



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

CRIMINAL APPEAL NO. 309 OF 2019

Kishor S/o Janardhan Kavale,
Aged about 30 years, Occ. Labour
R/o Poha, Tahsil Karanja, District Washim
(In Jail)

... Appellant

// VERSUS //

The State of Maharashtra,
through Police Station Officer, Police Station
Karanja, District Washim

... Respondent

Shri R.M.Daga, Advocate for the appellant.
Shri Nikhil Joshi, APP for the respondent/State.

**CORAM : NITIN B. SURYAWANSHI &
PRAVIN S. PATIL, JJ.**

DATED : 19th MARCH, 2025.

ORAL JUDGMENT : (PER : NITIN B. SURYAWANSHI, J.)

This appeal assails the judgment of the learned Sessions Judge, Yavatmal dated 7th March, 2019 in Sessions Trial No. 101 of 2013 thereby convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.3000/- in default of the payment of fine, to suffer rigorous imprisonment for one year.

2. Prosecution case in short is that Archana was daughter of Sudhakar Vyankatrao Shinde (P.W.6) and Lilabai Shinde (P.W.7), both residents of Malipura, Karanja. She was married with Kishor (Accused/Appellant), resident of Poha, Tq. Karanja, Dist. Washim in the year 2008. One son and one daughter were born out of the said wedlock. She was residing in a joint family of her father-in-law and brother-in-law Shekhar and accused Kishor. After few years of marriage Archana and Kishor started residing in a separate room with their children. Archana was treated well initially for few years. Thereafter, Kishor started suspicion on her character and he used to tease Archana that she was doing business of selling her body. He used to ill-treat her on that count. Archana was bearing all the harassment for her children. On 8th May, 2013, Archana was brought in burnt condition at Karanja Rural Hospital by accused Kishor and Shekhar. There her first dying declaration (Exhibit 105) was recorded by Investigating Officer (P.W.10). In that dying declaration Archana stated that on that day since morning her husband was beating her. At about 5 pm when she was at home her husband Kishor quarreled with her and poured kerosene on her body and ignited matchstick and set her on fire. Thereafter, her husband brought

her to the hospital and admitted her there. Thereafter, Archana was sent for further treatment at Akola Survopchar Hospital. There her second dying declaration (Exhibit 84) was recorded by Naib Tehsildar (P.W.8). In the second dying declaration, she implicated her husband as well as brother-in-law Shekhar.

3. On the basis of first dying declaration, First Information Report was registered for the offence punishable under Section 307 of Indian Penal Code and investigation was set in motion. During treatment Archana expired on 10th May, 2013 at about 6.30 a.m. Hence, Section 302 of Indian Penal Code was added in the crime. On completion of investigation, charge-sheet was filed. Trial Court framed charge against Kishor and Shekhar under Section 302 read with Section 34 of Indian Penal Code. Prosecution examined 10 witnesses to prove the charge against the accused. The defence of accused was of total denial and they claimed that they are falsely implicated in the crime. The deceased caused burnt injuries due to extinguishing of fire and they both have no concern with that. Trial Court acquitted Shekhar and convicted the accused as above.

4. Heard learned advocate for the appellant and learned Additional Public Prosecutor for the respondent/State.

5. Learned advocate for the appellant assailed the impugned judgment by submitting that trial court has erred in placing reliance on dying declarations of Archana. In first dying declaration (Exhibit 105) there is no time mentioned as and when she talked, so also no certificate of medical officer is obtained before recording the dying declaration. The certificate is given at the bottom of the dying declaration is to the effect that “*patient is conscious to give consent*”. He therefore submitted that there is no certificate that Archana was in fit state of mind to give the dying declaration. Considering the fact that Archana had suffered 76% burn injuries, her capacity to give statement appears to be doubtful. He further submits that as per case papers of Archana, she was admitted in the hospital at 5.50 pm and she was discharged at 6 pm. On her admission, intimation was given to the police station and police took half hour to reach to the hospital. In these circumstances, it is doubtful as to how dying declaration was recorded at 6.20 pm. He, therefore, submitted that dying declaration (Exhibit 105) is unreliable.

6. He further submits that second dying declaration (Exhibit 84) which is recorded by Naib Tehsildar (P.W.8) is inconsistent with the first dying declaration. In the second dying declaration, Archana had implicated her brother-in-law. Since, the trial Court has acquitted brother-in-law Shekhar against accused no.2, therefore trial Court could not have convicted appellant on the basis of same evidence. It is submitted that it has come in the inquest panchanama that feet of Archana were burnt. However, in both the dying declarations left great toe impression was obtained. In view of burning of the feet of Archana, it is not possible that ridges and curves on the toe would appear in the dying declarations. This also renders both dying declarations doubtful. According to him, the certificate of fitness in the second dying declaration is mechanically given by the doctor. By referring to the evidence of P.W.9, Dr. Anant Pore, he has categorically admitted that during recording of the second dying declaration, he had stopped recording and examined the patient, it shows that patient was not in a fit condition to give dying declaration. Further, submission is that parents of deceased Archana P.W.6 Sudhakar and P.W.7 Leelabai have not supported the prosecution case. Sudhakar (P.W.6) has stated in his evidence that Archana told him

that while igniting hearth, there was explosion of kerosene and hence she was burnt. Leelabai (P.W.7) mother has stated that their relatives told Archana to implicate the accused persons. Therefore, according to him, there is no corroboration to the dying declarations which are recorded in suspicious circumstance. He further submits that even appellant had received burn injuries of his hands. This is not at all explained by the prosecution, therefore, the defence of the appellant while cooking Archana received burn injuries and at the time of extinguishing of fire he received burn injuries is probable and is liable to be accepted. By relying on Kalu Ram Vs. State of Rajasthan reported in 2000(10) SCC 324, Maruti S/o Raghunath kendra and another Vs. The State of Maharashtra reported in 2014 ALL MR (Cri) 3831; Masoodali Sahaikali and another Vs. The State of Maharashtra reported in 2017 ALL MR (Cri) 4685; Parasram Chandrasha Ghante Vs. The State of Maharashtra reported in 2014 ALL MR (Cri) 5089; Phulel Singh Vs. State of Haryana reported in 2023 (10) SCC 268; Suresh S/o Shirang Mandawgane Vs. State of Maharashtra reported in 2010 ALL MR (Cri) 147; Prakash Yuvraj Sonawane Vs. The State of Maharashtra reported in 2015 ALL MR (Cri) 1328; Samadhan Dhudaka Koli Vs. State of Maharashtra reported in

2019 ALL MR (Cri) 229 (S.C), he submits that the prosecution has failed to prove the charge beyond reasonable doubt and appellant is entitled for acquittal.

7. Per contra, learned Additional Public Prosecutor supported the impugned judgment and order of conviction. He submits that homicidal death is not disputed by the accused. P.W.8 and P.W.10 who recorded both the dying declarations and Doctor who has given endorsement on the same are independent witnesses and they have no reason to falsely implicate the appellant. Both the Doctors have given certificate that deceased was in a fit mental state to give dying declaration. Findings of kerosene residue on the clothes of appellant in the CA reports corroborate the prosecution case. According to him, there cannot be said to be inconsistency in two dying declarations, in view of the fact that in both dying declaration same role is attributed to the appellant. He therefore submits that trial Court has properly appreciated the evidence and has rightly convicted the appellant and no case is made out by the appellant to interfere in the impugned judgment and order of conviction. By relying on Padmaben Shamalbhai Patel Vs. State of Gujarat reported

in 1991 AIR SCW 464 and Laxman Vs. State of Maharashtra reported in AIR 2002 SC 2973, he submits that appeal being devoid of merit and the same may be dismissed.

8. With the assistance of learned advocate for the appellant and learned Additional Public Prosecutor, we have perused the record.

9. It is well settled in catena of decisions of the Apex Court as well as of this Court that, before basing conviction solely on the dying declaration, Court must come to a conclusion that dying declaration is trustworthy, reliable and one which inspires confidence. Probability of any doubt regarding mental fitness of dying declarant has to be considered in the facts of each case.

10. The trial Court has convicted the appellant by relying on two dying declarations, Exhibit 105 and Exhibit 84. First dying declaration (Exhibit-105) is recorded by PSI Suresh Gangarde (PW-10). He has deposed that, he was serving in Karanja Police Station in the year 2013 as a PSI. On 8th May, 2013, while he was on patrolling duty, he received a phone call from Police Station that, patient Archana Kawale was admitted in hospital and he had to record her dying declaration. He went to the

Government Hospital, Karanja and inquired with the Doctor present there, the whereabouts of the burned woman. He gave a letter (Exhibit-104) to the Medical Officer asking whether the patient was fit for giving statement. Thereafter, he recorded statement (Exhibit-105) of the patient as per her narration. Then he returned to Police Station and as per statement (Exhibit-105), registered the FIR is at Exhibit-106 for offence under section 307 of the Indian Penal Code.

In her dying declaration (Exhibit-105) Archana has stated that;
“On being asked, I state that, I reside at Poha and my marriage was solemnized 5 years before”.

“Today, dt. 08.05.13, my husband was beating me since morning and in the evening, at about 5.00 p.m. when I was at home, my husband Kishor quarreled with me and poured kerosene on my person and set me on fire by igniting match stick. Thereafter, I was admitted in the hospital by my husband. My husband tried to kill me by setting me on fire.”

“My statement is recorded as per my say. It is read over to me, it is correct.”

11. Perusal of dying declaration (Exhibit 105) shows that there is no time mentioned at the top and this fact admitted by P.W.10. At the beginning of the dying declaration there is no certificate of medical officer and the certificate of the Medical Officer appears at the bottom, which is in the following words, “*patient is conscious to give consent in front of me*” (Exhibit-62). This endorsement is made at 6.20 p.m. It is therefore clear that there is no certificate to the effect that patient was in a fit state of mind to give the statement.

Perusal of medical case record of Archana (Exhibit 70) shows that Archana was admitted at Gramin Rugnalaya, Karanja on 8th May, 2013 at about 5.50 pm and she was discharged on the same day at 6 p.m. There is an endorsement that patient is transferred to Government Hospital, Akola. It is admitted fact that Archana was admitted by appellant Kishor. It is mentioned in Exhibit 70 that Kishor has made endorsement on the said record that he had brought his wife in a burned condition at the hospital. Doctor opined that her condition was critical and advised to take her to Civil Hospital, Akola. He therefore brought her to Akola.

12. Dr. Nathuram Salunke (P.W.5) in his evidence has admitted that police had come at 6 p.m and gave him letter for recording of statement of patient. He examined patient and found her in fit condition to give statement, that time was about 6 p.m. Thereafter police recorded the statement of patient. If the patient was discharged at 6 p.m. as per medical record, it cannot be believed that her statement was recorded at 6.20 p.m.

13. One more reason to disbelieve the dying declaration is that, Dr. Nathuram Salunke (P.W.5) in cross-examination admitted that when Archana was admitted, at that time her condition was serious and she was only for 10 minutes in his hospital. He had informed police when the patient was brought to him. He further admitted that police took half hour for coming to the hospital. He has also admitted that he did not take any note in (Exhibit 70) that patient was fit and he has issued the fitness certificate. He has also admitted in a given case patient may be conscious, but may not speak. His opinion on Exhibit 70 is about seriousness of the patient due to burn injuries to the patient. In (Exhibit 70), it is nowhere mentioned when the dying declaration was started and

when it was completed. Recording of dying declaration is also not mentioned in (Exhibit 70). He also admitted that in his endorsement (Exhibit 62) the word statement is nowhere written and it is also not written that the patient was fit. All these aspects create doubt about the genuineness of the dying declaration (Exhibit 105).

14. The second dying declaration is recorded by Naib Tahsildar Shriram Raut (PW-8), wherein deceased Archana has stated that, *“today evening at 5.30 at residential house, husband Kishor Janardan Kawale and brother in law Shekhar Janardhan Kawale beat me and my brother in law caught hold of me and my husband poured kerosene on my person and set me on fire by igniting match stick. The reason being, my husband used to suspect my character and used to always beat me. Today also he has done the same thing”*.

15. In cross-examination, he admitted that when he went to the burn patient ward, two relatives of the patient were present there, he did not enquire with them. His signature was not obtained on the patient's bedhead ticket. No entry of recording of dying declaration of the patient was taken on the bedhead tickets. He did not record dying declaration in

question answer form. He did not record reasons for taking the left great toe impression of the patient on the dying declaration.

16. In dying declaration Exhibit 84, Archana has implicated her brother-in-law accused No.2 Shekhar who was not referred to by her in the first dying declaration. Obviously, therefore, the dying declaration Exhibit-84 is inconsistent with the first dying declaration Exhibit-105.

17. Law is well settled that if there is inconsistency in two dying declarations, the benefit has to be given to the accused. In Suresh Shrirang Mandawgane Vs. State of Maharashtra (supra), this Court has held:-

“5. One more important circumstance which goes against these dying declarations is the fact that the appellant during that night also suffered burn injuries. Dr. Gute P.W.9 during the cross-examination admitted that on 09-03-2006 not only deceased Mangalbai was admitted to the hospital but the appellant was similarly admitted to the hospital and that he had treated him for his burn injuries. This witness stated that the appellant had sustained 9% burn injuries, out of which the burns on his face were 4% and remaining 5% burns were found on right and left arms. The injury certificate at Exhibit-32 issued in respect of appellant's burn injuries was thus proved. It is obvious that the appellant sustained these injuries at the time of incident. In his statement under Section 313 of the Code of Criminal Procedure, he stated that his wife tried to commit suicide and he tried to extinguish the fire and thereby he sustained burn injuries. It was, therefore, necessary for Mangalbai while she gave her dying declaration to explain as to how her husband the appellant had sustained his injuries. In both dying declarations she made no statement as to whether after setting her on fire, the appellant came near her for any purpose and came in contact of flames

emanating from her person. Thus, in our view, this is a serious lacuna in the dying declarations.

6. The law on the point as to how the Court should appreciate the evidence in which there are multiple dying declarations is discussed in the judgment of our High Court in the case of Suresh s/o. Arjun Dodorkar (Sonar) Vs. State of Maharashtra reported in 2005 ALL MR (Cri) 1599. [Incidentally one of us (P. V. Hardas, J.) was party to the said judgment]. The relevant portion of the said judgment reads as under :-

"In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations there is consistency in respect of the name and the number of accused However, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declaration and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs.24 and 27 as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. In our opinion, therefore, no reliance can be placed on the dying declarations at Exhs.24 and 27".

18. We are unable to accept the submission of learned APP that, since in both the dying declarations same role is attributed to Appellant – Accused No.1, Trial Court is justified in convicting the Appellant and dying declarations cannot be said to be inconsistent to the extent of the

role attributed to Accused No.1, in view of the observations of the Apex Court in State of Punjab Vs. Parveen Kumar (supra), which is rendered in similar facts, wherein it is held:

“8. It will thus, appear that so far the first dying declaration is concerned, there is no allegation against either the mother-in-law, father-in-law or the sister-in-law and the allegation is solely against the respondent, who is said to have sprinkled kerosene oil on her and set her on fire. In the second dying declaration, the allegation is that the mother-in-law sprinkled the kerosene oil and the husband set her on fire with a match stick. While they were doing so, her father-in-law and sister-in-law were exhorting them to do away with her by setting her on fire. These two versions are quite different and not consistent with each other, except that so far as the respondent is concerned, the act of lighting the fire is ascribed to him in both the dying declarations.

9..... The mere fact that on the basis of the same evidence another view is possible, is not a ground for setting aside an order of acquittal.....

10. While appreciating the credibility of the evidence produced before the Court, the Court must view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declaration. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence. The High Court while considering the evidence on record has rightly applied the principles laid down by this Court in Thurukanni

Pompiah and another Vs. State of Mysore, AIR 1965 SC 939, and Khusal Rao Vs. State of Bombay, 1958 SCR 552.

19. In Maruti S/o Raghunath kendra and another vs. State of Maharashtra (supra), it is held:

“.....In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations, there is consistency in respect of the name and the number of accused. However, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations acceptance of any one dying declaration necessarily renders the other as false and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs.24 and 27, as acceptance of any one dying declaration necessarily renders the other as false.....”

In the light of aforesaid ratio and reasons, it is not possible to rely upon the two dying declarations (Exhibit-84 and Exhibit-105).

20. Another reason to disbelieve the dying declarations is that, Sudhakar (P.W.6), father of the deceased has not supported the prosecution case. He has deposed that on 8th May, 2013 Archana was brought to the hospital as she was burned. Thereafter, they went to the Government Hospital Karanja. Doctor told them to take Archana to

Akola. Accordingly, he took Archana to the Government Hospital at Akola and admitted her there. At Akola Hospital she told him that while igniting hearth explosion of kerosene took place and hence she was burned. It did not happen that she told him that on 8th May, 2013 at 5.30 her husband and Shekhar beat her, Shekhar held her and her husband Kishor burned her by pouring kerosene and igniting match stick.

21. Though, he was declared hostile and cross-examined by the learned Public Prosecutor, nothing supporting the prosecution case was brought on record in his cross-examination.

22. P.W.7 Lilabai mother of deceased has deposed that Archana told her that while igniting hearth due to explosion of kerosene, she was burnt. Even she was declared hostile and cross examined by the learned Public Prosecutor but nothing supporting the prosecution case could be brought on record.

In cross-examination by accused, she admitted that at Karanja Hospital, Archana told that, while igniting the hearth explosion of Kerosene took place and she was burned and some kerosene was splashed on her person. She further admitted that their relatives told Archana to

take names of her husband and his relatives for burning her. Evidence of P.W.6 and 8, therefore creates further doubt about the truthfulness of the inconsistent dying declarations.

23. Learned Advocate for the Appellant has rightly relied upon following observations of this Court in Masoodali Sadaikali and another Vs. The State of Maharashtra (supra):

“22. Exh.-139 is the post mortem report, column no.17, shows that both right lower limb and left lower limb suffered 10% and 11% burns, that means that they were completely charred. However, examination of both dying declarations shows that right toe impressions clearly show that it is having clear ridges and curves. In our view this is also one of the suspicious circumstance.”

24. In the case in hand also, admittedly, deceased had suffered 100% burns and right tow impressions showing clear ridges and curves are obtained on both dying declarations Exhibit-84 and Exhibit-105. This is one more suspicious circumstance to create doubt about both the dying declarations.

25. In Phulel Singh Vs. State of Haryana (supra), it is held that dying declaration if it disbelieved against one accused, the same cannot be made basis for convicting co-accused. In the case in hand, though

accused no.2 is implicated in the second dying declaration, the trial Court has acquitted him. However, for convicting the appellant, trial Court has relied on both the dying declaration which is not permissible in the light of decision in Phulel Singh Vs. State of Haryana (supra), therefore on this ground also conviction of the appellant is unsustainable.

26. Learned Additional Public Prosecutor has strongly relied upon Padmaben Shamalbhai Patel Vs. The State of Gujarat reported in 1991 AIR SCW 464 wherein it is held that:

“8. It is well settled by a catena of cases that a dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premise that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime....”

27. There cannot be no dispute about the aforesaid observations. However, in the present case we have already held that both the dying declarations are unreliable and in view of inconsistencies between them, the benefit of doubt has to be given to the accused.

28. Learned Additional Public Prosecutor has also relied on Laxman Vs. State of Maharashtra reported in AIR 2002 SC 2973 while

referring the judgment of Koli Chunilal Savji and another Vs. State of Gujarat, reported in 1999(9) SCC 562 wherein it is held that ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording dying declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question.

29. Law laid down in Koli Chunilal Savji and another Vs. State of Gujarat (supra) is affirmed by the Hon'ble Apex Court in this judgment.

30. For the reasons recorded in forgoing paragraphs, this citation is also of no help to the prosecution.

31. Only adverse evidence remains against the appellant finding of kerosene residue on his clothes as is mentioned in CA report (Exhibit 68). Learned counsel for the appellant has rightly pointed out that, in the seizure Panchanama of clothes of Accused (Exhibit-57), it is not mentioned that at the time of seizure of clothes, they were smelling of kerosene. Exhibit-57 is proved in the evidence of Investigating Officer (PW-10). However, in his evidence he has not deposed that, after seizure of clothes of the accused, they were sealed and kept in safe custody in

Malkhana. It is pertinent to note that the Appellant was arrested on 8th May, 2013 and the seized clothes were received by forensic lab on 15th May, 2013 i.e. after 7 days. The delay of 7 days is not explained by the prosecution. Therefore, no reliance can be placed on this evidence of finding of kerosene residues on the clothes of the appellant.

32. The trial Court has failed to appreciate the evidence in proper perspective and has erred in recording the conviction of appellant by ignoring settled principles of criminal jurisprudence, therefore, the impugned judgment is unsustainable in law and facts of the case. Hence, the following order.

- i. Criminal Appeal No.309 of 2019 is allowed;
- ii. Impugned judgment and order of conviction and sentence dated 7th March, 2019 passed by I/c Additional Sessions Judge, Mangrulpir Camp at Washim in Sessions Trial No.101 of 2013 is hereby quashed and set aside.
- iii. Appellant is acquitted of the offence punishable under Section 302 of Indian Penal Code.

iv. Appellant be set at liberty forthwith, if not required in any other cases. Fine amount, if any, paid by the appellant be refunded to him.

v. Appellant to execute the bail bond in the sum of Rs.15,000/- under Section 437-A of the Code of Criminal Procedure.

[PRAVIN S. PATIL, J.]

[NITIN B. SURYAWANSHI, J.]