

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

CRIMINAL APPEAL NO.286 OF 2015

Sandip Prakash Rathod,
Age-30 yeas, Occupation:Agricultural,
R/o-Pimperkhed, Tq-Mantha,
District-Jalna.

**...APPELLANT
(Orig. Accused No.1)**

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Joydeep Chatterji Advocate for Appellant.
Mr.S.J. Salgare, A.P.P. for Respondent-State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
RAJESH S. PATIL, JJ.**

DATE OF RESERVING JUDGMENT : 29th JULY 2022

DATE OF PRONOUNCING JUDGMENT : 20th DECEMBER 2022

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

1. Appellant is the husband of deceased Kavita, who stood prosecuted and convicted for committing offence punishable under Section 302 of the Indian Penal Code in Sessions Case

No.24 of 2014 by the learned Additional Sessions Judge, Jalna, on 2nd March 2015. He has been directed to undergo imprisonment for life and to pay fine of Rs.1500/-, in default of payment of fine, to suffer rigorous imprisonment for six months. It will not be out of place to mention here that appellant is the original accused No.1 and along with accused Nos.2 to 5, he stood prosecuted for the offence punishable under Sections 302, 498-A read with Section 34 of the Indian Penal Code, however all of them have been acquitted of the offence punishable under Section 34 of the Indian Penal Code. Accused Nos.2 to 5 were also acquitted of the offence punishable under Section 302 of the Indian Penal Code.

2. The prosecution story, in short, is that Kavita who was aged 27 years, got married about 9 years prior to her death with accused No.1 i.e. present appellant. She had a son, aged 8 years and a daughter, aged six years. According to the prosecution, the husband as well as the in-laws and other relatives of husband i.e. in all accused Nos.1 to 5 used to raise suspicion over the character of Kavita. She was assaulted and abused under the influence of liquor. She was at home at about 11.00 a.m. on 17th September 2013 when accused No.1 had poured kerosene on her person. Then Kavita got annoyed and abused the husband.

The husband got annoyed with her and ignited the match stick and set her to fire. Thereafter, accused Nos. 2 to 5 had extinguished the fire and took her to Mantha Government Hospital. She was then referred to Civil Hospital, Jalna. While under treatment, she gave the dying declaration, which came to be recorded by police head constable Rangrao Sardar. The said dying declaration has been treated as First Information Report and further investigation has been undertaken.

3. Statements of witnesses have been recorded and at that stage the offence was under Section 307 of the Indian Penal Code and other Sections. But thereafter Kavita expired on 21st September 2013 and then, after drawing the inquest panchnama, the dead body was sent for postmortem. After the postmortem, the dead body was handed over to the relatives. Statements of the relatives were recorded and prior to that panchnama of the spot came to be executed. Certain articles came to be seized from the spot. The seized articles were sent for chemical analysis. Some of the accused persons came to be arrested and others had obtained anticipatory bail. After completion of the investigation, charge-sheet came to be filed.

4. After the committal of the case, the learned Additional Sessions Judge framed charge against all the accused persons at Exhibit-13 for the offence punishable under Sections 498-A, 302 read with Section 34 of the Indian Penal Code. All the accused pleaded not guilty. Trial has been conducted. Prosecution has examined in all eight witnesses to bring home the guilt of the accused. After taking into consideration the evidence on record, the other documents, statement of the accused persons under Section 313 of the Code of Criminal Procedure and hearing both the sides; as aforesaid, the learned Additional Sessions Judge has held accused No.1 guilty of committing offence under Section 302 of the Indian Penal Code and the rest of the accused as well as even accused No.1 under rest of the charges have been acquitted. Hence this Appeal by original accused No.1.

5. Heard Mr. Joydeep Chatterji, learned Advocate for the appellant and Mr. Salgare, learned APP for the State.

6. It has been vehemently submitted on behalf of the appellant – husband that the conviction is solely based on dying declaration Exhibit-31 recorded by PW-5 police head constable Sardar. PW-8 Dr. Ramteke was the duty medical officer who had given endorsement on dying declaration Exhibit-31. Perusal of

the dying declaration together with the entire evidence of PW-5 Sardar and PW-8 Dr. Ramteke, it can be seen that the dying declaration is a concocted document. The thumb impression on the dying declaration is not attested. The dying declaration was not read over to the deceased. So also, it does not appear to be in the words of deceased Kavita. The contents if considered with the testimony of other relatives, it can be seen that some concocted story was prepared. Death occurred three days after the alleged incident. There was no attempt on the part of the investigating agency to record the dying declaration once again though PW-5 Sardar says that intimation was given to the Tahsildar i.e. Executive Magistrate to record the dying declaration of the deceased. Other major witnesses have turned hostile. The relatives have negated that there was any kind of ill-treatment to the deceased. Under such circumstance, when there was no motive at all to the appellant to commit the crime, he cannot be held guilty. Only dying declaration cannot be relied to award conviction. The learned trial Judge has not appreciated the evidence properly.

7. The learned Advocate appearing for the appellant relied on the Full Bench decision of this Court in ***Ganpat Bakaramji Lad***

vs. The State of Maharashtra, 2018 ALL MR (Cri) 2249,

wherein it has been held thus:-

“ In respect of the dying declaration, the general principles to be kept in mind are

(i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence, and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :

(a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,

(b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and apeak186.13.odt

(c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires confidence to such an extent that it can be the sole basis of conviction?

The absence of an endorsement in the dying declaration -
(a) by a doctor regarding the fitness of mind of the declarant, or
(b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining

the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of Shaikh Bakshu 2007 ALL SCR 2407 and Kantilal (2009) 12 SCC 498, are based on the facts and would not, therefore, constitute a precedent or a ratio decidendi or even an obiter dicta to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials. ”

8. Per contra, the learned APP strongly opposed the Appeal and submitted that even the dying declaration as a sole evidence can be relied to convict an accused if it is found to be reliable. If the dying declaration inspires confidence then it can be relied on. A person will not lie on his death bed, therefore, proper weightage is required to be given to those statements of a person who makes those statements when he is on death bed. Here, the learned trial Judge has held that the dying declaration is inspiring confidence. The concerned police officer, after receiving the intimation, had gone to the doctor. PW-8 Dr. Ramteke had made endorsement about the mental condition of the deceased Kavita at that time. When he had found that she was in a mental condition to give statement, PW-8 Dr. Ramteke allowed PW-5 Sardar to record the dying declaration. The thumb part was not required to be attested, as the document in its entirety is required to be considered and it was the statement of Kavita and therefore, we can take that the said thumb impression was that of deceased Kavita. Though the other relatives of deceased Kavita had turned hostile, yet her own statement on the death bed is required to be weighed more. The learned APP has supported the reasons given by the learned

Additional Sessions Judge and submitted that conviction does not require any interference.

9. At the outset, it will have to be considered from the record that whether dying declaration can be the sole basis for conviction and if yes, then whether in the present case the dying declaration Exhibit-31 is inspiring confidence or not. As regards the first part of the question is concerned, it is already answered in the various decisions of the Hon'ble Supreme Court as well as this Court that the dying declaration can be the sole basis of conviction if it is true and voluntary. Further, a dying declaration recorded by the police officer is also admissible. However, in order to adjudicate as to whether the dying declaration is true, voluntary and inspiring confidence, we will have to scan the evidence.

10. In the present case, PW-1 Shyam Rathod – panch to the spot panchnama, PW-2 Sunil Chavan – panch to the seizure of clothes of accused No.1, PW-3 Balchand Chavan – father of deceased Kavita, PW-4 Prakash Balchand Chavan – brother of deceased Kavita, all of them turned hostile. PW-6 PSI Limbaji Shelke is the investigating officer. PW-7 Dr. Ravindra Bedarkar is the autopsy surgeon, who proved the postmortem report Exhibit-

46. PW-5 police head constable Sardar and PW-8 Dr. Ramteke have been examined on the point of dying declaration Exhibit-31.

11. PW-7 Dr. Ravindra Bedarkar has deposed that dead body of Kavita Rathod was brought to civil hospital, Jalna on 30th September 2013 for autopsy. In fact it appears to be a typographical mistake committed by the learned Additional Sessions Judge while recording the deposition, for the simple reason that if we peruse the postmortem report Exhibit-46, it says that the dead body was received at about 10.00 a.m. on 21st September 2013, the postmortem was started at about 10.05 a.m. on 21st September 2013 and was ended by 11.00 a.m. on 21st September 2013. The learned trial Judge ought to have been alert while recording the evidence. If there was any controversy in the document and the deposition, it ought to have been got clarified immediately during the deposition itself. The Judicial Officer, while recording evidence, is expected to be alert and he or she should get involved in the said process, so that there should be no confusion either to themselves or even to the appellate authorities. The postmortem report, at the end, also states that it has been given on 21st September 2013. Important point to be noted is that a cryptic examination-in-chief appears

to have been taken on behalf of the prosecution. PW-7 Dr. Bedarkar states that he found that there was evidence of 100% superficial to deep burns and the cause of death was, due to septicemia due to 100% superficial to deep burns. It is also to be noted that Column No.17 of the postmortem report only states that there was evidence of 100% superficial to deep burns. The percentage of burns on each limb was not given and it was not even tried to be extracted by anybody. There is no cross-examination to this witness on behalf of the accused also. Therefore, we can conclude that Kavita died due to burn injuries those were sustained by her. In case of death by burn injuries, three possibilities would be initially created, first is accidental, second is suicidal and third is homicidal. The burden is on the prosecution to prove that the burn injuries sustained by Kavita were homicidal in nature only in order to bring the case under Section 299 of the Indian Penal Code. In other words, the prosecution will have to rule out the possibility of accidental and suicidal burn injuries. The postmortem report by itself will not prove the same.

12. Before proceeding further, we will have to bear it in mind that other accused persons as well as the present appellant have been acquitted by the learned trial Judge for the offence

punishable under Section 498-A read with Section 34 of the Indian Penal Code. The question, therefore, would be as to what was the motive for the appellant to commit such crime. Further, as aforesaid, all the relatives of deceased Kavita turned hostile. Therefore, there is no support to the theory of the prosecution that there was some motive for the appellant to commit the said crime. Under such circumstance, the dying declaration is the only piece of evidence now left to support the prosecution story.

13. Further, before turning to scan the evidence of PW-5 Sardar and PW-8 Dr. Ramteke, it will have to be considered that incident had taken place, as per the prosecution story, around 11.00 a.m. on 17th September 2013. Kavita was initially taken to Government Hospital, Mantha and then she was referred to Civil Hospital, Jalna. Prosecution has not examined anybody nor any document was collected from the Government Hospital, Mantha. At what time she was taken there, what was the history that was told etc. is kept in dark. PW-8 Dr. Ramteke appears to be the medical officer who had given treatment to Kavita, but when he came for deposition, he had not brought the case papers. In his cross-examination he has claimed that without going through those case papers, he will not be in a position to say what kind of medical treatment was given to Kavita on that day. In fact, it

has not even been brought on record as to the time at which Kavita was admitted to Civil Hospital, Jalna. It is then stated that the dying declaration was recorded between 6.10 p.m. to 6.50 p.m. on 17th September 2013. But PW-8 Dr. Ramteke in his cross-examination says that he will not be able to say what treatment was given to Kavita before 6.10 p.m. on that day. Whether any sedative was given to her or not and what was the assessment of the injuries on her person, is all kept in dark by the prosecution. When there was evidence of 100% burn injuries and then PW-8 Dr. Ramteke in his examination-in-chief also says that at the time of admission she has 100% burn injuries, but he has not bifurcated it limb-wise, then whether she was in a position to speak, was she conscious, oriented etc., all appears to be the guess work of PW-8 Ramteke on the day of his deposition only on the basis of Exhibit-31 i.e. dying declaration, because he was not supported with case papers. The investigating officer has not collected the case papers from the hospital. Therefore, the testimony of PW-8 Dr. Ramteke is not inspiring confidence. It appears that merely because the police official was asking for an endorsement, it appears that he has given the same. Further from the bare perusal of dying declaration Exhibit-31, it can be seen that the upper

endorsement is written afterwards, that means after the statement was recorded, and therefore there is overlapping. Further, the endorsement at the end has erasers. Word " होता " has been scored and added with " आहे ". It is also overlapping to the signature. The end endorsement originally appears to be "certified that the patient was in conscious state at the end of the statement" and now after scoring, the word " होता ", it reads, "certified that patient is in conscious state at the end of the statement". Therefore, it appears that the mistake was thereafter realized and the scoring has been done. There is absolutely no explanation taken by the prosecution from PW-8 Dr. Ramteke as to why the earlier word was scored.

14. PW-5 police head constable Sardar has stated that he was attached to medical police chowki at Civil Hospital, Jalna on 17th September 2013. He received MLC pertaining to Kavita and then he met to doctor in burn patients ward. Doctor put endorsement that the patient is in a condition to give statement. Thereafter, he recorded the statement. According to him, Kavita told before him that her husband, in-laws, husband's brother and his wife were suspecting her character since long. On the day of incident, she was sleeping at about 11.00 a.m. on 17th September 2013

and then her husband poured kerosene on her person whereupon she got annoyed and abused her husband. Thereafter her husband got annoyed and set her to fire with the help of match stick. Her mother-in-law and brother-in-law came and they extinguished fire by pouring water on her person and then she was taken to Mantha Hospital and then to Civil Hospital, Jalna. He says that the statement was read over to Kavita and thereafter she had put her right thumb impression. He had then signed it and after the conclusion the doctor had again put his remark and signature. It is to be noted that in his cross-examination, PW-5 has stated that he will not be able to state the time when Kavita was referred to Civil Hospital, Jalna. Medical treatment has started to Kavita when he was near her. Kavita had sustained burn injuries all over her body. She was in pains. PW-5 police head constable Sardar has not explained as to why he had taken right thumb impression of Kavita on Exhibit-31. In fact it is always the practice to take thumb impression of left hand on any document and if it is not possible for some reason to take the thumb impression of left hand then only the thumb impression of the right hand would be taken and for this purpose it was necessary on the part of the prosecution

to prove as to what had happened to the left hand of Kavita when she was admitted to Civil Hospital, Jalna.

15. Another fact that is required to be considered from Exhibit-31 is that there is only one statement that accused Nos.1 to 5 were raising suspicion over the character of Kavita since long. As aforesaid, Kavita's relatives i.e. father and brother are not supporting to this statement. Her marriage had taken place nine years ago and she had two children. In this background, as to what had happened for the accused persons to raise suspicion over her character at such a late stage itself, is a question and prosecution has not tried to give answer to the same. This statement cannot lead us to conclude that there was a motive for appellant to commit the crime. Another thing that is surprising is that Kavita's maternal home, Pimparkheda appears to be a small village and it is hard to believe that she has been allowed to sleep till 11.00 a.m. She says that she was sleeping at about 11.00 a.m. when appellant poured kerosene on her person. It is not her statement or words that as she was sleeping till 11.00 a.m., husband got annoyed and then poured kerosene on her person. Why she was sleeping even in that odd hours taking into consideration the village background, cannot be

gathered. Further, if she was sleeping, then prior to that nothing had happened. It has not been brought on record by the prosecution that something had happened in the morning and therefore she was sleeping, which annoyed the appellant. What was the reason for appellant to pour kerosene on her person, is a question. In the entire evidence led by the prosecution, we are unable to get answer to this question. Prosecution has not examined Kavita's children, who were expected to be at home in the normal course, provided they would have gone to attend the school etc. Another factor that appears to have not been considered by the trial Court is that in her dying declaration Kavita has stated that after the husband poured kerosene on her person she got annoyed and abused the husband, then husband got annoyed and then set her on fire. The trial Court has not gone into the aspect as to whether the deceased had provoked accused – appellant. We need not go into that aspect for the simple reason that the dying declaration itself is not inspiring confidence. It does not appear to be true and it is also not supported by the case papers, of which details were necessary, as to whether the sedative was started, what was the position of the left hand of Kavita etc.

16. Though the dying declaration can be the sole basis of conviction, yet as this dying declaration Exhibit-31 fails to comply the yardsticks, it is not reliable. Even after considering the ratio in ***Ganpat Bakaramji Lad vs. The State of Maharashtra*** (supra), the dying declaration in the present case is not inspiring confidence. Further, part of it has been, in a way rejected by the trial Court itself while acquitting the present accused as well as other accused for the offence punishable under Section 498-A of the Indian Penal Code. Such bifurcation or acceptance in part only, cannot be allowed. The dying declaration will have to be read in its entirety. At the cost of repetition, it can be said that since there are over writings also and the aforesaid unexplained facts leads us to conclude that Exhibit-31, dying declaration is a concocted document or a prepared document and it ought to have been discarded outright by the learned Additional Sessions Judge. The conviction based on the erroneous findings cannot be allowed to be sustained and therefore, the Appeal deserves to be allowed by holding that the prosecution had failed to prove the guilt of the accused beyond reasonable doubt. Under such circumstance, following order is passed:-

ORDER

(I) Appeal stands allowed.

(II) The conviction awarded to the appellant – original accused No.1 – Sandip Prakash Rathod in Sessions Case No.24 of 2014 on 2nd March 2015 by the learned Additional Sessions Judge, Jalna by holding him guilty of committing offence punishable under Section 302 of the Indian Penal Code, stands set aside.

(III) The appellant be set at liberty, if not required in any other case.

(IV) It is clarified that there is no change in the rest of the order passed by the learned Additional Sessions Judge, Jalna.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/DEC22