

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.690 OF 2016

Vitthal s/o Sambhaji Narwade

Age: 27 years, Occu.: Labour (Now in Jail)

R/o. Malzara, Tq.Hadgaon,

Dist.Nanded.

..Appellant

(Orig. Accused)

VERSUS

State of Maharashtra

Through Police Station,

Shivaji Nagar,Nanded.

..Respondent

.....

Mr.Mohit S. Shah, Advocate for Appellant (appointed)

Mr. A.M.Phule, APP for the Respondent State.

.....

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

RESERVED ON : 2 AUGUST, 2023

PRONOUNCED ON : 11 AUGUST, 2023

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

1. Judgment and order passed by learned Sessions Judge, Nanded dated 07-05-2015 in Sessions Case No.43 of 2014, convicting appellant for charge under Section 302 of the Indian Penal Code (IPC) is hereby questioned by appellant - convict by invoking Section 374 of the Code of Criminal Procedure (Cr.P.C.).

BRIEF BACKGROUND OF PROSECUTION CASE

2. Deceased Renuka, daughter of PW3 Vithal Mahadu Karade, was married to one Nivrutti. After cohabiting for six years with said Nivrutti and inspite of

having children, after coming in contact with appellant, deceased eloped with him and started residing with him in Ashirwadnagar. Appellant got addicted to liquor. When she prevented him from consuming liquor, he used to abuse her and raise quarrel with her.

On 12-12-2013 also he was drunk. Saying that he would incinerate her, he poured kerosene on her and set her on fire after pouring kerosene from bottle. Renuka was taken to the hospital.

PW9 Dandgawad (PSI) went to hospital and recorded her dying declaration wherein she told that she advised her husband not to consume alcohol and thereafter, he poured kerosene and set her on fire. After recording dying declaration Exh.30, the same was made basis for registration of crime.

This **PW9** Dandgawad (PSI) took over investigation and after its conclusion, chargesheeted accused. Case was tried by learned Sessions Judge, Nanded, who after appreciating oral and documentary evidence, accepted the case of prosecution as proved and vide impugned judgment and order convicted appellant and sentenced him for life for committing murder of wife.

3. Above judgment and order is now taken exception to before us by learned Counsel for appellant on following grounds:

GROUND

Firstly, there is no direct eye witness nor circumstantial evidence.

Secondly, case of prosecution is based on two dying declarations but none is proved to be truthful and voluntary and as such implication is false.

Thirdly, father of deceased as well as medical expert confirmed burns to be reported due to accidental burns but still conviction is recorded.

Fourthly, both dying declarations are not consistent and are rather contrary to each other.

Independent witness like neighbours have not supported prosecution.

Submissions on behalf of State :

4. In answer to above, learned APP for respondent-State would submit that though case is based on dying declarations, it is submitted that both dying declarations are consistent about overt act of appellant – husband. That he was addicted to liquor and on being prevented, in the rage of anger, he poured kerosene and ignited her. That immediately, after admission dying declaration was recorded by Police Officer followed by recording of dying declaration by Special Executive Magistrate. That before both the authorities, deceased has named husband to be responsible for burns. Therefore, learned trial Judge has rightly referred dying declarations and has convicted appellant. Consequently, it is submitted that there is no merit in the appeal and hence, appeal sought to be dismissed.

5. In the light of above submissions, we proceed to scrutinize the evidence on record.

EVIDENCE ON BEHALF OF PROSECUTION

It seems that **PW1** Anil is a Pancha to spot panchanama. His evidence is at Exh.12, which shows that incident had taken place in the house. From the spot, Police machinery seems to have seized two bottles i.e. one Fanta cold drink bottle and one plastic bottle containing kerosene and a match box.

PW2 Reena Kishan Paikrao is a tenant. She has not supported prosecution. She merely speaks about incident of burns taking place in the evening of 12-12-2013. She denied having any talks with deceased.

PW3 Vithal Mahadu Karade is father of deceased. He merely speaks about receiving telephonic information about burns suffered by deceased. However, he stated that he did not visit her because of anger on account of her conduct. On 14-12-2013, he learnt that she succumbed to burns.

PW4 Vishakha Shiddhodhan Jamdade is immediate neighbour, who has also not supported prosecution.

PW5 Dr.Rashtrapal Dattatraya Awasare is Autopsy Doctor, who opined about the death due to shock due to burns.

PW6 Shaziya Afreen Sayyad Sultan is Medical Officer, who examined and treated accused, who allegedly suffered 2% superficial burns on right hand and right wrist.

PW7 Datta Bhimrao Nawghare is Special Judicial Magistrate, who recorded dying declaration Exh.27. According to him, the dying declaration, which is recorded on 12-12-2013 at 10:50 p.m., is in question – answer form and deceased stated that her husband was addicted to liquor. That on the date of incident also, he consumed liquor and after closing the door, he poured two bottles of kerosene on her person and ignited her.

PW8 Dr.Keshav Ashwini Jindal is the Medical Officer, who examined deceased and gave endorsement as requested by Police Officer of Shivajinagar Police Station. He has also given endorsement on request of Special Judicial Magistrate.

PW9 Abhay Bhaskarrao Dandagawad (PSI) is the Investigating Officer, who conducted investigation and chargesheeted accused.

6. Here taking into account the nature of evidence, it is manifest that witnesses like immediate neighbours, who are leaving in proximity of deceased, have not supported the prosecution. Resultantly, the case of prosecution hinges only on dying declarations. Therefore, before proceeding to ascertain whether dying declarations are voluntary and inspiring confidence, we wish to state the brief law of manner and appreciation of evidence in the form of dying declaration.

7. 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.

8. Bearing in mind the above legal position, we take up dying declarations for scrutiny.

FIRST DYING DECLARATION

First dying declaration on the basis of which crime is registered is recorded by a Police Officer and same is at Exh.30. It seems to be recorded between 08:30 p.m. to 08:45 p.m. on 12.12.2013, wherein deceased Renuka had stated that on 12-12-2013 at around 07:00 she requested husband to not to consume liquor, upon which her husband said that what she can do and he would ignite her and saying so, he went out of house, brought a Can, poured kerosene on her person and ignited her with matchstick. Neighbours

gathered and they and her husband shifted her to hospital. She prayed for action against husband.

SECOND DYING DECLARATION

9. Now let us visit **second dying declaration** recorded by Special Judicial Magistrate. It is at Exh.27. It seems to be recorded at 10:50 p.m. but on the same date i.e. 12-12-2013. It is apparently in question – answer form. To the question regarding occurrence, she stated that husband used to consume liquor inspite of giving much understanding, he used to beat her and he came home drunk. She asked him not to drink liquor and at that time, he closed the door, poured kerosene from two bottles and ignited her.

ANALYSIS OF DYING DECLARATIONS AND CONCLUSION

10. What is discerned on scrutiny of above two dying declarations is that firstly both dying declarations are not consistent. The background in which the incident had taken place stated in first dying declaration is not finding place in second dying declaration. Secondly, in one dying declaration, toe impression is obtained i.e. by Police Officer, but of which leg has not been stated, whereas in the second dying declaration recorded by Special Judicial Magistrate, deceased had caused signature that too in English. Both **PW9** Dandgawad (PSI) as well as **PW7** Nawghare (Special Judicial Magistrate) are admitting about deceased suffering burns to both the hands and the same to

be in bandaged condition. There is admission about entire face to be burnt. In the light of such material, it is doubtful whether she was in a position to give more than one dying declarations and whether she could cause signature, as according to **PW7** Nawghare, her palms were covered with bandage.

In one dying declaration, she simply speaks about husband pouring kerosene and igniting her and in another dying declaration she speaks about husband to be under influence of liquor, threatening to kill her and thereafter, after closing the door, ignited her. Spot Pancha speaks of one bottle and one Can seized but Can is not part of Muddemal. Therefore, there is doubt about actual container from which kerosene was said to be poured. Both dying declarations are recorded in a short span of almost an hour one after the other. Husband also seems to have suffered burns to his hand. Neighbours have not supported the prosecution. Therefore, taking into account the above discrepancies, in our opinion, dying declarations cannot be said to be consistent and voluntary one, more particularly, when the scribe has admitted that relatives of other patients were coming and going. Resultantly, in our opinion, case of prosecution is not proved beyond reasonable doubt. Consequently, in our opinion, it is a fit case for extending benefit. Hence, following order is passed :

ORDER

- (I) Criminal Appeal stands allowed.

(II) Conviction awarded to the appellant – Vitthal s/o Sambhaji Narwade, by the learned Sessions Judge, Nanded in Sessions Case No.43 of 2014 under Section 302 of the Indian Penal Code on 07-05-2015, stands quashed and set aside.

(III) 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.

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

(VII) We quantify fees of appointed Advocate at Rs.10,000/- (Rs.Ten Thousand only) to be paid by High Court Legal Services Sub-Committee, Aurangabad.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)