

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

CRIMINAL APPEAL NO.16 OF 2016

Arjun S/o Zinga Ransing,
Age-32 years, Occu:Driver,
R/o-Jamgaon, Tq-Ashti,
Dist-Beed,
(At present is in Central Jail, Aurangabad)

**...APPELLANT
(Orig. Accused)**

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. S.B. Jadhav Advocate for Appellant appointed through
Legal Aid.
Mr. S.J. Salgare, A.P.P. for Respondent - State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.**

DATE : 27th MARCH, 2023

ORAL JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the original accused challenging his conviction by the learned Sessions Judge, Beed dated 28th August 2014 in Sessions Case No.15 of 2013 thereby

holding him guilty of committing offence under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and also to pay a fine of Rs.1000/-, in default to suffer rigorous imprisonment for three months.

2. The prosecution story, in short, is that deceased Sunita, aged 25 years was the wife of present appellant. They got married about four years prior to 9th October 2012. Accused was serving as a tractor driver and was addicted to liquor. He used to assault deceased under the influence of liquor and used to raise suspicion over her character. Because of his such behaviour, Sunita had gone to her parents house for about a month prior to 9th October 2012. However, accused went on Thursday prior to 9th October 2012 to her father's house in Ranjani Kelwandi, Taluka-Pathardi, District-Ahmednagar and fetched her back. Thereafter the incident took place on Monday i.e. 8th October 2012. Sunita had prepared the food around 7.00 to 8.00 p.m. Her husband came in drunken condition and started assaulting her. He poured kerosene on her person from the Can and set her on fire by igniting the match stick. Accused had tried to do the same thing in the afternoon also but at that time Sunita had ran

away. When Sunita was put to fire in the night time, she started shouting. Her brother-in-law tried to extinguish the fire and then called her husband. Thereafter they both took her to hospital. When she was admitted in Civil Hospital, Ahmednagar, her dying declaration came to be recorded between 00.40 a.m. to 1.15 a.m. by the Executive Magistrate. On the basis of the said dying declaration, offence came to be registered vide Crime No.128 of 2012 with Ashti Police Station, District-Beed and investigation was taken up.

3. During the course of investigation, panchnama of the spot was carried out, certain articles were seized from the spot, accused came to be arrested. His clothes came to be seized by drawing panchnama. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. The seized articles were sent to chemical analyzer for the purpose of analysis. Unfortunately Sunita expired on 12th October 2012. Inquest panchnama was prepared. Dead body was sent for postmortem and after the report, Section 302 of the Indian Penal Code came to be added. Upon completion of the investigation, charge-sheet was filed. After committal of the case, the trial was conducted. The prosecution has examined in all ten witnesses to

bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Sessions Judge, Beed convicted the accused by holding that accused has committed murder of his wife. Hence this Appeal.

4. Heard learned Advocate Shri Jadhav, appointed through Legal Aid to represent the appellant and learned APP Shri Salgare for the State – respondent. Perused the record and proceedings.

5. It has been vehemently submitted on behalf of the appellant that perusal of the record would show that many of the prosecution witnesses have actually not supported the prosecution story and the conviction appears to be based only on the dying declaration. PW-1 Sachin is the cousin brother of the deceased who had met her in Civil Hospital, but he has not stated that Sunita had told him as to how she received the burn injuries. PW-2 Dinkar is the father of the deceased. He has deposed that after he received the message on telephone, he had gone to Civil Hospital, Ahmednagar and saw his daughter. His daughter was completely burnt and was not able to speak with him. Therefore, oral dying declaration was not even given to

the father. Same is the case with PW-3 Alka, who is the sister of the deceased. In her examination-in-chief itself she has stated that she has not asked Sunita about the incident. PW-4 Kusumbai is the maternal aunt of Sunita. In fact she had taken initiative in settling the marriage of Sunita with the accused. Though she says about addiction of liquor of the accused, but as regards the incident is concerned, she has not stated that oral dying declaration was given to her by Sunita. The prosecution has come with the case that after hearing shouts, brother-in-law of the deceased had come and extinguished the fire. Said brother-in-law has not been examined by the prosecution in this case. His testimony was important as he was the person who reached the spot immediately after the incident.

6. Learned Advocate for the appellant has further submitted that PW-8 Bhaskar was the Special Executive Magistrate at the relevant time and he has recorded dying declaration Exhibit-39. If we consider cross-examination of this witness, it can be seen that he had scored certain words from the dying declaration. This indicates that he had developed the story on his own and then scored out, as later on it was transpired that the mother of the deceased had expired long back. PW-12 Dr. Amit Gosavi is

the medical officer who had given endorsement on Exhibit-39 regarding the mental and physical fitness of the deceased to give dying declaration Exhibit-39. In cross-examination the medical officer has admitted that normally in cases of burn patients, who are under severe pains, injection like Fortwin is given. The effect of said injection remains for about 4 to 5 hours. The patient may get slight relief for the pains but it has effect of little drowsiness. The overwriting or deletion of words had not taken place in his presence. That means, it has been done by PW-8 Bhaskar at his own convenience. The injured Sunita had sustained 9% burns to the upper limbs. that means it was 100% burns and therefore, it is hard to get thumb marks. Under such circumstances, the dying declaration Exhibit-39 is a created document and it cannot be relied to convict an accused. The impugned Judgment is perverse and deserves to be set aside. The accused is in jail and therefore, deserves to be set at liberty.

7. Per contra, the learned APP strongly opposed the submissions on behalf of the appellant. He supported the reasons given by the learned Sessions Judge, Beed. It is submitted on behalf of the prosecution that the dying declaration, if proved, can lead to the conviction. In other words,

it can be the sole basis for conviction if it inspires confidence and undergoes the requisite test. Here the incident has taken place around 8.00 to 8.30 p.m., in the house of accused. The accused has not come with the plea of alibi, therefore, it will have to be presumed that in the normal course the accused would be at home. He will have to explain as to how his wife caught fire. If we consider his statement under Section 313 of the Code of Criminal Procedure, accused only says that the dying declaration is false. He has not explained in any manner, where he was at that time and how his wife caught fire. The learned trial Judge, therefore, was right in convicting the accused. There is no merit in the present Appeal and the same may be dismissed.

8. Before we proceed to discuss the evidence, as in the appeal re-appreciation of the evidence is permissible, we are also required to consider as to what is the law on the point of dying declaration. Admittedly, the case is based on the dying declaration. 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 scrutinize 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 to 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.

9. 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.***

10. 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. ”

11. We may also consider the Constitution Bench decision of Hon’ble Supreme Court in ***Laxman vs. State of Maharashtra, 2002, Cri. L.J. 4095***, wherein it was held that:-

“Absence of certification of doctor as to fitness of mind of declarant will not render dying declaration unacceptable. What is essentially required is that the person who records it must be satisfied that deceased was in fit state of mind. Certification by doctor is rule of caution. The voluntary and

truthful nature of declaration can be established otherwise also.”

12. It is further observed in ***Laxman vs. State of Maharashtra***, (supra) that:-

“It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration.”

13. Further, we may also rely on ***Vikas and others vs. State of Maharashtra [2008 (2) B. Cr. C. 235 (SC)]***, wherein it has been observed that, special sanctity accorded to evidence of dying declaration should be respected. Unless there are clear circumstances brought out showing that person making statement was not in expectation of death, admissibility of dying declaration should not be questioned. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is no evidence. Section 32(1) of the Evidence Act makes a statement of the deceased admissible. Those

statements made by a person as to the cause of his death or to any of the circumstances of the transaction which resulted in his death, are admissible when the person's death comes into question. The essential requirement of such statement to be accepted as evidence would be that the person who makes such statement is under the expectation of death. The special sanctity has been given to such statements as it is believed that a person on the death-bed will not speak lie.

14. In view of this legal position, we would like to consider the evidence adduced in this case. We would like to consider the testimony of PW-8 Bhaskar, the Special Judicial Magistrate and PW-12 Dr. Amit Gosavi, the medical officer, together. Both of them have stated that upon the request by Tophkhana Police Station, Ahmednagar, PW-8 Bhaskar visited the Civil Hospital, Ahmednagar. He met Dr. Gosavi in his cabin and made request to allow him to take down the dying declaration of Sunita. Dr. Gosavi then examined Sunita and certified that she was conscious, oriented and in good mental condition to give statement. Thereafter, the Magistrate took down the dying declaration. He had read over the same and Sunita confirmed

the same and then her thumb impression was taken of the right hand by specifically mentioning that the left thumb has received burn injuries. Thereafter once again Dr. Amit Gosavi examined Sunita and certified that she was conscious, oriented and in good mental condition throughout and also after giving oral statement. It will have to be stated that in the cross-examination conducted on behalf of the accused, nothing contrary has been transpired. No doubt, in Exhibit-39 the words " सासू " (mother-in-law) and " आई " (mother) have been scored, but it is to be noted that PW-8 Bhaskar has initialed the scoring. He admitted the said scoring part in his cross-examination but denied the suggestion that those words have been struck down on his own. Scoring of the said words would have definitely taken place when he had read over the contents to Sunita which were written and after suggestions when it was scored out, Sunita had told that it was confirmed or it was correct. The admission by PW-12 Dr. Amit that scoring part has not taken place in his presence, is of no importance because PW-8 Bhaskar is the person who has written the dying declaration Exhibit-39. The cross-examination of both the witnesses also does not bring it on record that Sunita would have been under giddiness due to any drug that was given

to her. PW-12 Dr. Amit was the person who was giving treatment to Sunita. He had taken entry about recording of the dying declaration in bed-head ticket. General question was asked about injection Fortwin creating the effect of little drowsiness. Further question was not asked as to whether that injection was given to Sunita prior to starting of dying declaration Exhibit-39. When the witness was available in the witness box, specific question was not asked, then it cannot be left to the imaginations as to whether a particular thing has taken place or not. Therefore, there was no reason to disbelieve the dying declaration recorded in this matter.

15. At this stage itself, we would like to turn to the aspect that the prosecution was able to bring it on record that the incident in question had taken place after 8.00 p.m. of 8th October 2012. In the statement under Section 313 of the Code of Criminal Procedure the accused has not stated that he was at different place when the incident took place. He has not taken the plea of alibi and has not examined anybody. Normal course would have been that the accused would have been in his house at the relevant time. Therefore, taking into consideration the contents

of dying declaration Exhibit-39; burden was shifted on the accused under Section 106 of the Indian Evidence Act to explain the circumstances under which Sunita caught fire. If everything was alright and the couple was happily married, then why Sunita would have given dying declaration Exhibit-39. There would not have been any reason to implicate the accused. There was no enmity between accused and PW-8 Bhaskar so that he could create any such document against accused. In cross-examination of PW-8 Bhaskar, admits that he has asked some formal questions to Sunita after initial examination by the doctor and those questions were relating to place and time. He denied the suggestion that he had the feeling that he cannot subscribe to the opinion of the doctor. In other words, he denied the suggestion that Sunita was not in fit mental state to give statement. When these facts have been extracted in the cross-examination, even if there would not have the endorsement by the medical officer PW-12; in view of the decision in **Laxman vs. State of Maharashtra**, (supra), the dying declaration Exhibit-39 was admissible in evidence. It has been proved beyond reasonable doubt.

16. Next in line would be PW-7 ASI Abdul Kalim. He says that the Executive Magistrate after recording the dying declaration on 9th October 2012, handed over the sealed packet, containing dying declaration, to him and then he tendered the said packet to the Police Station. There is no reason to disbelieve this witness. After the envelope had reached the Police Station, offence was registered.

17. PW-10 Tanabai Ransing is the lady who resides near the house of accused. She says that there are two houses in between her house and house of accused. She was at home around 8.00 to 8.30 p.m. on 8th October 2012. She had come out of the house after dinner. She saw that Sunita was running towards her house while sustaining burn injuries and Sunita was crying for help saying as " वाचवा वाचवा ". PW-10 Tanabai sustained burn injuries since Sunita caught hold of her. Then Tanabai says that she fell down. The burn injuries were to her right palm. She was also carried to hospital by the people and Sunita was also admitted to hospital. In her cross-examination Tanabai has stated that she was knowing the accused since childhood. His financial condition was poor but he was hard worker, peaceful

and without any addiction of vices. Sunita was little bit hot tampered lady and used to quarrel with accused. We can consider that on some point Tanabai is supporting the prosecution and on some point she has admitted the suggestion given on behalf of the accused. Her entire testimony cannot be thrown away because there is no denial to the fact that she had sustained burn injuries when Sunita had caught hold of her. It cannot be accepted that as Sunita was a quarrelsome lady, she would have committed suicide after quarreling with accused, because such specific defence has not been taken by the accused and especially his statement under Section 313 of the Code of Criminal Procedure does not reflect the same. Therefore, those admissions though extracted, cannot be viewed beneficial to the accused. The prosecution has not tried to put on record that any oral dying declaration was given by Sunita to PW-10 Tanabai. It is also not the case in defence to her that anything was stated by Sunita conveying that how she sustained burn injuries. The only fact that can be proved from her testimony is that the incident had taken place between 8.00 to 8.30 p.m. on 8th October 2012 and with the flames Sunita was running in demand of help.

18. Prosecution has also examined PW-11 Pandit Dhas who was the Police Patil of village Jamgaon. He has stated that he was in Maruti temple around 7.00 to 7.30 p.m., on 8th October 2012 and then he heard shouts from the house of Arjun i.e. accused. He went there and found that wife of accused was on the raised platform (Otta) of the house in a doused condition. PW-11 Pandit further says that he called Civil Hospital, Ashti. Then PW-11 suddenly changes the track and says that accused is tractor driver and he was not addicted to any vices. Then PW-11 was declared hostile and learned APP has put questions in the nature of cross-examination. He has denied portion marked 'B' from his statement under Section 161 of the Code of Criminal Procedure. In his cross-examination by the accused, PW-11 Pandit has again stated that accused was not addicted to liquor and there were rumours in the village that Sunita set herself to fire without any reason. This suggestion was rather unmindful. Nobody would commit suicide without any reason. Even though he was Police Patil, it appears that with mala fide intention he suppressed the real story. He has not given as to what he had done in the capacity as Police Patil. There are duties assigned to

the Police Patil. He admits in his cross-examination taken by the APP that he has the duty to inform any untoward incident to Police in writing but he has not done his duty. Such person, who does not carry his duty and for some reason supports the suggestions those are given, is untrustworthy. His entire testimony deserves to be discarded.

19. No doubt, it appears that the prosecution has not examined brother-in-law of the deceased Sunita who extinguished the fire. But for that purpose the dying declaration was sufficient and as aforesaid, it has been proved beyond reasonable doubt.

20. PW-6 Dr. Shrikant Pathak is the medical officer who conducted autopsy. His testimony shows that Sunita had sustained 95% burns. There is no serious challenge to his testimony. Sunita died due to those burns. Now the effect of dying declaration Exhibit-39 and the postmortem report would show that the accused had poured kerosene on the person of deceased and set her to fire. When such act is done, it can be presumed that the person doing such act has the knowledge that

the said act will cause death of the other person. Thus, when such act is done with knowledge, then the offence can be said to have been proved beyond reasonable doubt. Another fact to be noted is that seized articles including the clothes of the accused were sent for chemical analysis. Exhibit-4 and 5 in Exhibit-57, C.A. report are jeans and full shirt. Kerosene residues were found on those clothes. There is no explanation by accused as to how there were kerosene residues on his clothes. It shows his presence on the spot and it is supportive document to dying declaration Exhibit-39.

21. Testimony of PW-1 Sachin, PW-2 Dinkar, PW-3 Alka, PW-4 Kusumbai, are neither helpful to prosecution nor to the accused. Though all of them are saying that they had gone to meet Sunita in the hospital, one is saying that she was not able to speak and the others are saying that she did not speak anything. It has not been extracted from them as to at what time they had paid visit to the hospital. Sunita had not spoken to them, but that does not mean that she was not in a position to speak. PW-8 Bhaskar and PW-12 Dr. Admit were the proper persons to state about the

mental condition of Sunita and about her ability to give statement.

22. Therefore, taking into consideration the evidence on record, it can be said that the learned trial Judge has rightly considered the scope of Section 106 of the Indian Evidence Act. It was the case of custodial death as the wife was in the custody of the husband at the relevant time and the husband is not explaining as to how the wife caught fire. Therefore, the impugned Judgment does not suffer from any perversity or illegality. There is no merit in the present Appeal and it deserves to be dismissed.

23. Accordingly, the Appeal is dismissed.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE