



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

CRIMINAL APPEAL NO.19 OF 2022

Dattatraya Arjun Bhosale,
Age : 34 years, Occ. Nil,
r/o. Jategaon, Tq. Jamkhed,
Dist. Ahmednagar

.. Appellant

Vs.

The State of Maharashtra

..Respondent

Mr.Satej S. Jadhav, Advocate for appellant
Mrs.S.N.Deshmukh, APP for respondent

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
RESERVED ON : JANUARY 29, 2025
PRONOUNCED ON : FEBRUARY 03, 2025**

JUDGMENT (Per R.G. Avachat, J.) :-

The challenge in this appeal is to the judgment and order of conviction and consequential sentence dated 03.05.2017, passed by learned Sessions Judge, Ahmednagar (Trial Court) in Sessions Case No.188 of 2015. Vide the impugned and order, the appellant has been convicted for the offences punishable under Sections 302 and 323 of Indian Penal Code and therefore, sentenced to suffer life imprisonment and to pay a fine of Rs.1,000/- and simple imprisonment, respectively, with default stipulation.

2. The facts, in brief, giving rise to the present appeal are as follows:-

The appellant married Suvarna (deceased) in 2002. The couple was blessed with two children. The appellant got addicted to liquor. On the given day, i.e. on 02.01.2015, by little past 10.00 p.m., the appellant returned to his one-room house. He was drunk. Since his son Aditya (PW1) was not seen studying, he assaulted him with belt. Suvarna intervened. A petty quarrel ensued between the couple. The appellant doused Suvarna with kerosene and set her ablaze after closing the door from inside. PW1 – Aditya raised cries and called his uncle. His uncle (Pralhad), in turn, broke open the door. He extinguished fire and rushed Suvarna to Civil Hospital, Ahmednagar.

3. On her admission to the hospital, a medico-legal case was registered. The police official on duty (PW10) recorded her statement, which, later on, became her dying declaration (Exh.59). He also availed services of the Special Executive Magistrate to have recorded her statement. Before and after recording her statements, the Medical Officers on duty certified Suvarna to be conscious oriented to make a statements. In her both the statements (dying declarations), she narrated the incident of the appellant to have set

her ablaze. Her brother (PW3-Shivaji) was informed. He along with his relations, rushed to the hospital. Suvarna orally informed him of having been set ablazed by the appellant. On the third day, Suvarna succumbed to the burn injuries.

4. Based on her statement (Exh.59) to the police official (PW10), a crime was registered, being crime No.4 of 2015, with Police Station, Jamkhed, Dist. Ahmednagar, for the offences punishable under Sections 304, 323, 504 of Indian Penal Code. On her demise, Section 302 of Indian Penal Code was invoked. The crime-scene panchnama (Exh.52) was drawn. The mortal remains was subjected to autopsy. The clothes on the person of both appellant and Suvarna (deceased) were seized. All the seized articles were sent for analysis and report. Upon completion of the investigation, the appellant was proceeded against by filing a charge sheet.

5. The trial court framed Charge (Exh.5). The appellant pleaded not guilty. His defence was that deceased Suvarna was hot-tempered. She was younger daughter of her parents and was, therefore, pampered. His brother - Pralhad had made gold ornaments to his wife. Suvarna wanted the appellant to make such ornaments for her. The appellant had financial constraints. The

appellant could not satisfy her demand. She, therefore, set herself ablaze. The appellant and his brother Pralhad extinguished the fire and rushed to the hospital. According to him, their children were influenced by their maternal grand-parents and therefore, testified against him.

6. To bring home the charge, the prosecution examined ten witnesses and produced in evidence certain documents. On appreciation of the evidence in the case, the appellant was convicted and consequently, sentenced, as stated above.

7. Heard learned counsel for the parties. Learned counsel for the appellant would submit the prosecution to have failed to bring home the Charge beyond reasonable doubt. He took us through the cross-examination of the children of the appellant and deceased Suvarna, and submitted that the deceased wanted the appellant to make gold ornaments for her. He would further submit that both the children had been residing with their maternal grand parents and were, therefore, influenced by those relations. The Special Executive Magistrate (PW5 - Bhaskar), who recorded the second dying declaration, did face prosecution for recording false dying declaration in some other case. Such witness, therefore, ought not to have been relied upon by the trial court. He would further

submit that when the so called statement (Exh.34) of the deceased recorded by the Executive Magistrate was first in point of time, it is not known, as to why her subsequent statement recorded by the police official (Exh.59) was registered as FIR. He would further submit that the medical papers of the deceased were not placed on record. Same caused prejudice to the appellant in his defence. He would further submit that the appellant too suffered extensive burns. The appellant was hospitalised for more than three and half months. This fact has been consciously suppressed in both the dying declarations and by the prosecution witnesses as well. He relied on the judgment of the Apex Court in the case of **Irfan alias Naka Vs. State of Uttar Pradesh, AIR 2023 SC 4129** and urged for allowing the appeal.

8. Learned APP would, on the other hand, submit that PW1 – Aditya was an eye-witness. He was of the age of understanding. The trial Court found him to be a competent witness. He gave the minute details of the incident as to how the appellant set his mother (Suvarna) ablaze. He categorically denied to have given evidence influenced by his maternal uncle. According to learned APP, the theory of tutoring, therefore, gets washed out. Presence of PW1-Aditya has not been disputed. It was for the defence to have

suggested this witness, as to how the appellant did suffer burns. Nothing of that sort was done. Learned APP then adverted our attention to both the dying declarations. According to her, those are consistent with each other. The Medical Officers on duty had examined Suvarna before and after recording of both the dying declarations. Even they were present when those were being recorded. According to her, the authorities relied on by learned counsel for the appellant were quite distinguishable on facts. She would, on the other hand, rely on the Apex Court judgment in the case of **Rajendra s/o. Ramdas Kolhe Vs. State of Maharashtra, 2024(2)ABR(CRI) 481**, wherein, it has been observed thus:-

Penal Code (45 of 1860), S.302 – Evidence Act (1 of 1872), S.3. S.32-Murder – Dying declaration – Reliability – accused husband poured kerosene on deceased and set her ablaze, resulting in her death - In her dying declaration, deceased clearly stated about the role played by her husband and brother-in-law, which led to her burn injuries – Contents of dying declarations were proved by witnesses – Attending doctor had certified that deceased was capable of narrating her statement – Substance of dying declaration was also borne out by medical history of patient, as recorded by doctor, which was also proved in evidence – Dying declaration was recorded on day of incident whereas evidence was tendered by witnesses in court after 5 years – Therefore, inconsistencies in the evidence of witnesses was quite natural – Dying declaration was

duly proved in evidence – Guilt of accused was proved beyond reasonable doubt Conviction was proper.

9. Learned APP would further submit that the appellant neither examined himself as defence witness nor examined his brother in his defence. According to her, a summons was issued to the appellant's brother, however, he did not appear to give evidence in favour of the appellant. Same goes a long way to indicate the appellant to have committed the offence. Our attention was also adverted to paragraphs 30 to 34 of the judgment in the case of **Rajendra** (supra), to ultimately urge for dismissal of the appeal.

10. Considered the submissions advanced. Perused the judgment impugned herein. Let us advert to the evidence on record and appreciate the same.

11. Admittedly, the appellant had married Suvarna way back in 2002. The couple was blessed with two children. The daughter (PW2-Divya) was staying with her maternal grand-parents' house at Namalgaon, Dist.Beed, for education purpose. She was not home when the incident took place. Her evidence only indicates that her father (appellant) was addicted to liquor and used to pick up quarrels with her mother and beat her up. She further testified that the appellant would beat up her brother and her as well.

12. The incident took place little past 10.00 p.m. on 02.01.2015 in the one-room house of the appellant. The crime-scene panchnama (Exh. 52) and the photographs indicate that the door of the room was required to be broke open. Suvarna had suffered 95% of burns. She succumbed to the burn injuries on 03.01.2015. PW4 – Dr.Amit conducted autopsy. In his opinion, Suvarna died of grade-II 95% burns, i.e. kerosene burns. PW 4 – Dr.Amit, in his evidence, gave details of the body parts, which suffered particular percentage of burn injuries. His evidence disclosed that both limbs of the deceased were burnt and there were blisters. He could not opine, whether it was a case of homicidal burns or suicidal one. The post mortem report finds place at Exh.31.

13. PW1 – Aditya, son of the appellant and deceased Suvarna, testified that on the fateful evening, the appellant returned home drunk. He started beating him as he did not study. His mother, therefore, asked the appellant not to beat him. The appellant, thereupon, set her ablaze after dousing her with kerosene. PW1 – Aditya was present. He gave call to his uncle Pralhad. Pralhad broke open the door and extinguished the fire.

During his cross-examination, PW1 – Aditya was categorical to deny that he testified against his father at the instance

of his maternal uncle (PW3). He further testified that he was loved by his maternal grand-parents. He testified that the appellant was not punctual in purchasing grocery items for the house. The appellant was hesitant to attend the marriage ceremonies of relatives and offer gifts in marriages. The appellant was miser. He further testified that his mother wished to have gold ornaments; but the appellant was not providing the same. His mother Suvarna (deceased) was younger daughter of her parents and therefore, was loved much. He, however, denied his mother to have committed suicide. True, his presence in the room at the time of the incident has not been disputed in the cross-examination.

14. PW2 – Divya did not witness the incident. In the cross-examination, she testified that her father was miser. Her mother wanted the appellant to make gold ornaments for her. Her uncle – Pralhad had made gold ornaments for his wife. She, however, denied that the same was the reason for suicide by her mother.

15. PW3 – Shivaji, brother of the deceased, testified that he rushed to the hospital and learnt from his sister Suvarna that the appellant set her ablaze. He further testified that the appellant was addicted to liquor and he used to beat up his sister and children as well. His evidence further indicates that he did not lodge the police

report, no sooner he learnt the appellant to have set his sister ablaze.

16. Admittedly, the brother of appellant – Pralhad had rushed Suvarna to the hospital. PW 5 – Bhaskar (Executive Magistrate) and PW 10 – Abdul (police official) had recorded the statements of Suvarna after having verified from the Medical Officers on duty, that she was conscious oriented to make the statements. Both the statements of the deceased have been on record. Exh.34 is the dying declaration recorded by the Special Executive Magistrate (PW 5 – Bhaskar); while Exh.59 is the FIR-cum-dying declaration recorded by PW10-Abdul, police official. Both the Doctors on duty namely, Dr. Sucheta (PW7) and Dr.Ashok (PW8) testified that they had examined deceased Suvarna, before and after recording her respective statements by PW 10 – Abdul and PW 5 – Bhaskar. They referred to their endorsement appearing on both the statements of the deceased.

17. Perusal of both the statements of the deceased suggest the deceased to have stated the appellant to have set her ablaze after dousing her with kerosene. The appellant returned home drunk. He started abusing her and assaulting their son – Aditya. The dying declaration-cum-FIR (Exh.59) is recorded by PW 10 – Abdul,

police official. Similar is the statement recorded by PW 5 – Bhaskar, Executive Magistrate. Close reading of both the statements indicate that PW1 – Aditya was present in the room. Both the statements are consistent with each other.

18. Now, the question is, whether the conviction of the appellant would sustain based on the dying declarations and the oral evidence as well. Section 32(1) of the Evidence Act reads thus:-

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. – Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases: —

(1) When it relates to cause of death.—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

In paragraph 62 of the judgment in the case of **Irfan alias Naka** (supra), it has been observed as under:-

62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

Paragraphs 30 to 34 of the judgment in the case of Rajendra (supra) read thus:-

30. Elaborating further, this Court in Sher Singh vs. State of Punjab, AIR 2008 SUPREME COURT 1426, held that acceptability of a dying declaration is greater because the declaration is made in extremity. When a party is on the verge of death, one rarely finds any motive to tell falsehood. It is for this reason that the requirements of oath and cross-examination are dispensed with in the case of a dying declaration.

31. In Sudhakar vs. State of Madhya Pradesh, AIR 2012 SUPREME COURT 3265, this Court observed thus:-

20. The "dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement.

Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

32. *When there are more than one dying declaration, this Court in Amol Singh vs. State of Madhya Pradesh, AIR ONLINE 2008 SC 62, clarified that it is not the plurality of the dying declarations that matter. On the contrary, it is the reliability of a dying declaration which is significant. If there are inconsistencies between one dying declaration and the other, the court has to examine the nature of the inconsistencies, i.e., whether those are material or not.*

33. *In Lakhan vs. State of Madhya Pradesh, 2010 AIR SCW 5993, this Court held that where there are multiple dying declarations with inconsistencies between them, the court would have to scrutinize the facts very carefully and, thereafter, take a decision as to which of the declarations is worth reliance.*

34. *Again, in Ashabai vs. State of Maharashtra, 2013 AIR SCW 333, this Court observed that when there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated independently on their own merit as to the evidentiary value of each. One cannot be rejected merely because of certain variations in the other.*

19. We are conscious of the fact that the dying declaration, if found to have been made voluntarily and truthful, can form the sole basis of conviction. The question herein is, whether the evidence of PW1 – Aditya and both the dying declarations are truthful and inspire confidence to uphold the appellant's conviction. In our view, the answer would be big "NO". PW10 – Abdul has categorically admitted that the appellant too had suffered burns in the very incident. The record indicates that he suffered extensive burns to his chest and hands. The appellant was also admitted to the hospital on the same day. The duration of his hospitalisation was little over three and half months and thereafter only, he could be arrested in this case. Close reading of the evidence of PW1-Aditya and both the dying declarations lead us to infer that the child witness (Aditya) and the deceased Suvarna have suppressed the fact as to how the appellant suffered extensive burns in the very incident. Their evidence, therefore, could be said to have not been inspiring confidence. It is for the prosecution to explain the injuries on the person of the appellant/accused. Failure of the appellant to lead evidence in his defence is of no consequence, since the fact of the appellant to have suffered extensive burns in the very incident and the same has been consciously suppressed by the deceased in her both the dying declarations and PW 1 – Aditya in his oral evidence, therefore, we

find their evidence to be not inspiring confidence.

20. The prosecution could be said to have failed to bring home the charge beyond reasonable doubt. Benefit thereof goes to the appellant. In the result, the appeal succeeds. Hence, the following order:-

- (i) The appeal is allowed.
- (ii) The impugned order dated 03.05.2017, passed by learned Sessions Judge, Ahmednagar, in Sessions case No.188 of 2015, convicting and sentencing the appellant for the offences punishable under Sections 302 and 323 of Indian Penal Code, is set aside. He is acquitted of the said offences.
- (iii) The appellant be released forthwith, if not required in any other case.
- (iv) Fine amount paid by the appellant, if any, be refunded to him.
- (v) Learned Registrar (Judicial) of this Court shall ensure compliance of this order today itself.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP