



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.780 OF 2018

Abhay s/o Nana Patil
Age: 37 years, Occu.: Agri.,
R/o. Waghadi-Budruk, Tq. Shindkheda,
District Dhule (At Present in Central
Prison, Nashik).

.. Appellant

Versus

The State of Maharashtra

.. Respondent

.....

Mr. P. P. Khandagale Patil, Advocate for the appellant (Appointed
Through Legal Aid).

Mrs. V. S. Choudhari, APP for the respondent – State.

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

DATE : 11th DECEMBER, 2023

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :-

1. Original accused in Sessions Case No.51 of 2016 i.e. present appellant takes an exception to challenge his conviction by learned Sessions Judge, Dhule on 22.06.2017 after holding him guilty of committing offence punishable under Section 302 of Indian Penal Code.

2. The prosecution has come with the case that deceased Shailabai was the wife of present accused. Shailabai was daughter of P.W.5

Vimalbai Patil. The marriage between accused and deceased was solemnized on 19.05.2005. They are blessed with two sons, namely, P.W.4 Tushar and Gaurav. Shailabai was admitted to Civil Hospital, Dhule around 9.45 p.m. on 14.10.2015 after receiving burn injuries. Her dying declaration came to be recorded on the same day around 11.05 p.m. to 11.20 p.m. by P.W.8, Police Head Constable, Santosh Sonawane. It was stated in the said dying declaration that initially she was treated properly, however, thereafter the accused became addicted to liquor. He used to ill treat Shailabai and therefore, she used to go and reside with her parents. About 7-8 months prior to the incident, she had gone to stay with her parents and had also lodged complaint with Women's Grievance Redressal Forum. The officers brought a compromise between them and, therefore, she resumed her cohabitation with the accused a month prior to the incident. On the day of incident she as well as her husband had gone for labour work in the field and returned in the evening. The accused came drinking liquor around 7.00 p.m., Shailabai had prepared food and served, but accused was not getting up. He refused to take meal and started abusing. Therefore, Shailabai went to call her mother-in-law Bhikubai, who is separately residing. Bhikubai came and requested accused to get up and eat the served food, but still accused did not get up and started using bad language to Shailabai saying that it is her habit. Thereafter, he got up,

poured kerosene on Shailabai and threw burning kerosene lamp (चिमणी) on her person, as a result of which, her clothes caught fire. When she shouted for help, accused got frightened and put quilt around her. In the said process, accused had also received burn injuries. Father-in-law Nana took both of them in Ambulance to Civil Hospital, Dhule around 9.45 p.m. and she has specifically told that she has a complaint to make against the accused. After the said complaint was reduced into writing i.e. dying declaration Exhibit-37, offence under Section 307, 504 of Indian Penal Code came to be registered vide Crime No.63 of 2015. It is the further prosecution story that second dying declaration of Shailabai Exhibit-18 came to be recorded between 10.40 p.m. to 11.00 p.m. by P.W.3 Executive Magistrate, Rajendra Sonawane.

3. After the registration of offence, panchanama of the spot was got executed with the help of two panchas and statements of witnesses were recorded. Unfortunately, Shailabai succumbed to the injuries on 16.10.2015. Inquest panchanama was got executed and dead body was sent for postmortem. After her death, offence under Section 302 of Indian Penal Code came to be added. Statements of further witnesses were recorded. Clothes of the deceased as well as accused came to be seized. The seized articles were sent for chemical analysis. Accused came to be arrested. After the completion of investigation, charge-sheet was filed.

4. After the case was committed to the Court of Sessions, learned Sessions Judge framed the charge and upon denial to accept the guilt, trial has been conducted. Prosecution has examined in all nine witnesses to bring home the guilt of the accused, whereas accused has examined his father as witness in defence. After considering the evidence on record and hearing both sides, the learned Sessions Judge, Dhule held that the prosecution has proved the guilt of the accused beyond reasonable doubt as regards offence under Section 302 of Indian Penal Code and sentenced the accused to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/-, in default of payment of fine, to suffer rigorous imprisonment for three months. Set off under Section 428 of the Code of Criminal Procedure has been given. This conviction is under challenge in this appeal.

5. The appellant appears to have approached the legal aid committee of this Court and thereupon the legal aid has been provided to him.

6. Heard learned Advocate Mr. P. P. Khandagale Patil for the appellant (Appointed through Legal Aid) and learned APP Mrs. V. S. Choudhari for the respondent – State.

7. The learned Advocate for the appellant has submitted that the case of the prosecution is based on two dying declarations, one is

recorded by the Police Head Constable and another is by the Executive Magistrate. Though the prosecution has examined the son of deceased and accused i.e. P.W.4 Tushar, it can be seen that he was only 8 years old boy at the time of deposition and at the time of incident, he was studying in 4th standard. He was under the custody of his maternal uncle. One of his maternal uncle by name Manoj is a home guard. Therefore, tutoring of the child witness cannot be ruled out. The two dying declarations are absolutely not inspiring confidence. The dying declaration appears to be not in the language of the deceased. She has stated about the presence of her mother-in-law, but mother-in-law has not been examined. If the appellant had the intention to kill, then he would not have douse the fire. He has also received injuries, but prosecution has not led evidence and explained the injuries to the accused. The dying declarations are the outcome of tutoring by the relatives of deceased and in fact, there were strained relations between the husband and wife. It appears to be the accident, but accused has been falsely implicated. The judgment and conviction is perverse and therefore, deserves to be set aside.

8. Per contra, the learned APP strongly opposed the appeal and submitted that the learned Sessions Judge has passed a detailed and sound judgment. There is absolutely no inconsistency between the two dying declarations. The case of the prosecution is not only based on the

dying declarations, but the direct evidence of P.W.4 Tushar, who is the son of deceased as well as accused. There was no electricity in their house and there was kerosene lamp (चिमणी) lighted. He had seen father setting his mother to fire and in the cross-examination, his testimony has not shattered. Merely because now he is staying in the house of his maternal uncle, it cannot be said that he is tutored. The accused was in habit of drinking liquor, which was the result of the strained relationship. Deceased had filed complaint against the accused. Only after the compromise, she had resumed the cohabitation. Still, it appears that there was no improvement in the behaviour of the accused. Accused had knowledge of consequences of pouring kerosene and setting the wife to fire and, therefore, it cannot be said that there was no intention on his part to kill deceased. It is specifically stated by the deceased in first dying declaration Exhibit-34 that after deceased shouted for help, the accused got frightened and then extinguished the fire and in that process, he had received burn injuries. It is the part of FIR and, therefore, it was not necessary for the prosecution to examine and bring evidence on record to show that accused had sustained burn injuries. Already explanation is there in the dying declaration. The appellant has been rightly convicted and, therefore, his appeal deserves to be dismissed.

9. At the outset, it is to be noted that the case is based on the direct evidence of the eye witness P.W.4 Tushar and the two dying declarations. For the convenience, we would like to take the evidence in respect of dying declarations first for scrutiny. As the case is based on dying declarations, before adverting to the merits of 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. The law was set in motion after the information was given to Dhule City Police Station about the admission of Shailabai and P.W.8 Police Head Constable Santosh went to record her statement in view of the orders given to him and after he had recorded the statement of Shailabai, the offence was registered. P.W.8 Santosh has deposed that

after he went to Civil Hospital, Dhule, he contacted the medical officer on duty regarding the health condition of Shailabai. After examining Shailabai, the medical officer gave opinion that her statement can be recorded. The said endorsement was given by P.W.7 Dr. Milind Chandrakant Saner. According to P.W.8, the FIR Exhibit-34 came to be recorded around 11.05 p.m. on 14.10.2015 and was completed around 11.20 p.m. He has narrated as to what Shailabai had told to him which is already reproduced by us in paragraph No.2 above and, therefore, it is not repeated again. P.W.8 Santosh further stated that he had read over the complaint to Shailabai and her left hand thumb impression was obtained. He has proved the FIR Exhibit-34 and in the cross-examination, he has admitted that as per Exhibit-36, which was the order given by Police Station In-charge to him to record statement of Shailabai, it was mentioned that Shailabai had sustained burns due to the fall of burning kerosene lamp on her person. He has also stated that the thumb impression of Shailabai is not attested. He has also admitted that the accused was also admitted in the hospital and he has recorded the statement of accused, wherein he has stated that Shailabai poured kerosene on her person and set herself to fire. Now, the question is as to whether we can rely on dying declaration Exhibit-34. It is to be noted that at Exhibit-36, it has been further stated that Shailabai's father-in-law Nana Patil has admitted her to the hospital. That means the history was

given by D.W.1 Nana Patil. If we consider his examination-in-chief to support the defence of the accused, he is totally silent that he had given the history to the hospital authorities. But then he says that on the way, Shailabai was saying that burning kerosene lamp fall on her person and thereby she sustained burns accidentally. He was not present at the time of incident. He wants to take help of alleged oral dying declaration by Shailabai to him, but the said is contrary to what accused had disclosed to P.W.8 Santosh. Of course, since the accused is alive, his statement recorded by P.W.8 Santosh cannot come within the purview of Section 32 of the Indian Evidence Act, but when the said admission was given by P.W.8 Santosh, it can be seen that what was communicated by accused to him, who was admittedly present, that it was a suicide attempt by Shailabai i.e. by pouring kerosene upon herself and setting herself to fire. That means, the defence of the accused is not consistent. As regards to the comparison between the oral dying declaration as well as written dying declaration, the written dying declaration has more evidentiary value. Further, in the present case, there is not only one written dying declaration, but there are two. In fact, it appears from the timings that the dying declaration recorded by Executive Magistrate was first in time i.e. it was started at 10.40 p.m. on 14.10.2015 and completed by 11.00 p.m. and it appears that immediately thereafter the second dying declaration had started within 5 minutes, which was recorded by

P.W.8 Santosh. It is to be noted that Shailabai was admitted at 9.45 p.m. and as the record appears, the Executive Magistrate started recording her dying declaration at 10.40 p.m. Thus, there is no much delay in recording the dying declaration. P.W.3 Rajendra Sonawane is the Special Executive Magistrate, who recorded dying declaration Exhibit-18. He has also stated that after he received call on his mobile from Dhule City Police Station around 10.00 p.m. on 14.10.2015 for recording dying declaration of Shailabai, he went to Dhule City Police Station, where a letter was issued to him i.e. Exhibit-17 and after getting that letter, he went to Civil Hospital. He obtained endorsement in respect of health/fitness of Shailabai to give statement from P.W.7 Dr. Milind. When it was found that she was fit to give statement, the statement has been recorded and after the statement was over, it was read over to her and she confirmed the same and then her thumb impression was obtained. Here, there is attestation of the thumb mark. P.W.7 Dr. Milind has stated that at the time of both the dying declarations, he had examined Shailabai and found her to be in fit state and, therefore, endorsements have been given by him. In the cross-examination, he has admitted that the conscious state indicates physical and mental state. There is difference between physical consciousness and mental consciousness. The patient who sustains burns always remain in agony and pain. These are the general questions and they have been

answered, but then he has denied that a person who sustained 84% burns, may not be mentally conscious to give statement. Rest are the denials. Thus, there is nothing brought on record on behalf of the accused that when both the dying declarations were given i.e. Exhibit-18 and Exhibit-34, the mental condition of Shailabai was not proper or she was not fit to give any statement. In both the dying declarations, she was consistent in saying that on the day of incident, around 7.00 p.m., she served the meal to husband, who had come after drinking liquor. He had not got up and he was using bad words against her. She had even called her mother-in-law to convince her husband for dinner, but he refused and after abusing her, he poured kerosene on her person and threw the burning kerosene lamp (चिमणी) on her person, as a result of which, she caught fire. There is nothing brought on record by the accused, which will discard the evidence on the point of the two dying declarations. As they are consistent, certainly, they can be relied.

11. Now, turning towards the testimony of the eye witness i.e. P.W.4 Tushar, he being a child witness, preliminary questions have been asked to assess his competency as witness. It was found by the learned Trial Court that he has correctly given the answers to the questions and with confidence. He knew the sanctity of oath and, therefore, oath was administered and then his testimony has been recorded. There is absolutely no technical hitch in the testimony of P.W.4 Tushar the child

witness. His examination-in-chief is almost in question and answer form, whereas the cross-examination is partly in question and answer form and partly in narrative. His examination-in-chief totally supports both the dying declarations. He has also categorically stated that the neighbours extinguished the fire and his father also, but in the said process father had sustained burns. In the cross-examination it was mainly tried to be brought on record that as he is residing with his maternal uncle since the date of incident, he was tutored. The said maternal uncle who is serving as home guard has influenced the minor. We do not find any substance in the said suggestion. Definitely, when the mother has expired and the father is in jail, he as well as sibling would have been taken by the relatives of mother. He has categorically denied that the said maternal uncle had tutored him. He was the eye witness to the incident and, therefore, his account has more evidentiary value, as he has withstood the cross also and it is consistent with both the dying declarations.

12. The testimony of P.W.4 Tushar was attacked on the ground that he has been tutored. D.W.1 Nana Patil, who is the father of accused, has stated that both the sons of Shailabai and accused are now residing with the parents of Shailabai. Shailabai used to insist accused that they should reside separately from the parents and, therefore, they were residing separately since last 3-4 years prior to the incident. Shailabai was insisting the accused for partition of ancestral property, but they

were reluctant and, therefore, she started residing with her parents. She resided there for about one year and then he had given his house and half share in agricultural land to her, however, she was insisting for allotment of entire land in her name. He was having open plot and house and it was recorded in the names of Shailabai as per her say. Important point to be noted is that in cross-examination, he has admitted that Shailabai had not lodged any complaint against him and his wife alleging cruelty or harassment. He also admits that all the ancestral lands are standing in his name as well as in the name of sons of Shailabai, but saying him as their guardian. Important point is that this recording of the name of the sons of Shailabai to the 7/12 extract by saying the grandfather as their guardian is not legal. When exactly it took place is also not stated by him. According to D.W.1, after the incident, the parents and relatives of Shailabai had demanded amount of Rs.10,00,000/- from him, but he was not having cash amount and the relatives were insisting for transfer of ancestral land in the name of sons of Shailabai and, therefore, he has transferred 57 R land in their name. That means the transfer of 57 R land has taken place after the incident and not prior to that, that means not during the life time of Shailabai. How for that purpose it can be said that the testimony of P.W.4 Tushar is tutored is still indigestible. Further, in the dying declaration Exhibit-34 Shailabai has clearly stated that there was dispute between herself and

her husband and for that purpose, she had also lodged a complaint with Women's Grievance Redressal Forum, but as compromise took place due to the mediation by the authorities, she had resumed cohabitation with accused. It can lead us to presumption that on the date of incident, there was no dispute between Shailabai and the appellant. She has not stated that there was any quarrel between herself and appellant when he had come after consumption of liquor. It was the appellant, who appears to have got irritated when she had asked him to get up and have dinner. When he refused, she had gone to her mother-in-law, called her to persuade accused to take dinner which was already served. We do not think that there is any objectionable thing in the behaviour of the deceased at that time. It appears that thereafter also the accused by abusing directly took the kerosene, poured it on Shailabai and as there was no electricity in the house, the kerosene lamp was lighted, which was readily available for the accused. He had set the deceased to fire by means of said kerosene lamp (चिमणी).

13. We cannot give any concession or advantage to the accused that he has tried to extinguish the fire, as in the dying declaration Exhibit-34 itself deceased has stated that as she shouted, accused got frightened and then put quilt on her person. Therefore, it was not the voluntary act of extinguishing the fire by the accused. In that process he had sustained burn injuries. The explanation to that extent is already there in

the dying declaration as well as testimony of P.W.4 Tushar and, therefore, it was not necessary for the prosecution to explain the injuries on the person of the accused.

14. P.W.5 Vimalbai is the mother of deceased Shailabai. She is not an eye witness to the incident, but her testimony has been recorded to prove the oral dying declaration. Her examination-in-chief is consistent with dying declarations. She has stated in the examination-in-chief as well as cross-examination that she herself and her relatives had reached hospital in Dhule around 8.00 p.m. However, it has not been specifically asked to her as to what was the date. According to her, somebody had given a phone call to her son and they went to the hospital. She has given her address as village Ranaiche, Tq. Amalner, Dist. Jalgaon. The distance between her village to Dhule has not come. When as per the record Shailabai as well as accused were admitted around 9.45 p.m. to Dhule hospital, then how P.W.5 Vimalbai would have reached there at 8.00 p.m. is a question. She has denied the suggestion in the cross that their relatives were already assembled in the hospital. Therefore, no much importance can be given to her testimony. The prosecution has proved the panchanama of seizure of clothes through P.W.1 Rajendra Bhamre along with the spot panchanama and inquest panchanama. There is nothing in the cross which can suggest that his testimony cannot be believed. P.W.2 Naresh Kulkarni is the Circle Officer, who had

later on drawn the map of the spot. Here, the accused is not denying the incident wherein Shailabai had received 92% burns and, therefore, the testimony of these witnesses would be certainly help the prosecution to prove its case. The prosecution has also examined P.W.9 P.S.I. Bharat Kale, who had carried out the investigation. Thus, from the evidence scanned up till now, we conclude that the prosecution has proved beyond reasonable doubt that the accused had poured kerosene on the person of Shailabai and set her to fire. She expired on 16.10.2015 i.e. three days after the incident. P.W.6 Dr. Vijay Jadhav has conducted the autopsy. In the cross-examination, again the suicide theory is tried to be brought on record, but it is only a general question. The cause of death is “shock due to burns” and as aforesaid, it has been proved by the prosecution that those burns were caused by accused and the death is homicidal in nature.

15. The accused has not come with the case that he was under the influence of liquor and, therefore, unable to understand or was not in his senses at the relevant time. The facts as narrated and proved as to how Shailabai was put to fire would clearly demonstrate that the accused had intention to kill her or he had the knowledge and he was in his senses to know that his action of pouring kerosene and setting her to fire by means of kerosene lamp (चिमणी) would cause her death. The case will not fall under any of the exceptions to Section 300 of the Indian Penal Code.

We, therefore, hold that the prosecution had proved that the accused had committed offence punishable under Section 302 of Indian Penal Code beyond reasonable doubt and, therefore, the conviction of the appellant by the learned Trial Judge is perfectly legal and justified. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, the appeal stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm