned trial court, but it failed to do so and hence, according to him, there is no proper appreciation of evidence and even law on dying declaration has not been applied by learned trial Judge. Resultantly, he prays to allow the appeal.

6. Per contra, learned APP for respondent State would submit that dying declaration was promptly recorded by police official. Such police official has deposed in the witness-box. In the dying declaration, deceased has named appellants. Finding the said dying declaration to be worthy of credence, learned trial Judge has committed no error in accepting the same and holding accused guilty and consequently, according to him, there is no merit in the appeal.

7. Here, admittedly case is based on dying declaration allegedly given by Pramila. Before advertng to the credibility and veracity of the dying declaration, we deem it fit to give a brief account of the settled legal position while appreciating the evidentiary value of dying declarations.

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.

9. Here, the dying declaration which is made the basis of registration of crime is at Exhibit 45.

10. The solitary piece of evidence admittedly is the dying declaration Exhibit 45 recorded by PW3 PSI Pawar. His evidence is at Exhibit 42 in which he speaks about receiving MLC from Ghati Hospital and accordingly he approaching the hospital, seeking opinion of doctor about fitness and then he claims to have put her preliminary questions wherein she allegedly said that her husband had gone for work at village Nilajgaon since last two months and that she was staying with her in-laws. According to this witness, she further stated

that her marriage was performed five years back and that she has no issues. That, on 25.01.2015 around 6.00 p.m. when she was preparing food, her father-in-law came to her and said “*tula mulbal hot nahi*” (you are unable to conceive). According to this witness, she further stated that father-in-law started abusing her and so she requested him not to do so. At that time, mother-in-law came, took kerosene from a Bisleri bottle and poured it on her person. Thereafter father-in-law asked mother-in-law to ignite her and mother-in-law set her on fire by using match-box. That, both in-laws and neighbours took her to Ghati hospital. This witness has identified dying declaration at Exhibit 45.

In cross, above witness has admitted that his statement was not recorded by the Investigating Officer and he is first time stating whatever is narrated in examination-in-chief. In para 4 of his cross, he has admitted that while in Ghati hospital, in the concerned ward, relatives of Pramila were present.

11. The sum and substance of the dying declaration dated 26.01.2015 [Exhibit 45] is that on 25.01.2015 around 6.00 p.m., while she was cooking food, at that time, her father-in-law said to her that she is unable to conceive and abused her. She requested him not

to abuse her. At that time, mother-in-law brought Bisleri bottle having kerosene and poured it on her person and thereafter, her father-in-law directed to ignite her upon which, mother-in-law ignited match stick and set her fire. This dying declaration seems to be recorded at 21.00 hrs. on 26.01.2015. Here, it is to be noted that occurrence had taken place on 25.01.2015 around 6.00 p.m. In spite of being brought to the hospital after two and half hours or so, the dying declaration is recorded on the next day by PW3 PSI Pawar at 21.00 hrs. PW3 has admitted that at such time, relatives of Pramila were present in the ward. Even the Doctor [PW8 Dr. Jagtap], who examined Pramila and gave endorsement, in cross has admitted that her relatives were present when PW3 PSI Pawar recorded her statement. Therefore, there is enough room to infer that the dying declaration is apparently recorded in presence of her relatives. Therefore, above circumstances compel us to hold that there is doubt about voluntary dying declaration.

12. Though victim's brother and sister, who reached same night at around 1.30 a.m. and claimed to have received oral dying declaration, they have not informed anything to that extent in their statement under Section 164 of Cr.P.C. and they have admitted regarding it in their cross-examination. No efforts were taken to promptly lodge FIR

in spite of claiming to have received dying declaration next day morning. Therefore, all such circumstances create doubt about credibility and veracity of the dying declaration.

13. Learned counsel for the appellant would submit that motive is not established. Here, in dying declaration, allegations are levelled that parents-in-law were taunting her for not bearing child. Even though PW6 Dr. Shinde, who had given treatment to deceased for not bearing child, is examined, he has stated in his evidence that whatever tests were conducted revealed that their reports were normal. Therefore, even motive is not cogently established. We find that what preceded the alleged incident is not finding place in the dying declaration. There are direct allegations of abuse for not bearing child and then pouring kerosene. Role attributed to father-in-law is about instigation. There is no evidence about from where kerosene was brought and poured. It is surprising to note that in spite of the fact that deceased claimed that she was cooking and mother-in-law poured kerosene, she does not seem to have reacted or attempted to flee. It is not the case that she was caught hold by father-in-law or even the doors of the room were kept locked to prevent her from going out. Neighbours who doused fire and shifted her to hospital, namely, Vikram and Dattu are not examined by prosecution. It has

also come in the dying declaration itself that parents-in-law had taken her to the hospital. Therefore, such circumstances prompt us to draw adverse inference against prosecution version.

14. It has been brought to our notice by learned counsel for the appellants that in medical papers/case papers, history reported is of accidental burn. This aspect has not been brought by prosecution on record for the best reason known to it. Therefore, this further contributes to the suspicious character of prosecution evidence. Resultantly, in our considered opinion, the solitary piece of evidence i.e. dying declaration is not voluntary and it does not inspire confidence and cannot resultantly be made the basis for conviction.

15. Learned trial court has not appreciated the evidence as well as the law relating to dying declaration in its proper perspective. The above aspects are not meticulously examined by prosecution while recording guilt. Therefore, interference is called for and hence, we proceed to pass the following order:

### **ORDER**

I. The appeal stands allowed.

II. The conviction awarded to appellant no.1 Jijabai w/o Ashok Dongre and appellant no.2 Ashok s/o Shankarrao Dongre by learned Additional Sessions Judge-8, Aurangabad in Sessions Case No.114 of 2015 on 07.08.2017, after holding them guilty of committing offence punishable under Section 302 r/w 34 of the Indian Penal Code, stands quashed and set aside.

III. The appellants stand acquitted of the offence punishable under Section 302 r/w 34 of the Indian Penal Code.

IV. The appellants be set at liberty, if not required in any other case.

V. We clarify that there is no change in the order as regards disposal of muddemal is concerned.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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