

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

CRIMINAL APPEAL NO. 849 OF 2015

Sandeep S/o Haribhau Chavan,
Age – 23 Years, Occu. - Labour,
R/o. Bhagoor, Tq. Vaijapur,
Dist. Aurangabad

... Appellant

Versus

The State of Maharashtra
Through MIDC Waluj Police Station.

... Respondent

...
Mr. Nikhilesh K. Tungar, Advocate for Appellant (Appointed through Legal Aid)
Mr. R. V. Dasalkar, APP for Respondent - State

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

DATE : 23rd JANUARY 2023

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

1. Appellant / convict is questioning the Judgment and order passed by the Additional Sessions Judge, Vaijapur on 21-09-2015 in Sessions Case No.58 of 2013 by which appellant was held guilty for the offence punishable under Section 302 of the Indian Penal Code (IPC).

PROSECUTION CASE IN THE TRIAL COURT

2. Deceased Sangita was married to accused. Merely after six months of the marriage, it is the case of the prosecution that, deceased was beaten by the

accused while they were residing at Bhagoor. Accused was maintaining extra-marital affair and was in constant touch with the said girl on phone. On 30-03-2013 accused received phone call shortly after midnight and thereafter, finding the accused husband talking with the girl, deceased Sangita questioned him. Enraged by the same, it is the case of the prosecution, that accused poured kerosene on her and ignited her. She suffered 90% to 94% burns. While she was being treated at the hospital, deceased gave two dying declarations on the strength of which Police registered crime initially under Section 307 of the IPC. Accused came to be arrested. While undergoing treatment deceased succumbed to the burns and therefore, offence was converted into Section 302 of the IPC and accordingly, accused was charge-sheeted and tried and resultantly, the learned trial Court convicted him for the same.

Appellant is now questioning the Judgment and order of guilt and conviction by preferring instant appeal on various grounds raised in the appeal memo.

SUBMISSION OF APPELLANT

3. Learned Advocate for the appellant would strenuously submit that prosecution has miserably failed to establish that accused was responsible for setting the deceased on fire. It is pointed out that prosecution's own evidence suggest that deceased suffered accidental burns. Only on instigation of

relatives, Police machinery had implicated the accused for charge of setting her on fire and causing homicidal death. It is pointed out that dying declarations and Police papers, which are part of the charge-sheet, indicate so. Learned Advocate submitted that immediately when deceased was admitted, thereafter relatives rushed to the hospital and they have tutored deceased and therefore, dying declaration is not reliable. It is his next submission that considering the degree of burns, it is difficult for deceased to give two dying declarations. That both the dying declarations do not inspire confidence of the Court. That the dying declarations are full of scoring. The learned trial Court ought not to have relied on the same. There was no other strong and reliable evidence in support of allegations levelled by the prosecution and therefore, guilt and conviction by the learned trial Court being not sustainable in the eyes of law, is required to be set aside.

SUBMISSIONS ON BEHALF OF PROSECUTION

4. In response to the said submissions, learned APP for the respondent-State submits that it has come in the evidence of prosecution witnesses that accused was maintaining affair inspite of getting married to deceased. That In support of their case, prosecution has examined testimonies of in all 11 witnesses. That there used to be quarrels between the accused husband and the deceased. That even on the fateful night, accused had received a phone call from the said girl at odd hours. Therefore, deceased wife questioned him.

Getting in rage of the same, accused poured kerosene on her person and set her on fire. Deceased has given dying declaration to that extent. After medical examination by the medical authorities, they found her fit to give dying declaration. She named her husband for setting her on fire. That coupled with this, her father, uncle, mother and maternal cousin are all unanimously named accused. Therefore, on the strength of such material, learned trial Court committed no error whatsoever in finding accused guilty and convicted him. There is proper appreciation of law on the point of dying declaration. Therefore, such Judgment which is based on sound reasons, no fault can be found in it and he prays not to interfere in the same.

EVIDENCE ON BEHALF OF PROSECUTION

5. Admittedly, deceased was married to accused one and half years prior to the alleged incident. In support of their case, prosecution has examined in all 11 witnesses i.e. oral evidence of authorities, who recorded dying declaration, medical authorities, who allegedly examined and treated deceased, father and relatives of deceased, Panchas and the Investigating Officer. It would be appropriate to give a brief account of their oral evidence in witness box which is as under :

PW1 Appasaheb, who acted as Pancha in Spot Panchanama, stated to that extent at Exhibit 12 about visiting the spot on 30-03-2013 i.e. a room ad-measuring 10 x 10 feet. He has narrated whatever he saw at the scene of

incident. He specifically stated that he found empty Can of kerosene having plastic red lid at the spot. He identified the plastic Can shown to him in the Court.

In **cross-examination** he stated that he is doing plotting business. He also stated about his residence. He stated that colour of Can was black.

6. **PW2** Sanjay Gaidhane is Naib Tahsildar, who was entrusted with the work of recording dying declaration. On the strength of communication to medical authorities at Exhibit 18, he claims to have recorded dying declaration and according to him, when he questioned about incident, deceased Sangita allegedly told him that there was quarrel between herself and her husband when there was talk on phone. Thereafter, husband poured kerosene on her and set her on fire. He claims to have obtained her toe impression on her statement because her both hands were burned.

In **cross-examination** he answered that he has visited Ghati Hospital between **05:30 to 06:00 p.m.** That it required 5 to 7 minutes to go to ward from parking place. He further stated that he recorded statement at about 04:00 p.m.

7. **PW3** Babasaheb is father of deceased. He stated that after marriage, his daughter went to reside with the accused. After six months of marriage, accused started beating her. At that time, accused was residing at Bhagurgaon

at Vasti. Thereafter, his daughter and accused started working in MIDC Company and they started residing in rented premises at Ranjangaon Shenpunji. According to him, since 15 days prior to incident, accused started stopped going to work. Then he stated that his daughter used to inform him on phone that she is being ill treated. Therefore, he brought his daughter home. As regards to incident is concerned, he stated that uncle of accused namely Chandrakant informed him that his daughter is admitted in the hospital and so he went there. According to him, his daughter told him that accused was talking on phone for one hour and therefore, she asked with whom he was talking. That she told him that thereafter accused shut the door of the house, poured kerosene on her person and set her on fire. She further told him that she received burns and at that time accused ran away and again came in the house. After 10 days, while undergoing treatment, his daughter succumbed to the burns.

He too **cross-examined** by learned Advocate for defence in the trial Court at length. Initial cross is about conduct and behaviour of accused prior to the incident. He asked where both his daughter and son in law shifted and where they worked. Then, he asked about the time at which he received phone call from Chandrakant and in which condition his daughter was in the hospital. In cross he answered that his daughter Sangita told him that she had given statement to Police that due to accidental fall of matchstick she sustained burns, but she also stated that said statement was given under

pressure of her husband. He denied that he had discussion with Magistrate. In paragraph No.5 of the cross, more improvements are brought by defence.

8. **PW4** Nitin is a Doctor who conducted post mortem and he attributed death due to “95% dermo – epidermal thermal burns” and he talked about authouring post mortem report and he identified the same at Exhibit 27.

9. **PW5** Shivaji is uncle of deceased. He stated that there was some dispute between Sangita and her husband. That he went to see her in hospital. She told about ill-treatment. This witness stated that he learnt from father of deceased about the incident and therefore, he visited hospital where Sangita told him that her husband Sandip received a phone call at 03:00 a.m. She enquired about it and thereafter, for only such reason Sandip poured kerosene and set her on fire. That Sandip was a womanizer.

While undergoing **cross**, he answered that he visited hospital on **31-03-2013**. Omissions are brought on record by defence about his brother informing him about accused to be a womanizer. Answers given by this witness in paragraph No.4 are apparently about hearing from his brother. However, he admitted that his brother told him about deceased giving statement about sustaining accidental burns. Rest all is denied.

10. **PW6** Gopichand is cousin of deceased. He also stated that deceased told

him that there was relation between her husband and a girl and there was dispute on this count. Regarding the incident, he learnt it from PW3 Babasaheb and when he went to meet Sangita, she told him that at around 12:30 in the night her husband received call from a girl on mobile and when she asked whose call it was, he stated that, she told that there was quarrel between them due to which her husband poured kerosene on her person and set her on fire by matchstick. He further stated that she told him that due to fear of her husband she had given statement that while lightening chimney she suffered accidental burns.

In **cross-examination** he is asked about marriage between accused and deceased Sangita. This witness is unable to state the day or date when deceased disclosed him about the facts. He is questioned as to what was the situation in GHATI Hospital when he visited there and whether Police were present there. He admitted that father of deceased accompanied him whenever he come in Court.

11. **PW7** Gopinath is maternal uncle of deceased. He stated that there was ill-treatment to his niece. Husband and mother in law were ill-treating her. He claims to have wheel marks on her person. According to him, there used to be quarrels between Sangita and her husband. That Sangita told him about illicit relations of her husband with a lady. According to him, at about 12:00 in the mid night Sandip received a call and therefore, Sangita asked Sandip about it

due to which he set her on fire. He further told that she has given statement to Police under pressure from her husband regarding suffering injuries due to accidental burns.

In paragraph No.4 are the omissions brought in his evidence about ill-treatment meted out by mother in law, about assault by belt, about accused not doing any job, about receiving information from his sister's husband at 12:00 mid night and informing about accused set Sangita on fire. He is unable to state which ward he visited and whether bandage was applied. He denied that Sangita was shouting due to pain. He is unable tell the date when Police recorded his statement. Rest all is denied.

12. **PW8** Ambadas is a Pancha to seizure and he deposed to that extent. His evidence is at Exhibit 41.

13. **PW9** Jivan is Inquest Pancha. His evidence is at Exhibit 44.

14. **PW10** Ramanuj is a Doctor, who issued endorsement on communication at Exhibit 18 received from Naib Tahasildar.

15. **PW11** Dashrath Chaudhari is the Investigating Officer, who stated about all the steps taken by him.

Exhibit 58 is dying declaration recorded on 31-03-2013.

Above is the oral and documentary evidence on behalf of prosecution in the trial Court.

ANALYSIS

16. Apparently and admittedly case of prosecution is based on dying declaration. Though father, uncle, cousin are examined, it is emerging they have visited deceased to see her in hospital on receipt of information about the incident. It would be desirable i.e. before touching merits of the case, to discuss in brief legal settled position and appreciation of evidence when the case is based on dying declarations.

It is trite law that, sole dying declaration can be made basis of conviction, if at all it qualifies the test of truthfulness, voluntariness and if it is free from suspicion and doubt. There are various rulings of Hon'ble Apex Court regarding evidentiary value of dying declaration. It has been held time and again that accused being deprived of cross examination, court has to be very careful and cautious while assessing dying declaration. It is expected that court should be on guard that the statement of deceased was not a result of either tutoring, prompting or product of imagination. It is further expected of the Court to satisfy itself that the deceased was in a fit state of mind to give dying declaration. In the case of *Paniben Vs. State of Gujarat; (1992) 2 SCC 474*, the Hon'ble Supreme Court has laid down the principles governing dying declaration, which are as follows :-

(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 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.

The above principles are affirmed, relied, summarized and applied in various other rulings, namely *Surinder Kumar Vs. State of Punjab; (2012) 12 SCC 120*, *Madan Vs. State of Maharashtra; (2019) 13 SCC 464*.

17. Similarly, very recently Hon'ble Apex Court in the case of *Ganpat Bakaramji Lad Vs. State of Maharashtra; 2018 ALL MR (Cri) 2249.*, has also reiterated certain tests to be put to use before accepting that dying declaration. It has been held thus:-

“ In respect of the dying declaration, the general principles to be kept in mind are

(i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence, and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :

(a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,

(b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and

(c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires

confidence to such an extent that it can be the sole basis of conviction?

The absence of an endorsement in the dying declaration - (a) by a doctor regarding the fitness of mind of the declarant, or (b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying

declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of Shaikh Bakshu 2007 ALL SCR 2407 and Kantilal (2009) 12 SCC 498, are based on the facts and would not, therefore, constitute a precedent or a ratio decidendi or even an obiter dicta to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials. ”

18. Keeping above legal position in mind, we proceed to scan the prosecution evidence.

It is emerging that there are **three** dying declarations purported to be given by deceased. However, it is pertinent to note that first dying declaration is not surprisingly finding place in the entire prosecution evidence.

The second dying declaration seems to be recorded by **PW2** Sanjay Gaidhane who was officiating as Naib Tahsildar. In his evidence Exhibit 16, he is found to be deposing that on receipt of communication from MIDC Police Station, he visited GHATI hospital and forwarded communication Exhibit 18 addressed to the Doctor to certify fitness of the lady to give dying declaration. According to him, after Doctor gave endorsement / remark, he asked the lady what happened and according to him she told that after pouring kerosene on her person, she was set on fire. On further questioning, she allegedly told him

that there was quarrel between herself and her husband who poured kerosene and set her on fire. That she allegedly told him that there were talks on phone before quarrel took place. This witness PW2 Sanjay claims that he obtained her toe impressions as both her hands were in burned condition. This witness identified dying declaration authored by him and was resultantly marked as Exhibit 19.

In his **cross-examination** he has given distance between hospital and his office. He answered that he received communication from Police at around 04:00 to 04:30 p.m. and further answered that he went to GHATI Hospital on his own vehicle and reached there at about 05:30 to 06:00 p.m. Again in further cross, he reiterated that he recorded the statement at around 04:00 p.m. He obtained opinion of Doctor.

19. Now let us visit the dying declaration, the same is at Exhibit 19 and it is in question - answer form. Crucial questions are question Nos.3 to 6. We propose to deal with the questions and answers in translated form which are as under :

“Q.No.3 : When did the incident occurred and under what circumstances ?

Ans : There was quarrel between myself and husband.

Q.No.4 : On whom there is suspicion about the occurrence ?

Ans. : Husband Sandip Chavan poured kerosene.

Q.No.5 : What was the intention for committing the incident ?

Ans. : Quarrel arose for talking on phone.

Q.No.6 : Who were present at the time of the incident and who did what ?

Ans. : Myself and my husband only were present.”

20. On carefully evaluating the evidence of **PW2** Sanjay, it is emerging that dying declaration was given stating that there was quarrel between deceased and accused husband for talking on phone. It seems that PW2 Sanjay has obtained certificate of fitness not on the dying declaration which is a typed format, rather it is a certification on a distinct paper but also in typed format. It is pertinent to note from Exhibit 18 that endorsement / certification of fitness of PW10 Dr.Ramanuj is obtained at around 06:15 p.m. on 30-03-2013. But in chief itself PW2 Sanjay in paragraph No.3 has stated that he reached GHATI Hospital at about 05:30 to 06:00 p.m. However, in his own cross in paragraph No.4, he surprisingly answered that he recorded statement of deceased at about 04:00 p.m. Therefore, this witness, on one hand speaks about reaching GHATI Hospital at between 05:30 to 06:00 p.m. whereas in cross he answered about recording dying declaration at 04:00 p.m. However, Exhibit 18 shows that certification itself is allegedly obtained at around 06:15 p.m. and therefore, witness PW2 Sanjay is contradicting himself as regards to exact time of dying declaration. Even so called toe impression is not identified or attested.

21. Now let us visit third dying declaration recorded by **PW11** Dashrath. This dying declaration seems to be recorded on 31-03-2013. In his testimony at Exhibit 56 Police Officer claims that on 30-03-2013 MLC was referred to him for enquiry alongwith statement of Sangita. He stated that he visited spot, drew panchaman Exhibit 13, cause seizures on 31-03-2013 and he received copy of statement recorded by Tahasildar. He claims to have again visited hospital, approached the Doctor for certification and thereafter he himself recorded her statement, wherein deceased Sangita allegedly told him that husband Sandip poured kerosene on her person, set her on fire by use of matchstick and tried to kill her. He identified said dying declaration at Exhibit 58. Then he stated that on statement of Sangita, crime was registered and carried out further investigation.

Above witness while facing **cross** answered that on 30-03-2013 at 03:30 a.m. MLC report was forwarded to him for enquiry. Prior to him P.S.I. Ahire was looking into the matter. He categorically answered that Ahire had taken statement of Sangita on 30-03-2013. He denied seeing parents and relatives of Sangita in hospital on 31-03-2013. He admitted that while arresting accused Sandip, he found injuries to his hands and nose. He admitted that it was necessary to mention about the injuries at the time of panchanama. He answered that he is unaware whether husband Sandip and his brother Bapu had brought Sangita in a Police Van but admitted that in MLC there is entry about husband and brother alongwith Sangita being brought to hospital by

Police. Thereafter, some contradictions and omissions are brought in the statement of Babasaheb and Shivaji.

22. Communication Exhibit 57 addressed to Medical Officer does not carry timing. Even in Exhibit 57 itself fitness certificate of Doctor is obtained at 11:40 a.m. To the necked eyes it is also apparent that initial date of 30-03-2013, there is scoring and overwriting and date is corrected as 31-03-2013.

Exhibit 58 dated 31-03-2013 on which crime is registered for offence under Section 307 of IPC, full details are noted. In this dying declaration Exhibit 58, there is no certification of fitness for recording statement. In this dying declaration, there is material that husband is not behaving properly, always beating and troubling. That husband has habit of maintaining extra-marital relations. Event that took place in the night 30-03-2013 is finding place in this dying declaration stating that while she and her husband were sleeping at around 00:30 hours, her husband made a call to a girl. She questioned him as to whom he made call. It is alleged that there was quarrel followed by husband Sandip pouring kerosene from the Can and igniting her. Thereafter, husband tried to douse the fire by use of quilt and neighbours also came to her rescue and thereafter, she being taken to the hospital alongwith husband. In this dying declaration it is stated that because of fear of Sandip, Police was initially informed about saree catching fire at the time of igniting

Chimney. That facts were different and infact husband has set her on fire by pouring kerosene on her person.

23. On carefully going through Exhibit 58, it is emerging that it was recorded on 31-03-2013. From Exhibit 58 it has apparently come on record that prior to dying declaration recorded by PW2 Sanjay and PW11 Dashrath, dying declaration was recorded by Police Official Ahire. In said dying declaration deceased had informed about suffering accidental burns. So this very statement is surprisingly not finding place in the evidence of prosecution. Father, uncle and cousin are all unanimously admitting statement given by deceased herself about suffering accidental burns. Therefore, the question arises for consideration is when initially at the inception there was statement by deceased, why need was felt to record second and third dying declarations. Prosecution has not come straight on requirement of recording two subsequent dying declarations. Reason seems to have been put forth that first statement about accidental burns was under pressure of husband but very Investigating Officer has candidly admitted that MLC carried noting about deceased being accompanying by husband Sandip and his brother. Relatives have also reached shortly thereafter. As stated above, father also acknowledges about statement given by deceased on her immediate admission into the hospital. When husband himself was victim of injuries, of which there is no explanation coming from prosecution, it is doubtful whether husband was in capacity to

exercise his influence or pressure over deceased Sangita.

24. It is also surfacing that seizure of kerosene Can is rendered doubtful, for the reason that Pancha to seizure i.e. PW11 Dashrath in his evidence states that during his visit black coloured Kerosene Can was seized, but in panchanama description of such article is shown as yellow kerosene Can.

Surprisingly when the genesis of the incident was due to conversation by accused with a girl and said episode had triggered quarrel, investigation machinery was expected to place before the Court said mobile in possession of accused. No doubt CDR is placed on record but it has not been further demonstrated that there was call after midnight by accused to a girl. Therefore, the alleged motive comes under shadow of doubt.

SUMMATION

25. To sum up, unfortunately the first statement / dying declaration given by the deceased at the stage of her admission in the hospital informing about sustaining accidental burns is not brought before the Court. For above reasons, second and third dying declarations are rendered doubtful as to whether they are voluntary one, because deceased was surrounded by her relatives. We have also come across Exhibit 13 which is a crime scene panchanama wherein occurrence is noted as “ignited matchstick falling on saree resulting in burns”. In the light of suppression of first statement and

Exhibit 13, we are hesitant in accepting the dying declarations Exhibits 19 and 58. Prosecution's own evidence shows and is also candidly admitted by none other than relatives of deceased that accused has also sustained burns. Such material prompts us to infer that accused had tried to save his wife. Had he not done so or had fled away, adverse inference could have been drawn, but it has not happened so. The above aspects have not been thought of by learned trial Court while appreciating the prosecution case and accepting it. Consequently, interference at the hands of this appellate Court becomes necessary and resultantly, appellant succeeds and so we proceed to pass following order :

ORDER

- (i) Criminal Appeal stands allowed.
- (ii) The conviction awarded to the appellant - Sandeep Haribhau Chavan in Sessions Case No. 58 of 2013 on 21-09-2015 by the learned Additional Sessions Judge, Vaijapur by holding him guilty of committing offence punishable under Section 302 of Indian Penal Code, stands set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 302 of Indian Penal Code.
- (iv) The appellant be set at liberty, if not required in any other case.

- (v) The fine amount paid, if any, be refunded to the accused after the statutory period.
- (vi) It is clarified that there is no change in the order regarding disposal of Muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT