



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.922 OF 2018

Prakash s/o Rupa Rathod
Age 47 years, Occu.: Labour,
R/o. Mahora, Tq.Mantha,
Dist.Jalna

... Appellant
(Accused)

Versus

The State of Maharashtra

... Respondent

.....
Mr.Sudarshan J. Salunke, Advocate for Appellant
Mrs.V.S.Choudhari, APP for Respondent-State
.....

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

**RESERVED ON : 02 NOVEMBER, 2023
PRONOUNCED ON : 08 NOVEMBER, 2023**

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

1. Judgment and order of conviction passed by the learned Sessions Judge, Jalna dated 21-03-2012 in Sessions Case No.121 of 2012, is taken exception to by the convict by invoking Section 374 of the Code of Criminal Procedure.

PROSECUTION CASE IN TRIAL COURT

2. In short story of prosecution is that on 09-03-2012 at 09:00 p.m., appellant visited the house of deceased Sushila and insisted her to give him liquor on credit. She refused and therefore, appellant got enraged, abused her,

poured kerosene on her person and incinerated her. She was taken to the hospital on account of 50% of burns. While undergoing treatment, her dying declaration was recorded by PW5 Rathod (PHC) and was consequently made basis of registration of crime. She succumbed to burn injury.

Crime was entrusted to PW6 Baste (PI). He carried out investigation and filed challan against accused for commission of offence under Sections 307 and 302 of the Indian Penal Code (IPC). Learned Sessions Judge, Jalna conducted trial, appreciated the oral and documentary evidence adduced by the prosecution and finally reached to the conclusion that dying declaration Exh.29 and testimony of PW2 Kavita, daughter of deceased, are inspiring confidence and accordingly held accused guilty and convicted him for the offence under Section 302 of the IPC. The said judgment and order is challenged in the present appeal.

SUBMISSIONS

On behalf of Appellant :

3. Learned Counsel for the appellant would submit that here only piece of evidence is dying declaration. There is no other evidence. According to him, there are several infirmities in the dying declaration rendering it doubtful. He pointed out that alleged occurrence is of 09-03-2012 but FIR is recorded on 12-03-2012. Delay is not explained and therefore, it is fatal for prosecution. He further pointed out that firstly the dying declaration is not in the

vernacular of deceased and secondly, as required, the statement is not read over to the deceased before obtaining her thumb impression as there is no endorsement and so according to him, such dying declaration cannot be admitted, accepted or relied. He further pointed out that even dying declaration comes under shadow of doubt because there are insertions and overwriting. There apart material witnesses like mother and brother of deceased are not examined. A child is examined but her evidence is without administering oath and without ascertaining whether the child has intellectual capacity to depose. Even seized material is not sent to Chemical Analyzer (CA) for forensic analysis and as such there is no CA report. For all above reasons, he submits that such evidence ought not to have been accepted.

4. He further pointed out that going by sequence of evidence put-forth by prosecution, it is not a case of Section 302 as according to him, appellant never intended to commit murder. It is his submission that if at all this Court is not accepting above submissions, then it is his alternative submission that the case should be considered under Section 304 of the IPC as culpable homicide not amounting to murder and not under Section 302 of the IPC.

In support of his submission, learned Counsel relied on the following citations :

- a) ***State of Rajasthan v. Sheeshpal***; AIR 2016 Supreme Court 4958.

- b) *Smt.Rashida Abdul Gani Khairadi v. The State of Maharashtra; 2014 ALL MR (Cri) 244.*
- c) *Sampat Babso Kale v. State of Maharashtra; AIR 2019 SC 1852.*
- d) *Dinesh Vasant Bhoyar v. State of Maharashtra; 2018 (2) ABR (Cri) 446.*
- e) *Subhash Tikaram Jadhav v. State of Maharashtra; 2017 (1) ABR (Cri) 668.*

On behalf of State :

5. In contrast learned APP pointed out that dying declaration Exh.29 is sufficient to record guilt. She submitted that here also dying declaration has been found to be truthful, voluntary and therefore, learned trial Judge has correctly accepted the same and also relied for holding guilt of the accused. She further pointed out that apart from dying declaration, very child of deceased has stepped in the witness box and has given consistent version. Her statement and text of dying declaration are both consistent. Therefore, there was overwhelming evidence both oral as well as documentary. Deceased succumbed to the burns. According to learned APP, accused having poured kerosene and incinerated deceased, nothing short of offence under Section 302 is attracted.

6. Here case of prosecution is rested on evidence of in all seven witnesses.

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Sitaram Tukaram Waghmare is Pancha to spot panchanama. His evidence is at Exh.17. He did not support prosecution.

PW2 Kavita Asaram Chavan is daughter of deceased. She is eye witness. Her evidence is at Exh.23.

PW3 Sanjay Gynoji Mundhe is Pancha to seizure of kerosene Can. His evidence is at Exh.24. He did not support prosecution.

PW4 Dr.Kirti Keshav Karhadkar is Autopsy Doctor. Her evidence is at Exh.27.

PW5 Ankush Rahu Rathod is Police Head Constable who recorded dying declaration of deceased Sushila. His evidence is at Exh.28.

PW6 Arun Yeshwant Baste (PI) is Investigating Officer. His evidence is at Exh.33.

PW7 Dr.Irfan Baktiyar Palla is Medical Officer in whose presence dying declaration of deceased Sushila was recorded by PW5 Rathod. He gave endorsement on top as well as bottom of the statement that patient was conscious and oriented.

7. Admittedly case is based on dying declaration.

Before adverting to the evidence, we propose to give brief account of settled legal position regarding evidentiary value 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 v. State of Bombay*, AIR 1958 SC 22,

Paniben v. State of Gujarat; (1992) 2 SCC 774, Laxman v. State of Maharashtra; (2002) 6 SCC 710, Ganpat Bakaramji Lad v. State of Maharashtra; 2011 ALL MR Cri. 2249. Surendrakumar v. State of Punjab; (2012) 12 SCC 120, Jagbir Singh v. State (NCT of Delhi); (2019) 8 SCC 779, Madan v. State of Maharashtra; (2019) 13 SCC 464.

Off late in the case of *State of Uttar Pradesh v. 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.”*

Similarly, in the case of ***Uttam v. 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 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 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.”

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.

8. Here dying declaration is at Exh.29. We have minutely gone through the same in view of the objection raised by the learned Counsel for the appellant appearing in aforesaid paragraph.

We have noticed that dying declaration Exh.29 which is made basis of registration of crime is recorded by **PW5** Rathod a Police Head Constable. He deposed that he went to the hospital, approached the Doctor, obtained endorsement and thereafter recorded dying declaration of deceased wherein initially she told about her family and about her husband to be dead. According to him, she told that at around 09:00 p.m. on 09-03-2012, appellant came to her house, demanded liquor, she refused to give him liquor so he abused her, poured kerosene on her body from the kerosene can lying in the house and put her on fire by using a match stick. He identified the statement the statement Exh.29.

Above witness is subjected to **cross-examination** wherein he accepted that he did not record dying declaration in question answer form nor he put question to ascertain fitness of deceased and that he did not record her dying declaration in *Banjara* language. He stated that he did not give any letter to Doctor to know whether deceased was able to give statement and he did not obtain separate certificate from the Doctor to that extent. He answered that as

Doctor was present while he recorded statement, he did not obtain separate certificate. He denied that Doctor was not present when he recorded dying declaration. He admitted that it is not mentioned in the statement that the contents of the statement were read over to deceased, but he volunteered that contents were read over to her.

9. Dying declaration in question is at Exh.29. We have minutely examined the same wherein deceased has stated that on 09-03-2012 at 09:00 p.m. accused came to her house, asked her to give liquor on credit and that she refused to give liquor on credit. She stated that he abused her, poured kerosene from a Can lying in her house, took a match box and ignited her. PW2 Kavita, daughter of deceased, was gone in the neighbourhood for watching TV. She stated that after burn, when she shouted and ran out of house, accused tried to douse the fire by wrapping quilt and fled from the spot. She stated that her relatives brought her to the hospital.

10. In view of objection raised by the learned Counsel for the appellant, we have gone through the dying declaration and noticed that there is certificate at beginning issued by the Doctor at 11:30 p.m. and even at the bottom, there is certification of Doctor. Right thumb impression of deceased is noted.

Likewise **PW7** Dr.Palla stated that while he was on duty on 09-03-2012 PW5 Rathod, Police Constable approached him for seeking permission to

record statement of deceased. He claims that he put endorsement that patient is conscious and oriented to give statement. He identified it at Exh.29. He stated that PW5 Rathod recorded statement in his presence. PW7 Dr.Palla has made endorsement at the beginning as well as at the end of the statement that patient was conscious and oriented.

In **cross-examination** this witness has admitted that he did not specifically state in the endorsement that he examined the patient and that he did not make endorsement of the examination in register. Rest all are denial.

ANALYSIS

11. On analyzing dying declaration Exh.29, evidence of PW5 Rathod (PHC) and PW7 Dr.Palla, it is clear that on 09-03-2012 deceased Sushila was admitted in the hospital on account of burns and PW5 Rathod (PHC) had recorded her dying declaration. There is certification at both at the top as well at the bottom part. There is also thumb impression of the deceased. Therefore, in our considered opinion, required formalities are completed by PW5 Rathod (PHC). He also deposed the text of the dying declaration. Mere failure to record dying declaration in question answer form, as put forth by the learned Counsel for the appellant, would not be a good ground to suspect or discredit above evidence. Delay, if any in recording dying declaration, at the most can be attributed to the lapse of the investigating machinery but that itself will not be a good ground to doubt the entire story of the prosecution.

Certificate of Doctor about fitness of patient to give statement is by way of abundant caution but assessment of fitness by scribe is necessary. Here PW5 Rathod (PHC) admitted that he had not ascertained fitness of deceased by putting question. We would like to say that the said fitness need not be ascertained by separate specific questions. If the patient has given answers to the questions about name, residence, number of family members etc., then it would be sufficient. Here those questions were asked by PW5 Rathod (PHC) and answered by deceased. That was sufficient for him to proceed to record further dying declaration. Hence, accused cannot get advantage of said admission.

12. Apart from above dying declaration, prosecution has adduced evidence of very child of deceased i.e. **PW2** Kavita. Her testimony is tried to be challenged by learned Counsel for the appellant by submitting that the learned trial Court has not verified her capacity to depose and that there is no oath to her and therefore, according to him, such testimony cannot be taken recourse to or relied and further as required by law, there is no corroboration to child witness account.

Under Section 118 of the Indian Evidence Act, a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child

witness, Section 4 of the Oaths Act, 1969 is relevant, which is reproduced as under:

“4. Oaths or affirmations to be made by witnesses, interpreters and jurors. -

(1) Oaths or affirmations shall be made by the following persons, namely :-

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2)”

What can be culled out from above provision is that under the proviso to

Sub- Section [1] to Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness.

In view of above requirement, here when child is reported to be of 13 years of age and for this simple reason, further requirement of ascertainment of understanding the import of the oath did not be insisted upon. Apparently she is above 12 years, which is age prescribed in the above Statute and therefore, we do not find any substance in the above objection raised by learned Counsel for the appellant. Even otherwise, the manner of answers from her side to all the questions clearly show that she understands the purport of each of the questions and though of 13 years of age, is capable of understanding the questions and is found to have given rational answers in context with the questions. She has categorically stated that she was watching TV in the neighbourhood. Her deceased mother also in dying declaration has stated to that extent. Child claims to have heard shouts and further claims to have seen the occurrence from the window. Resultantly, there is no reason to doubt her testimony for want of oath.

It is tried to be submitted that panchanama is silent about any window to be available to the house and therefore, evidence of child about seeing the occurrence from window is itself manufactured and concocted story.

In the light of such objection, we have gone through the cross-examination of PW2 Kavita. She has stated that there is window to the house

and she volunteered and given direction of the window towards North. Therefore, even above submission pales into insignificance.

CONCLUSION

13. Therefore, the sum total is that dying declaration and evidence of PW2 Kavita both inspire confidence. There is no reason to discredit or doubt both such evidence. Therefore, there is no error on the part of the trial Judge in accepting such evidence and returning guilt.

14. As regards submission of learned Counsel for the appellant that at the most Section 304 Part II of the IPC i.e. culpable homicide not amounting to murder is attracted in the present case and not Section 302 of the IPC, there is force in the said submission. Going by chronology of events, it is emanating that accused entered the house of the deceased for liquor. He sought it on credit and only on its refusal, he has used kerosene available in the house for pouring it on person of deceased and ignited her. Consequently, there was no premeditation and whatever incident took place is on the spur of the moment and in the rage of anger. It is not intentional or premeditated act. Therefore, taking such background of incident into consideration, we are of the considered opinion that it is not a case of murder but it falls under Section 304

Part II i.e. culpable homicide not amounting to murder. Accordingly, we interfere to the extent of conviction and sentence and modify it as under :

ORDER

(i) Criminal Appeal No.922 of 2018 is partly allowed.

(ii) The conviction and sentence awarded to the appellant Prakash Rupa Rathod by learned Sessions Judge, Jalna, in Sessions Case No.121 of 2012 on 21-03-2013 is altered from Section 302 of the IPC to Section 304 Part II of the IPC and he is sentenced to suffer imprisonment already undergone by him.

(iii) Appellant be set at liberty, if not required in any other case.

(vi) We clarify that there is no change in rest of the order of the Sessions Judge, Jalna.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT