

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.546 OF 2017

Tukaram Shivram Dhepe
Age: 46 years, Occu.: Agriculturist,
R/o. Maharoli, Post Nannaj,
Taluka Jamkhed, District Ahmednagar

.. Appellant

Versus

The State of Maharashtra

.. Respondent

...

Ms. Pratibha J. Bharad, Advocate for the appellant.
Mr. S. D. Ghayal, APP for the respondent – State.

...

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

DATE : 17th October, 2023.

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

. Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Ahmednagar in Sessions Case No.416 of 2016 on 16.11.2017, thereby holding him guilty of committing offence punishable under Section 302 of Indian Penal Code. He was charged for committing murder of his wife Shobha.

2. Before considering the disputed facts, the admitted facts which are emerging from the record are that deceased Shobha got married to accused

and they both were residing at Nannaj (Maharoli), Taluka Jamkhed, District Ahmednagar. They have daughter P.W.4 Smt. Rupali Akash Zambare. Rupali is married and residing with her husband at Chinchpur, Taluka Paranda, District Osmanabad.

3. It is the prosecution story that Shobha received burn injuries and was admitted in Civil Hospital, Ahmednagar on 16.09.2016 when her dying declaration was recorded by Special Executive Magistrate between 5.33 p.m. to 6.00 p.m. and thereafter around 8.30 p.m., her second dying declaration came to be recorded by P.W.8 Jagannath Batule attached to Tophkhana Police Station, Ahmednagar. The second dying declaration has been treated as FIR. Offence vide Crime No.155 of 2016 under Section 307 of Indian Penal Code came to be registered around 22.50 hours on 17.09.2016. It was stated in the FIR i.e. dying declaration recorded by ASI Batule that accused is addicted to liquor. He used to assault and abuse Shobha under the influence of liquor. Shobha was preparing food around 6.00 p.m. on 15.09.2016. Nobody else was there in the house, however, accused came under the influence of liquor and started abusing her. She told him that it is the regular feature and why he is abusing her. Accused got annoyed and then took kerosene can, poured the kerosene upon her person and set her to fire. Her Saree caught fire and she started shouting for help. Her cousin sister-in-law Vaijayanta and neighbouring persons came and douse the fire,

however, by that time, she had received burn injuries to her stomach, face, hands, legs etc. Initially she was taken to private hospital at Jamkhed and then shifted to Ruby Cathlab Hospital, Ahmednagar and then shifted to Civil Hospital, Ahmednagar.

4. It is the further prosecution story that after the registration of the offence, panchanama of the spot was got executed. Certain articles were seized from the spot. Statements of witnesses were recorded. However, Shobha died on 19.09.2016 around 10.45 a.m. After the inquest panchanama, dead body was sent for postmortem. Supplementary statements were recorded. Accused came to be arrested. Necessary documents came to be collected and after the completion of investigation, charge-sheet was filed.

5. After committal of the case, the prosecution has examined in all ten witnesses to bring home the guilt of the accused when he pleaded not guilty to the charge. After considering the evidence on record and hearing both sides, the learned Trial Judge held that the prosecution has proved the guilt of the accused. Hence, he was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/- in default to suffer rigorous imprisonment for two months for the offence punishable under Section 302 of Indian Penal Code. The accused was never released on bail and, therefore, set off was granted under Section 428 of the Code of Criminal Procedure. Hence, this

appeal.

6. Heard learned Advocate Ms. Pratibha J. Bharad for the appellant and learned APP Mr. S. D. Ghayal for the respondent – State.

7. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has not appreciated the evidence properly. The learned Advocate Ms. Bharad would take us through the evidence that was before the learned Trial Judge, especially both the dying declarations i.e. Exhibit-35 and Exhibit-32 respectively and submit that both the dying declarations are the piece of concoction. The fact that by the time the dying declarations were recorded relatives of Shobha had arrived and, therefore, it was not considered that the dying declarations were the outcome of tutoring. Exhibit-24 is the Medico Legal Certificate that was given by Ruby Cathlab and Critical Care Center, Ahmednagar to police in which it was specifically stated that she received burn injuries due to the bursting of stove. The spot panchanama shows that the stove was not seized. P.W.2 Vijayantabai, who was the first person to go to the spot, even as per both the dying declarations, has stated that Shobhabai was not in a position to speak. She has also stated that she had not asked anything to Shobhabai nor Shobhabai had told her anything, but in her cross-examination she says that both the hands of Shobhabai had received burn injuries. Even P.W.4 Rupali – daughter of deceased and accused has stated that both the hands of

her mother had received burn injuries. Then the question arises how there was thumb mark with clean ridges on both the dying declarations. The record with the hospital as well as the cross-examination of P.W.4 Rupali would show that accused had taken Shobhabai to Hospital and she was shifted from Jamkhed to Ruby Cathlab Critical Care Center immediately and then even to Civil Hospital, Ahmednagar. It was with a view to save her life, but in the testimony of P.W.2 Vaijayanta, she has stated that Shobha's brother Subrao Borade was having doubt that Shobhabai has been set to fire by accused and, therefore, it appears that such dying declarations have come up. By relying on the decision in **Irfan @ Naka Vs. State of Uttar Pradesh, 2023 SCC OnLine SC 1060**, it was submitted by the learned Advocate for the appellant that when dying declaration is creating doubt, then conviction cannot be rested on those dying declarations. The Hon'ble Supreme Court has guarded all the Courts to see whether the dying declaration is the result of tutoring or prompting or is a product of imagination. The circumstantial evidence adduced in this case is not adhering to the five golden principles (Panchsheel) laid down in **Sharad Birdhi Chand Sarda Vs. State of Maharashtra, [1984 SCC (4) 116]**. The delay in lodging the FIR has not been explained. The evidence of P.W.8 ASI Batule and P.W.9 the Tahsildar, Executive Magistrate, is contradictory. It appears that the learned Trial Judge got carried away, as P.W.4 Rupali - the daughter has deposed against father, however, it was not considered that it is the outcome of tutoring by the

brother of the deceased. It has come on record that the relations between the relatives from the Shobha's side and the accused were strained. With these shortcomings, the dying declarations cannot be accepted. The appeal therefore deserves to be allowed.

8. Per contra, the learned APP strongly opposed the appeal and submitted that there is absolutely no variance and contradictions between two dying declarations of Shobha, which have been recorded by Executive Magistrate as well as the police officer. It appears that the dying declaration recorded by Executive Magistrate was first in time, but reached Jamkhed Police Station belatedly and, therefore, the transmission time cannot be considered as delay. The right upper limb of Shobha had received 7% burns, whereas left upper limb had received 5% burns. Therefore, it cannot be said that the left thumb mark which is taken on the dying declarations was not that of deceased. At the time of giving information to Ruby Cathlab Critical Care Center, the accused himself was present and, therefore, the information that was given is appearing that it was because of the bursting of stove. Merely because Shobha was in critical state, it cannot be said that she was incapacitated from giving dying declarations. Both the dying declarations are consistent and also PW.4 the daughter has also stated about the oral dying declaration and, therefore, the finding arrived at by the learned Trial Court that accused has committed murder of his wife is perfectly legal and

no interference is required.

9. Before we proceed to analyze the evidence adduced by the prosecution, a fact will have to be noted that the present case is based on the two dying declarations Exhibit-32 and Exhibit-35. We would like to take note of the legal position in respect of admissibility of the dying declarations. We wish to state in brief, law on manner of appreciation of evidence in the form of dying declaration as well as settled principles which are culled out by the Hon'ble Apex Court from the various landmark cases like *Khushal Rao vs. State of Bombay*; AIR 1958 SC 22, *Paniben vs. State of Gujarat*; (1992) 2 SCC 774, *Laxman vs. State of Maharashtra*; (2002) 6 SCC 710, *Ganpat Bakaramji Lad vs. State of Maharashtra*; 2011 ALL MR Cri. 2249. *Surendrakumar vs. State of Punjab*; (2012) 12 SCC 120, *Jagbir Singh vs. State (NCT of Delhi)*; (2019) 8 SCC 779, *Madan vs. State of Maharashtra*; (2019) 13 SCC 464.

10. Off late in the case of *State of Uttar Pradesh vs. 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.”*
11. Similarly, in the case of ***Uttam vs. 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 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 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.”

12. Very recently certain principles of law with regard to case involving multiple dying declarations are spelt out in the case of ***Abhishek Sharma vs.***

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.”

13. The ratio that is settled is 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.

14. Therefore, after taking note of the above-said legal position we proceed to consider whether the above-said criterias are fulfilled and whether the conviction was properly based on the assessment of the evidence in respect of the two dying declarations.

15. Exhibit-35 was recorded by P.W.9 Sunil Pakhsre, who was the Naib Tahsildar at Ahmednagar and Executive Magistrate. He was given a letter around 5.15 p.m. on 16.09.2016 i.e. Exhibit-37 by A.S.I. Batule of Tophkhana Police Station requesting him to take the statement of injured Shobha. Accordingly, he went to the hospital, requested the medical officer P.W.6 Dr. Prashant Kulkarni to examine Shobha and gave endorsement regarding her fitness to give statement. After the said endorsement was given, he has recorded dying declaration Exhibit-35 wherein Shobha disclosed that accused and herself are the only persons in the house after marriage of their daughter. Accused is addicted to liquor and on the day of incident around 6.00 p.m., her husband came under the influence of liquor. There was quarrel between them and then he poured kerosene on her person and set her to fire. It is to be noted that this witness has been cross-examined at length, but the said cross-examination is in the form of technical things, as the Executive Magistrate has used printed form. In fact, a form is not prescribed at all. If a form is used by Executive Magistrate for

his convenience, we cannot find a fault in the same as the main gist or content of the dying declaration is in the handwriting of this witness. His testimony finds support in the testimony of P.W.6 Dr. Prashant. Exhibit-24 Medico Legal Certificate was got exhibited in the cross-examination of P.W.6. It is the Medico Legal Certificate in which it was stated that the history that was given in respect of burn injuries/accident was bursting of stove. It is to be noted that this witness in the cross-examination has not stated that the said letter Exhibit-24 bears his signature. Though he admits that it was given by his hospital, when he is not saying that it is signed by him, we cannot read the contents. It was open for the accused to examine the author of Exhibit-24. P.W.6 has stated in his examination-in-chief that he was the R.M.O. on that day attached to Ruby Cathlab and Critical Care Center, Ahmednagar and Exhibit-24 says that it is signed by R.M.O., still it was not extracted from him that Exhibit-24 bears his signature. Even if for the sake of arguments it is accepted that Exhibit-24 is properly proved, yet it can be seen that the name of the person, who admitted Shobha in the said hospital was of the accused. It was not specifically asked to P.W.6 Dr. Prashant that he had extracted the history from Shobha herself. That could have been the proper way to prove the oral dying declaration by the patient to the doctor and, therefore, Exhibit-24 is of no help to the accused. It cannot also be said that the information in Exhibit-24 which is given prior in time to Exhibit-35 are contrary to each other.

16. Thereafter, it appears that Shobha was shifted to Civil Hospital, Ahmednagar and then dying declaration Exhibit-32 was recorded by P.W.8 A.S.I. Batule. P.W.8 Batule has said that after receipt of Exhibit-24 Medico Legal Certificate, he gave letter to Executive Magistrate Pakhare Exhibit-37 and after Pakhare had recorded the statement it was put in an envelope and closing the same, it was handed over to him. After Shobha was shifted to Civil Hospital, he went to Civil Hospital and recorded dying declaration Exhibit-32. Prior to recording of dying declaration, Shobha was examined by P.W.7 Dr. Ashwini Sonawane and certified to be fit for giving statement. P.W.8 Batule has been cross-examined at length and it is mainly on the point that Exhibit-32 has not been treated as FIR, but subsequently recorded Exhibit-35 has been treated as an FIR. The answer to the same has been given in the cross-examination itself. P.W.8 Batule says that after P.W.9 Pakhare recorded the dying declaration Exhibit-32, he closed the envelope and handed it over to him. He admitted that whoever used to record the dying declaration of a person used to keep such dying declaration in the envelope and closing the said envelope used to hand over to police. He has clearly stated that he had not put Exhibit-32 in envelope. It can be seen therefore that it is a bad practice that appear to have been adopted. If that envelope is closed and then handed over, then who was supposed to open it and when. When the FIR would then be lodged on the basis of such dying declaration and therefore, it appears that it prompted P.W.8 Batule to record

second dying declaration. He has stated in the cross-examination that after he recorded dying declaration Exhibit-32, he had put it in envelope along with the envelope given by P.W.9 Pakhare and forwarded it to Jamkhed Police Station on 17.09.2016. Under the said circumstance, we could get the answer that why the second dying declaration was treated as FIR and not the first one. There was difference of about three hours between the two dying declarations, which cannot be said to be fatal and at the time of both the dying declarations, both the medical officers who examined Shobha found that she was in a fit state of mind at the time of starting of the statement and throughout the statement. There is absolutely no inconsistency between the two dying declarations. We therefore hold that the prosecution had proved both the dying declarations.

17. The third piece of evidence on which the prosecution intends to rely is the testimony of P.W.4 Rupali, who is the daughter of accused and deceased. If we consider her testimony, then it can be gathered that around 6.15 p.m. on 15.09.2016, her father i.e. accused gave phone call to her and inform that mother Shobha has sustained burn injuries and she is being taken to Jamkhed. She wanted to go to Jamkhed but after a while accused informed her that they are taking Shobha to Ahmednagar for treatment and therefore, she along with her husband went to Ruby Cathlab and Critical Care Center at Ahmednagar. She found that mother had received 75% burns and then

they shifted her to Civil Hospital, Ahmednagar. She has clearly stated that only at Civil Hospital, Ahmednagar she had talked to her mother and at that time her mother told that as usual the accused had come to house after consuming liquor and there was quarrel between them. When mother told that he is consuming liquor day to day, accused became angry and under the heat of anger, accused poured kerosene from a can and set her to fire. Thus it can be seen that the oral dying declaration is also corroborating to the written dying declarations. She has been cross-examined at length and then it emerged that she and her husband reached Jamkhed on motorcycle around 12.00 midnight. They met Shobha in the said hospital, but they all remained in Jamkhed hospital for about 5-10 minutes only. There was no talk between herself and her mother at that place, though she was firm in saying that the mother was able to talk. Thereafter it was extracted from her as to what happened at Rubi Cathlab Hospital. It has not been extracted from her as to why her mother would make allegations against her father. Though both the dying declarations say that there were quarrels between the husband and wife, but it was explained that it was on the count of liquor drinking habit of the accused and not any other issue. The testimony of Rupali is trustworthy.

18. The accused is relying on the testimony of P.W.2 Vaijayantabai and P.W.3 Uttam Dhepe, however, as regards Uttam Dhepe is concerned, he

turned hostile and there is no cross-examination. Even P.W.2 Vijayanta turned hostile at a later point of time i.e. in respect of oral dying declaration, however, she was firm in saying that Shobhabai caught fire around 6.00 p.m. on 15.09.2016. Accused was present and she herself, accused and deceased tried to extinguish fire with the help of water. She has given admissions in the cross-examination in the form that when Shobhabai came out of the house, she was caught by fire. When she came out of the house, after hearing the cries of Shobhabai, she found that accused was standing out of the room and Shobhabai came out of the room after opening the door. Then she says that Shobha's mouth had not received burn injuries. She says that her palms were totally burnt, however, it is against the postmortem report. She has stated that she did not hear the accused asking Shobhabai as to how she caught fire. Here, it is to be noted that the permission was given to her to put the questions in the nature of cross by prosecution, as she was not supporting the prosecution. Under the said circumstance, those admissions extracted knowing it that she is the relative from the side of accused. Her entire testimony becomes doubtful. With ultimate object, it appears that she was supporting the accused. A witness can be won over at a later point of time, but when it comes to the dying declaration; they are made admissible with a view that a person on the death bed will not lie. When both the written dying declarations and the oral dying declaration have withstood the ordeal of proof, then we cannot give importance to the

testimony of hostile witness. Under the said circumstance, the ratio laid down in **Irfan @ Naka** (Supra) is also not applicable to the present case.

19. PW.1 Prakash Mahale is the panch witness to the spot panchanama Exhibit-10. He has given the account in his examination-in-chief as to what was found at the spot and what was the situation there. He has been cross-examined at length. He has admitted that near the wall a stove was found with smoke marks. He found that the stove was found at the central portion of the room and it had become blackish. The stove was not seized. It is to be noted that if there was a bursting of stove then the situation at the spot would have been different. Even the roti's in dried form, which were by the side of the utensil in which tea was prepared, had not received any burn marks. In his statement under Section 313 of the Code of Criminal Procedure, the accused has not explained that the incident took place due to the bursting of stove. He has also not stated that he was out of the house when the incident took place. When as per both the dying declarations he was inside the house and Shobha caught fire, then it was for him to explain the circumstances in which she caught fire in view of the burden under Section 106 of Indian Evidence Act. In his statement under Section 313 of the Code of Criminal Procedure, the accused has stated that his daughter has given false evidence against him at the instance of her maternal relatives and police. The witnesses were deposing against him at the instance of his

brother-in-law Subrao Borade, who is the brother of his wife Shobhabai, but then he has not explained as to why Subrao should be against him.

20. Thus, taking into consideration the evidence that was adduced by the prosecution and testing it on the touchstone of the various decisions above-said, we are of the opinion that the prosecution had proved the case beyond reasonable doubt. Though it had come in both the dying declarations that accused had come after consuming liquor; accused has not come with the case that because of the consumption of liquor he was incapacitated from understanding as to what he was doing. The act of putting kerosene and igniting the matchstick and setting a person to fire presupposes intention to kill. It cannot be at the spur of moment and, therefore, the case does not fall within any of the exceptions to Section 300 of Indian Penal Code. The finding and conviction awarded by the learned Trial Judge is perfectly legal. We do not find that the learned Trial Judge has erred in appreciating the evidence. 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