

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

**CRIMINAL APPEAL NO. 693 OF 2016
WITH
CRIMINAL APPLICATION NO.1425 OF 2019 IN APPEAL/693/2016**

Suraj Vitthal Ghotekar,
Age 22 yrs., Occ. Nil,
R/o Golden City, Sangamner,
Tq. Sangamner, Dist. Ahmednagar.

... Appellant
[Orig. Accused]

Versus

The State of Maharashtra

... Respondent

.....
Advocate for Appellant : Mr. D. R. Jethliya h/f. Mr. Kisan Chaudhari
and Ms. Anuradha R. Joshi
APP for Respondent-State : Mr. S. J. Salgare
.....

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

DATE : 18 AUGUST, 2023

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

1. Getting dissatisfied by the judgment and order of conviction passed by the learned Additional Sessions Judge, Sangamner, Dist.Ahmednagar in Sessions Case No.60 of 2015 dated 25-10-2016, appellant has preferred instant appeal by invoking Section 374 of the Code of Criminal Procedure (Cr.PC.) on various grounds mentioned in the appeal memo.

CASE OF PROSECUTION IN BRIEF

2. Appellant / accused had relationship otherwise than marriage with one Shobha Borade. Deceased wife objected for the same resulting into quarrel. On 19-04-2015, there was telephonic conversation between appellant and said lady. This angered deceased and she snatched phone of appellant. This again resulted into quarrel and accused beat her. Angered by the same, deceased poured kerosene on herself saying that she would not tolerate. Husband ignited a matchstick and threw it on her resulting into fire and burns. Hence, the charge.

SUBMISSIONS

On behalf of appellant :

3. According to learned Counsel for the appellant, there is apparently false implication on the strength of dying declarations, which are not only inconsistent but are not voluntary and not inspiring confidence. According to him, except so called dying declarations, there is no other evidence in support of the accusation. He emphasized that initial charge was for offence under Sections 302 and 323 of the Indian Penal Code, but appellant is already given clean chit by the learned trial Judge from charge under Section 323 and thus, it is his submission that when on the same set of evidence, case of prosecution has been disbelieved, he questioned as to how learned trial Judge accepted the case of prosecution on same dying declarations. He took us through both the dying declarations and would point out that genesis of the occurrence has not

been spelt out in both the dying declarations. It is pointed out that even there is delay in lodging FIR and therefore, there is possibility of false implication. Inviting our attention to the judgment under challenge, it is his submission that there is total non-application of mind and failure to appreciate evidence as required by law. Learned Counsel would strenuously submit that very near and dear ones of deceased have not supported the case of prosecution. Resultantly, he prays to interfere and set aside the impugned judgment and order of conviction.

On behalf of State :

4. In answer to above, learned APP, while canvassing in favour of judgment under challenge, would submit that no doubt case of prosecution is based on dying declarations, however, according to him, both the dying declarations are inspiring confidence and the same are truthful version of deceased. She had named accused for setting her on fire. According to learned APP, even circumstances at the scene of occurrence belies the defence of accidental burns. He pointed out that history, though given as burst of gas stove, said history is on the information of none other than appellant. That mere a day's delay in lodging the FIR is not fatal and therefore, it is his submission that guilt recorded is on the basis of legally acceptable evidence and as such no fault can be found in the judgment under challenge and he prays to dismiss the appeal.

5. Heard both the sides.

6. Here admittedly crime is registered on the basis of dying declaration. That apart prosecution had adduced evidence of in all eleven witnesses, their status and role is summarized as under :

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Vikas Ramnath Mogal is Panch to spot Panchanama. His evidence is at Exh.E-24.

PW2 Chandrakala Dilip Gotekar is maternal sister of deceased. Her evidence is at Exh.26.

PW3 Tulshiram Gangadhar Pangavhane is father of deceased. His evidence is at Exh.27.

PW4 Shobha Sampat Borade is sister of friend of accused. Her evidence is at Exh.28.

PW5 Dr.Bimbisar Mookarji is Autopsy Doctor. His evidence is at Exh.29.

PW6 Dr.Jitesh Vijay Chudival is Medical Officer in Dhanvantari Multispeciality Hospital where deceased was initially admitted for treatment.

PW7 Dilip Madhav Pawar, Special Executive Magistrate, who recorded dying declaration Exh.36. His evidence is at Exh.34.

PW8 Dr.Fayyum Shaikh is Medical Officer in Dhanvantari Hospital. His evidence is at Exh.37.

PW9 Vijay Punjaji Khandizod is Police Officer, who received MLC from Dhanvantari Hospital.

PW10 Nitin Sukhedeo Chaven (PI) is Police Officer. His evidence is at Exh.41.

PW11 Sanjay Bhagwan Bhamare (PI) is the Investigating Officer, who recorded dying declaration Exh.44. His evidence is at Exh.43.

7. The case of prosecution is mainly based 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.

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

Laxman v. State of Maharashtra; (2002) 6 SCC 710, ***Jagbir Singh v. State (NCT of Delhi)***; (2019) 8 SCC 779, ***Paniben v. State of Gujarat***; (1992) 2 SCC

774, *Surendrakumar v. State of Punjab*; (2012) 12 SCC 120, *Madan v. State of Maharashtra*; (2019) 13 SCC 464, *Ganpat Bakaramji Lad v. State of Maharashtra*; 2011 ALL MR Cri. 2249.

8. Bearing in mind the above legal position, we proceed to deal with dying declarations at the threshold.

There is no dispute that accused and deceased are husband and wife. There is further no dispute that they were cohabiting together under one roof. Alleged incident took place on 19-04-2015.

FIRST DYING DECLARATION

9. First dying declaration is at Exh.44 and it is recorded by PW11 Bhamare(PI), Investigating Officer himself. In the said dying declaration, deceased seems to have informed about her marriage and family. According to her, her husband had relationship otherwise than marriage with a lady and there used to be quarrel between them on that count. According to her, on 19-04-2015 at around 04:00 p.m, there was telephonic talk between her husband and said lady, therefore, she threatened to call said lady, to question her and to inform her family members. That time, appellant snatched her phone resulting into quarrel and he beat her. Therefore, she poured kerosene on herself saying that she would die upon which husband said that it would make no difference on him even if she dies and thereafter, he threw matchstick on

her and she caught fire and burnt. She stated that thereafter husband and neighbours extinguished the fire and took her to the hospital.

What is conspicuous from above dying declaration is that apart from this being recorded on the next day of the occurrence, the time at which exactly this dying declaration is recorded is not reflected on the dying declaration. The Doctor who has given fitness certificate on said dying declaration is not examined. Toe impression is also not identified.

SECOND DYING DECLARATION

10. Now let us advert to the **second dying declaration** which is at Exh.36 and it is recorded by **PW7 Pawar**. It is in question answer form. To question no.5 regarding occurrence, answer is noted as “पती पत्नीच्या भांडणामध्ये वाद होवून अंगावर रॉकेल ओतल्याने अंग भाजले”. To a question as to who extinguished the fire, answer is noted that neighbours and husband doused the fire and they shifted her to hospital.

On going through above dying declaration, it is also noticed that it is recorded on the next day i.e. on 20-04-2015 but around 05:30 p.m. There is no fitness certification on said dying declaration and even toe impression is not identified as like of first dying declaration.

ANALYSIS AND CONCLUSION

11. On scanning both the dying declarations, it is revealed that occurrence had taken place at 04:00 p.m. on 19-04-2015, but dying declarations are not recorded promptly and rather recorded on the next day and that too in quick succession. **PW11** Bhamare (PI), who has recorded first dying declaration is shown to be present at the time of recording second dying declaration at the hands of **PW7** Pawar. As stated above, toe impressions are not identified. In first dying declaration, there is detail narration and history of quarrel and beating by husband, whereas in the second dying declaration, which is subsequent in point of time, there is merely reference of quarrel between husband and wife and kerosene being poured and suffering burns. Who poured kerosene and who ignited is not stated in it.

12. It seems that **PW2** Chandrakala, cousin of deceased, is unaware as to how Vaishali suffered burns. According to her, accused informed her husband about the occurrence and about admission of Vaishali in Dhanwantari Hospital. **PW6** Dr.Chudiwal, a Doctor at Dhanwantari Hospital, deposed about admission of Vaishali on 19-04-2015 on account of burns and alleged history was given about explosion of gas cylinder. However, no efforts seem to have been taken to record dying declaration on 19-04-2015 itself inspite of MLC given to the Police. At Exh.33 is the MLC form wherein incident is reported as burst of gas stove. **PW3** Tulshiram, very father of deceased, though examined

and though claims to have visited hospital, he categorically stated that his daughter did not disclose as to how she suffered burns. According to him, everything was smooth. **PW4** Shobha is the lady, who was cause of quarrel, stated in her evidence at Exh.28 that accused was friend of her brother and he was on visiting terms. According to her, on 19-04-2015, accused made a telephone call to her at 04:00 pm but she did not respond. Even no CDR is gathered by the investigating machinery to ascertain truth.

Even spot panchanama is not drawn on 19-04-2015, rather it is drawn on the next day and even seizure of clothes is despatched to the Chemical Analyzer(CA) after inordinate delay. Resultantly, even if CA analysis is positive, for the delayed despatch of articles, link evidence is not satisfactory. Taking into account above material and variance in both the dying declarations about occurrence, coupled with the fact of delay in recording of dying declarations, possibility of tutoring and false implication cannot be ruled out.

13. We have gone through the judgment under challenge. Learned trial Judge seems to have failed to consider and appreciate the above shortfalls noticed by us in the dying declarations. Resultantly, there is no proper appreciation. Case of prosecution is straight-away accepted without assigning satisfactory reasons. Resultantly, we are constrained to interfere in the impugned judgment. Hence, the following order is passed :

ORDER

- I. The appeal stands allowed.
- II. The conviction awarded to the appellant Suraj Vitthal Ghotekar in Sessions Case No. 60 of 2015 by learned Additional Sessions Judge, Sangamner, Dist.Ahmednagar on 25-10-2016 for the offence punishable under Section 302 of the Indian Penal Code, stands quashed and set aside.
- III. The 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. The fine amount deposited, if any, be refunded to the appellant after the statutory period.
- VI. We clarify that there is no change in the order passed by learned Additional Sessions Judge, Sangamner, Dist.Ahmednagar regarding disposal of *muddemal*.
- VII. Criminal Application No. 1425 of 2019 stands disposed off.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)