

Jalba Vs. State of Maharashtra

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Court : Mumbai

Decided On : Aug-04-1994

Reported in : 1995(2)BomCR575; II(1994)DMC588

Judge : M.S. Vaidya and ;S.G. Mutalik, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Cri. Appeal No. 309 of 1992

Appellant : Jalba

Respondent : State of Maharashtra

Advocate for Def. : S.B. Bhapbar, A.P.P.

Advocate for Pet/Ap. : M.D. Shinde, Adv.

Disposition : Appeal allowed

Judgement :

M.S. Vaidya, J.

1. This Appeal is directed against the judgment and conviction order dated 13th October, 1992 passed by the learned 2nd Additional Sessions Judge, Nanded in Sessions Cases No. 61 of 1992, on his file. The learned Judge had convicted the appellant of the offence punishable under Section 302 of the Indian Penal Code,

and had sentenced him to suffer R.I. for life and to pay a fine of Rs. 500/-, in default, to suffer further R.I. for three months. Appropriate orders regarding the set off of the period of detention were passed.

2. The appellant, a resident of CIDCO Colony Nanded was an employee of some Textile Mill and was, probably, active in the trade-union activities. His first wife had died some years ago, leaving behind about three children and, thereafter, he had married with deceased--Sumanbai, about 15-years before the date of the incident, which is said to have been taken place on 11.11.1990. According to the prosecution, the appellant had returned home at about 11.00 pm on 11.11.1991 and he was drunk and under the influence of alcohol. Having reached home, he picked up some quarrel with deceased-Sumanbai and, then, thrashed her severely. Finally, he is alleged to have been poured on her person kerosene and to have set her on fire by igniting her clothes with a kerosene lamp that was burning in the house. The house itself consisted of one room of 10 x 12. Sumanbai suffered extensive burn injuries almost all over the body and she had rushed out of the house while in flames. She fell somewhere near a lamppost in front of her house. Some neighbours and the appellant extinguished the fire and, ultimately, those neighbours and the appellant removed Sumanbai to Shri Guru Govindsingh Memorial Hospital at Nanded. Dr. Mahure (PW 3), was on duty and he treated the patient. He registered a medico-legal case and after noting the history reported the incident to the police. PW 7, ASI Utkar, reached the hospital and recorded the first dying declaration of Sumanbai (Exh. 27) between 5.30 am and 5.45 am. The matter was, then, reported to Civil Judge (Jr. Dn.) and Judicial Magistrate, First Class--Shri Birajdar (PW 2) who reached the hospital early in the morning at about 7.00 a.m. and recorded the second dying declaration (Exh. 21). Dr. Mahure had certified the consciousness of Sumanbai on both of these dying declarations. The incident was reported by the neighbours to the relatives of Sumanbai. As a result PW 6, Bhagwan came immediately to the scene of offence and, according to his version, Sumanbai had made an oral dying declaration before him. PW 4 Parsuram, the father of the deceased, came by the evening to the hospital and one more oral dying declaration was alleged to have been made in his presence by Sumanbai. PW 5, Ashok, another brother of the deceased, arrived in the hospital at about 7 00 p.m. on 13.11.1991 and one more oral dying declaration

was alleged to have been made by Sumanbai in his presence. The investigations were conducted partly by PW 7, ASI Utkar and partly by PSI Nimanwad (PW 8). Finally, the charge-sheet was submitted and after committal, the appellant was tried in the Sessions Court at Nanded.

3. At the trial, the prosecution examined in all eight witnesses, ASI Utkar (PW7), CJJD & JMFC Shri Birajdar (PW 2) and Dr. Mahure (PW 3) were examined to prove the dying declarations and the condition of health of Sumanbai, while making the dying declarations. PW 1, More was examined to prove the post-mortem examination notes which he had made after the death of Sumanbai on 14.11.1991 at about 6.00 p.m. For proving the oral dying declarations PW 4, Parsuram Wade (father), PW 5, Ashok Wade (brother) and PW 6, Bhagwan Wade (another brother) were examined. PSI Nimanwad (PW 8) was examined to prove the cross-investigations.

4. The defence taken by the appellant/accused at the trial, was of total denial. According to him, he had attended the lecture of one Shiv Sena leader--Dada Kondke, late at night and had returned home at about 3.15 a.m. He said that when he and the neighbours were around, cries were heard from his residence and Sumanbai was seen burning in flames at the entrance of his house. It was contended that she came out running and fell down near some pole, where he himself and some neighbours attempted to extinguish the fire. According to him, Sumanbai was, then, removed in a jeep to the hospital and was treated there. He contended that Sumanbai had falsely named him in connection with this offence. He did not examine any witness in defence. But, he prayed for an acquittal, contending that no guilt was brought home to him. According to him, the relations of Sumanbai were giving false evidence and Sumanbai had falsely implicated him in the alleged commission of this offence.

5. The learned 2nd Additional Sessions Judge found favour with the prosecution story as made out in several dying declarations which, according to him, stood duly proved by the witnesses. Holding that the aforesaid dying declarations were corroborated by the medical evidence contained in the post-mortem examination notes and the subsequent events, the learned 2nd Addl. Sessions Judge

proceeded to hold the petitioner guilty of the offence and to convict him and further to award sentence, as stated at the outset.

6. Mr. M.D. Shinde, learned Counsel for the appellant, contended that the lower Court was wrong in relying upon the dying declarations, especially when they were grossly uncorroborated. He pointed out that though in the First Information Report (FIR) one Gajbhare was named as a person who had extinguished the fire on the person of the deceased--Sumanbai, that person was not examined at all in the Court nor was any reason assigned for his non-examination. He submitted that this was a case of suppression of facts by the prosecution by non-examination of certain material witnesses and as also of banking upon the dying declarations, allegedly made by the woman (Sumanbai) against her husband, forgetting the fact that a woman who was aggrieved against her husband, could implicate falsely the husband in commission of such an offence. He submitted that the Appeal deserved to be allowed and that the appellant deserved to be acquitted.

7. The learned A P.P. supported the judgment of the Court below to the extent to which he could do so. But, he had to concede that material eye-witnesses whose statements were recorded during the course of investigation, were not examined by the prosecution at the trial and that the aforesaid error could prove fatal to the case. He submitted and that the case might be decided as per the law laid down by the Supreme Court.

5th August, 1994.

8. There is no reason to doubt that the death of Sumanbai was an unnatural death. PW 3, Dr. Mahure told that Sumanbai was admitted to Shri Guru Govindsingh Memorial Hospital, Nanded at about 5.15 p.m. on 12.11.1991 in a seriously burnt condition and it is not in dispute that she died there on 14.11.1991 at about 6.00 p.m. The post-mortem examination notes proved by PW 1, Dr. More indicate that she had 97 per cent of burns spread almost all over the body and the larger portion of the burning injuries, namely, 18 per cent were found even on the right lower limb, left lower limb, abdomen and thorax and 18 per cent on the back. The cause of death as recorded in the post-mortem examination notes and proved by Dr. More, (PW 1), is 'shock due to 97 per cent superficial to deep burns'. The fact

that her death was due to injuries caused on account of the burns, was not seriously in dispute before us. We, therefore, conclude on the basis of evidence that the death of Sumanbai was an unnatural death.

9. The main point which was urged before us strenuously was that the complicity of the appellant in connection with the causing of burn injuries and the consequent death, was not established before the Court according to law. The learned 2nd Addl. Sessions Judge. Nanded who decided the case, had depended mainly on the evidence of the dying declarations. But, it appears to us that his attention was not focussed much on the question, whether or not, proper care was taken as required by law for recording the dying declarations. Pointing out that, generally speaking, the maker of a dying declaration could not be tarnished with the same brush as a maker of a confession or an approver, it was submitted that the Supreme Court had held in *Khushal Rao v. State of Bombay*, : 1958 CriLJ106 that it could be laid down as absolute rule of law that a dying declaration would not form the sole basis of a conviction unless it was corroborated because, each case has got to be determined on its facts, keeping in view the circumstances in which the dying declaration was made. The Supreme Court held, further, that it could not be laid down as general proposition of law that a dying declaration is a weaker kind of evidence than other pieces of evidence because, the dying declaration stood on the same footing as another piece of evidence and had to be judged in the light of surrounding circumstances and with reference to the principles governing weighing of evidence. The Supreme Court observed, further, that a dying declaration which had been recorded by a Competent Magistrate in a 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, stood on a much higher footing than a dying declaration which depended upon oral testimony which might suffer from all the infirmities of human memory and human character and further, in order to test reliability of a dying declaration, the Court had to keep in view, the circumstances like the opportunity of the dying man for observation, 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. One of the considerations was also that the statement had been consistent throughout if the dying person 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 any tutoring by interested parties.

Again, in *State of Assam v. Mafizuddin Ahmed*, (AIR 1983 SC 274), the Supreme Court pointed out that there could be a conviction on the basis of dying declaration and it was not at all necessary to have corroboration provided that the Court was satisfied that the dying declaration was a truthful dying declaration and not vitiated in any other manner.

In *the State of Uttar Pradesh v. Ram Sagar Yadav*, : 1986 CriLJ836 , the aforesaid propositions were confirmed and it was, further, observed that there was not even a rule of prudence which had hardened into a rule of law that a dying declaration could not be acted upon unless it was corroborated. It was emphasised, again, that the primary effort of the Court was to find out whether the dying declaration was true and if it was found true, no question of corroboration could arise. It was also held in that case that it was only when the circumstances surrounding the dying declaration were not clear or convincing that the Court might, for its assurance, look for corroboration to the dying declaration.

In *Hari Ram v. State*, (1965)2 Cri. LJ 132, the point was considered at length by the Rajasthan High Court and it was indicated that the proper method for recording a dying declaration by a person, be a Magistrate or a Police Officer or a Doctor or any other person was as follows :--

'(1) He must be first satisfied that the declarant is in senses. If the declarant is not in his senses then the person recording the dying declaration should not proceed further, before making a note, that the declarant was not in his senses.

(2) If the person recording the dying declaration is satisfied that the injured person is in his senses, the second thing to be done is to ascertain whether the injured is in a position to speak coherently.

(3) If he is so satisfied, he may proceed to put any general question or questions to elicit from the injured person as to what had happened to him.

(4) It is always proper that the questions put by the person recording the dying declaration should also be recorded so that the Court may judge the nature of the questions put. So far as possible the putting of leading questions be avoided. A person recording the statement may record what is said to him by the injured. If during the course of recording of the statement of the injured, it becomes necessary to put any question in order to elucidate what is stated by the declarant, it may be permissible to do so. But such questions must be recorded.

(5) What is thus recorded may, the end, be read over to the injured, if the circumstances do not warrant otherwise. For example, it may be necessary to remove the injured as early as possible for operation and if the recording of the statement may cause such delay, as may not be proper in such an event it can be dispensed with.

(6) If the injured person is in a position to append his signature or to put his thumb impression on such a statement, signature or thumb impression should be obtained or appended.

(7) If the injured is in his senses, but is not in a position to speak by mouth in a coherent way, he may be put short questions, and his answers given by gestures may be recorded/noted. It is imperative, however, in such a case that the gesture of the injured person signifying the answer given by him should find an appropriate mention.

(8) Over and above all what is necessary is that the person recording the dying declaration should see that there is no chance of prompting of the injured person by persons near him and no replies should be recorded, which are given on such prompting. The possibilities of the prompting should be entirely excluded. This can be done by excluding, from the place, where dying declaration is recorded, the relation of the deceased and all other unnecessary persons.'

In *Khushal Rao v. State of Bombay* (supra), the Supreme Court laid down that under the following conditions, a dying declaration could be disregarded, namely :

(i) If it was not made at the earliest opportunity.

(ii) That there existed reasonable grounds to show that the statement had been put in the mouth of the dying man, or when his power of resistance against telling a falsehood, was fast ebbing away;

(iii) That the statement was the result of prompting by some interested party;

(iv) That the statement was made in answer to leading question put by the Recording Officer, or, by the person purporting to reproduce that statement;

(v) If the dying declaration was not genuine.

(vi) The declarant's condition was such that he could not give any statement before death.

(vii) That the deponent, both mentally and physically, was in a state of confusion and might well be drawing upon his imagination, while making a declaration.

10. In the present case, several dying declarations were relied upon by the prosecution and each of them had one or the other infirmity and some of them had infirmities more than one. One may state, at the outset, that the learned 2nd Addl. Sessions Judge had, in a way, ignored those infirmities.

11. The defence of the appellant was that on the night in question he had attended a meeting which was addressed by a Shiv Sena leader, by name, Dada Kondke and that after his return from that meeting at about 3.15 a.m. or so, he had noticed his wife in a burning condition. In this respect, PSI Nimanwad, (PW 8), told in his deposition that Shri Dada Kondke had arrived late at about 1.30 a.m. in the night and that the house of the accused was about one and a half km. away from the place of public meeting. According to him, the mob took about 20 minutes after the meeting was over to disperse from the place of the meeting. PW 6, Bhagwan, the brother of the deceased Sumanbai, who was first relative of Sumanbai to reach the place of the incident, told in his deposition about the aforesaid meeting and, he too, admitted that Shri Dada Kondke had arrived very late at the meeting. According to him, he had attended that meeting and it was thereafter, that he had reached home. According to him the incident in question was reported to him at about 3.00 a.m. by one Gajbhare, who was the neighbour of the appellant and the

deceased. True it is that it was admitted by this witness in his cross-examination that he had told the police about this report to him by Gajbhare and he could not explain why his police statement did not contain that reference. This Gajbhare appeared to have played another important role in the investigation also. The Panchnama of the scene of offence at Exh. 33, which was drawn in the morning on 12.11.1991, showed that the scene of offence was shown to the Panchas and the police by Kishan Chandu Gajbhare and that he had stated to the Panchas that the incident in question had taken place at about 11.30 p.m. at the aforesaid place. This Gajbhare was not examined by the prosecution as a witness though it appears from, at least his statement in the Panchnama, that he had witnessed some part of the incident. On this background, when we looked to the investigation made by PSI Nimanwad (PW 8). it was found that the statements of witnesses were recorded by the aforesaid PSI on 12.11.1991. He was blunt enough in telling that he did not remember the names of all of them, but the names which he remembered were those of Chandraprakash, one Jondhale and Gajbhare. If the statements of the aforesaid witnesses who were neighbours, were recorded, the question arose why the evidence of these persons was not adduced by the prosecution before the Court. We could not ascertain this reason from the evidence recorded in the Sessions Court, or, from the other record of the Sessions case. The learned Counsel for the appellant as well as the learned A.P.P. could not enlighten us on that point. Therefore, we had to fall back on the decision in *Abdul Latif v. State of Uttar Pradesh*, : 1978 CriLJ639 , in which case a contention was raised before the Supreme Court that the evidence of the material eye-witnesses was not recorded at the Sessions trial and that, therefore, an adverse inference deserved to be drawn against the prosecution on that count. The Supreme Court, in that case, perused the statements of the alleged eye-witnesses, whose evidence was not adduced at the Sessions trial, in the interest of justice. On the facts of that case, the Supreme Court found that they were not very material witnesses. But the position of law as it boiled down from the aforesaid ruling was to the effect that it was open to the Appellate Court to peruse the police statement in the interest of justice to ascertain, whether or not, material witnesses were not examined by the prosecution and, whether or not, any adverse inference could be drawn against the prosecution on that count. This Court had

relied upon that ruling in a decision in Dilipkumar Gandhi and Ors. v. State of Maharashtra, (Criminal Appeal No. 51/1991, decided on 4th, 5th and 6th March, 1991), for a similar purpose. With that authority, therefore, we chose to peruse the police statements which were tendered by the prosecution in the committal Court. To our great surprise, we found that witness Kishan Chandu Gajbhare, claimed in his police statement to be witness to the incident, in which deceased Sumanbai was seen by him burning at about 3.30 a.m. He was not the only witness of that type, but other neighbours, such as, Chandraprakash Ramsukh Roy, Prakash Rajaram Jondhale, Renuka Prakash Jondhale, Geeta Chandraprakash Roy and Digamber Yeshwantrao Landge, were the other persons who had deposed to the incident on the same lines. Those witnesses were material for the case in question particularly because, according to them, the burning incident had taken place not at about 11.00 or 11.30 p.m. on 11.11.1991, but at about 3 00 a.m. on 12.11.1991. The perusal of the statements of the aforesaid witnesses indicated to us that, according to the eye-witnesses, the incident had taken place at about 3.00 or 3.30 a.m. on 12.11.1991, whereas in the dying declarations relied upon by the prosecution at the trial, the time was stated to be 11.00 p.m. on 11.11.1991. Even according to PW 6, Bhagwan, who lived in the same CIDCO colony in which the deceased and the appellant lived, the incident was reported to him at about 3.00 a.m. by Shri Gajbhare and he had arrived on the scene of offence immediately thereafter, to find his sister lying in the open courtyard outside the house below the lamp-post in a burnt condition. The first ever dying declaration was, allegedly, made by the deceased to him, as stated by him in his deposition.

12. This leads us to the question, what is the effect to omission to examine any of the witnesses who claimed to have seen Sumanbai in burning condition. It may be noted here only that, it was through these witnesses that the first-hand information could have been brought on record by the prosecution about the presence of the accused on the scene of offence, if at all he was there, the role played by him in the whole affair, his own physical condition when the woman was first seen in flames and after the flames were extinguished.

13. In Darya Singh v. State of Punjab, : [1964]3SCR397 , the Supreme Court observed, that it was primarily for the prosecutor to decide which witnesses he

should examine in order to unfold his story. But the prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The Supreme Court said that the duty of the prosecutor was to assist the Court in reaching a proper conclusion in regard to the case which was brought before it for trial. The Supreme Court clarified that it was no doubt open to the prosecutor not to examine the witnesses who, in his opinion, had not witnessed the incident, but normally he ought to examine all the eye-witnesses in support of the prosecution case. It could also happen, observed the Supreme Court, that if there were large number of persons witnessing the incident, the prosecutor had to resort to the process of elimination of the witnesses by making a selection of those witnesses who were important for the decision of the case. But, at the same time, it was pointed out, the duty was to select such witnesses fairly and honestly and not with a view to suppress inconvenient witnesses from the witness box. If it was pointed out to the Court that the persons who had witnessed the incident had been deliberately kept back, the Court could draw an inference against the prosecution and could, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. The Supreme Court, then, dwelt upon the duty of the Trial Judge in this respect, to which we shall refer later on in the relevant context.

In *Sawan Singh v. State of Punjab*, : 1976 CriLJ1757 , the Supreme Court had to deal with the contingencies in which an adverse inference might be drawn. The Supreme Court, then, observed that it was not the law that the omission to examine any and every witness even on minor points which would undoubtedly lead to rejection of the prosecution case or drawing an adverse inference against the prosecution. The Supreme Court pointed out that the law was well settled that the prosecution was bound to produce only such witnesses as were essential for unfolding of the prosecution narrative, i.e., in other words, before an adverse inference against the prosecution could be drawn, it must be proved to the satisfaction of the Court that the witnesses who had been withheld were eye-witnesses who had actually seen the occurrence and were, therefore, material to prove the case. The Supreme Court also recorded that it was not necessary for the prosecution to multiply the witnesses after witnesses on the same point

because, it was the quality rather than quantity of the evidence that mattered the most.

14. In view of this legal position and in view of the non-examination of the material witnesses who were not only present on the scene of offence when the woman had burnt, like Gajbhare, but who had taken some active part later on in the removal of the victim from the scene of Offence to the hospital, we would be obliged to draw an inference adverse to the prosecution. In the present case, it has really become doubtful whether the incident of burning of Sumanbai had taken place really at 11.30 a.m. on 11-11-1991 or, whether it had taken place at about 3.00 or 3.30 a.m. on 12-11-1991. It has also become doubtful, whether or not, the accused was really involved with the occurrence of the incident or, whether, being an active trade-unionist worker, he had really attended the meeting and had returned home at about 3.00 a.m. after the conclusion of that meeting. The witnesses who could enlighten the Court on those points have been dropped by the prosecution for a reason which cannot be legally explained. In the light of this, we will have to judge the evidence contained in the dying declarations which was primarily, If not solely, relied upon by the prosecution as well as by the Court below for the conviction of the appellant.

15. We are aware that the people living in mofussil areas are not very sensitive to about the exactness of the time by clock to which they referred in their narrations. We are also live to the fact that Sumanbai was, in a way, an illiterate woman, a wife of a labourer and also that, probably, she had no clock at all in her house. We could very well appreciate that if Sumanbai, by herself, had made a statement about the time by clock in her narrations, some fallibility could be attached to it. In that event, it was possible for the prosecution to show that whatever statement regarding timing by clock she had made, was not correct and that the real timing was different. Unfortunately, in the present case, this was not even the effort of the prosecution, but the effort was to withhold from the Court the witnesses who had narrated a timing much different than the timing given by Sumanbai in her narrations. It is in this perspective that we attach some importance to the timing narrated by Sumanbai in her various dying declarations.

16. The first ever oral dying declaration was allegedly made before P.W. 6, Bhagwan i.e. the brother of the deceased. According to him, he was told about the incident by Gajbhare at about 3.00 a.m. and he had come immediately to the scene of offence in question. According to him, his sister was lying in the open courtyard outside her house near the water-tap and beneath the lamp-post. He noted that the clothes on her person were completely burnt and that it was in those circumstances that he had asked his sister what had happened. According to him, she had told him that accused-Jalba had set her on fire after pouring kerosene on her person and that he had set the fire on with the help of a lamp. According to him, accused-Jalba also was present at that time and thereafter, he and Jalba removed Sumanbai to the hospital in a jeep. The first point to be noted in the context of this alleged dying declaration is that in this entire dying declaration, the timing of the incident is not referred to at all. If Sumanbai had sustained burns at about 11.00 or 11.30 p.m. during the same night, was it that she was lying in such a condition under the lamp-post outside her house from that hour till 3.00 a.m. The prosecution had no reply to this query. Secondly, though Bhagwan narrated about the presence of the accused, he did not say anywhere that accused was in a drunken condition or that he was in a subdued mood on account of the drinks. Such a theory is sought later on to be introduced through dying declarations. Had the neighbours been examined at the trial as witnesses some light could possibly have been thrown on the condition of the accused, namely, whether or not, he was drunk. The reason for assault was not narrated at all in the dying declaration. Bhagwan (PW-6) did not make any reference in his examination-in-chief to injuries, if any, sustained by the appellant-accused. It has come later on record that he had also suffered burn injuries and, according to him, those injuries were suffered by him while he was making an effort to extinguish the fire on the person of Sumanbai. Bhagwan did not tell, whether or not, the accused-appellant really did make any such effort.

17. The second oral dying declaration sought to be proved was of Dr. Mahure, (PW 3). According to him, Sumanbai was admitted to the hospital at about 5.15 a.m. on 12.11.1991 in a seriously burnt condition. He told that he had obtained the history of the case and informed the police of the same. He said further that the patient had told him that on the earlier night at about 11.00 p.m. her husband had

poured kerosene on her person and had set her on fire. He was specific in telling that the patient had also stated to him that her husband had ignited the kerosene oil by means of a match-box. This detail regarding match-box was introduced, for the first time, by Dr. Mahure. Bhagwan (PW 6) was positive in saying that the fire was set with a lamp and not with a match-box. There was no mention in the dying declarations proved through Bhagwan or Dr. Mahure, to any incident which had led to setting the woman on fire. In other words, both of them did not tell that at that time Sumanbai had disclosed to them that she was beaten, thrashed and was, then, set on fire. According to Bhagwan, the fire was set with the help of kerosene and kerosene lamp. Neither PW 6, Bhagwan nor Dr. Mahure (PW 3) told that the body of Sumanbai smelt of kerosene. Though there was no mention so far as a matter of dying declaration of the fact that the accused had attempted to extinguish the fire or that the accused had sustained the burns while setting the woman on fire, Dr. Mahure admitted in his cross-examination that the appellant-accused also was admitted to the hospital along with the deceased Sumanbai for his treatment for injuries due to burns. He admitted also that the appellant had, then, told him that he had suffered those burns while he was attempting to extinguish the fire on the person of Sumanbai. Normally, a medical officer receiving such a medical case was expected to record on case papers the history or the dying declaration, if any, made to him. The prosecution did not make any effort to produce through Dr. Mahure the case-papers maintained by him in respect of Sumanbai or in respect of the appellant. Therefore, his word/deposition appears more or less to be dependent on his own memory. It may also be noted here that till the moment when Dr. Mahure had admitted those two patients and had treated them, there was no introduction of the story that the accused was drunk at the time of the commission of the offence. Such a theory was introduced later on in some other dying declarations. Suffice it to note here that Dr. Mahure does not appear to have even suspected that the accused was drunk or that he had consumed alcohol. At least, the evidence on the point which could have been adduced by the prosecution to corroborate the statements made later on in the dying declaration, was not tendered before the Court.

18. In this very context, it may also be noted that though later on a theory was made out that the appellant had thrashed the woman severely before she was set

on fire, there was no evidence adduced to prove that the neighbours had hoard such cries while the woman suffered her thrashing at the hands of the appellant. In the absence of such an evidence, in the absence of any injuries other than burn injuries on the person of the victim, it has got to be presumed that the story regarding the thrashing also, had no foundation. It may also be noted at this very stage that, though according to the prosecution, the woman was set on fire in her residential house itself and she had come out of the house while in flames, the Panchnama of the scene of offence (Exh. 33) does not show that there were any stains of kerosene on the floor in the house. This Panchnama stated that at the entrance, some ashes of the burnt clothes from the person of deceased Sumanbai, were found. It is not recorded in the Panchnama that whatever were the left-outs found at that place, they smelt of kerosene. Finding of a kerosene tin in the house with about some 100 milliliters of kerosene in it, is not at all a circumstance adverse to the appellant in the facts and circumstances of the case, particularly on the background that the witnesses examined before the Court as the witnesses who has seen Sumanbai immediately after the incident, were silent about even the smell of kerosene. Kerosene is a common place article in the villages and particularly in houses, where there was no provision for electricity. The charge-sheet filed in the case indicates that the burnt pieces of the saree were seized by the police as Muddamal articles, but they do not appear to have been sent to the Chemical Analyser for obtaining any report of the C.A. particularly for proving the fact, whether or not, they bore any traces of burnt or half-burnt kerosene. 8 August, 1994

19. It is on this background that we have to go to the evidence of ASI Utkar (PW 7), who recorded the first formal dying declaration. During the night between 11.11.91 and 12.11.1991 ASI Utkar was on duty at the outpost of P.S. Vazirabad, which was located in the Government Hospital (Shri Guru Govind Singh Memorial Hospital) at Nanded. According to him, Dr. Mahure (PW 3) informed him that Sumanbai was admitted to the hospital at about 5.30 a.m. and, therefore, after contacting Dr. Mahure, he had proceeded to Ward No. 10 where Sumanbai was given her bed. His evidence, as to what happened thereafter, reads thus,

'In met Sumanbai. She was burnt. Then I requested the Doctor to examine her and report to me whether she was in a fit condition to give her statement. The Doctor examined her and permitted me to take the statement. Accordingly. I recorded the statement of Sumanbai in my own hand. I obtained her thumb mark at the foot of her statement. Similarly, I obtained endorsement of Dr. Mahure, regarding her fitness to make the statement. Sumanbai stated to me that at about 10 or 11 p.m. on 11.11.1991 her husband under the influence of liquor came home and be thrashed her on the ground and then poured kerosene on her person and set her on fire, due to which her chest, face, back, abdomen, waist, legs, hands, thighs etc. are burnt and then she became unconscious.'

The first thing to be noted is that neither according to ASI Utkar nor according to Dr. Mahure, any of them had put some preliminary questions to Sumanbai to ascertain, whether or not, she was able to give any consistent and coherent replies to the questions put to her. It is said that Dr. Mahure examined her, but the type of examination made by Dr. Mahure, is not indicated anywhere. Secondly, though ASI Utkar purported to narrate in his statement all that was told to him by Sumanbai, the learned Addl. Sessions Judge has not made any effort whatsoever to ascertain from the witness ad-varbatim the words uttered by Sumanbai. Thirdly, the written dying declaration at Exh. 27, if perused on the background of the aforesaid narration made by ASI Utkar, indicates that the dying declaration did contain certain statements made by Sumanbai which pertained to the particulars of her parents' family, her own wedding, births of the issues and it indicates further that her brother Bhagwan and her husband had removed her from the scene of offence in a rickshaw and had brought her to the hospital. The statement at Exh. 27 was recorded as if the same was the First Information Report of the offence in question and it was on that FIR that the medical certificate had been endorsed. Thus, it is to be noted that the document at Exh. 27 contained particulars more than the particulars which were narrated in the deposition by ASI Utkar as the facts narrated to him. It may next be noted that till this FIR was recorded, the theory that the appellant had come home drunk at about 10 or 11.00 p.m. on 11.11.1991 under the influence of drink and had thrashed her on the ground, is a theory which was introduced there for the first time. It is material also to note that if this story was introduced in the presence of ASI Utkar and Dr. Mahure, no effort

was made by either of them to ascertain, whether or not, at the relevant point of time, the appellant was really drunk or whether he was, at least, found to have consumed liquor. Surprisingly enough again, in the entire evidence adduced by the prosecution neither the father nor the brothers of deceased Sumanbai nor any other neighbours had ever stated that the appellant was in the habit of drinking or that he and his wife--deceased Sumanbai had, time and again, quarrelled with each other. The alleged incident of thrashing on the night of the offence appears to be the only incident and there is nothing even in the so called dying declarations made by deceased Sumanbai as to what had irritated the accused so much on the night in question as to induce him to give Sumanbai a good thrashing. Further, according to the version of Sumanbai herself in the alleged dying declaration, she had become unconscious on the scene of offence itself. None had stated when she had regained her senses thereafter. She had sustained 96 per cent of burns, some of them being superficial burn injuries and some deep injuries, as noted in the post-mortem examination notes. The probability of her losing the senses on the scene of offence with so many burn injuries on her person could not be ruled out. Again if the incident had taken place at 11.00 or 11.30 p.m. on 11.11.1991 and she was lying in the burnt condition in the open space from that hour, till she was removed to the hospital early in the morning, say about 3.00 a.m. or thereafter, the chances of her going in coma also were more. Bhagwan (PW 6) did not tell in his deposition either that she had become unconscious or that she had regained her senses. Under such circumstances, the dilemma is whether to believe the dying declaration (Exh. 27) about the unconsciousness of the woman on the scene of offence, or, whether to infer from Bhagwan's deposition that she had not lost her senses at all. It is important to note, in this context, also the fact that Bhagwan was all along with her since his arrival on the scene of offence where the alleged first dying declaration was made to him by Sumanbai. It could be that the history of the case came to be disclosed to the Medical Officer, Dr. Mahure or to the police by Bhagwan when, probably, Sumanbai had lost her senses. Dr. Mahure's statement, however, it shows that the history was given to him by the patient herself and he had found her conscious. In the face of averments made in the dying declaration (Exh. 27) about the consciousness of the patient, it may not become possible to attach much evidentiary weight to what Dr,

Mahure had stated on the point. We have already pointed out, while discussing the evidence of PW 6, Bhagwan, how there was a discrepancy in his evidence as to whether the fire was set with a lamp or with a match-box. On that background, it is pertinent to note that the dying declaration at Exh. 27 or the deposition of ASI Utkar, is silent on the point. It is also pertinent to note that the dying declaration at Exh. 27 is silent on the point as to what happened between the occurrence of the incident at about 11.00 p.m. and arrival of Bhagwan on the scene of offence at about 3.00 a.m. as narrated in the dying declaration.

20. As noted on the dying declaration (Exh. 27) by Dr. Mahure, the dying declaration was recorded between 5.30 a.m. and 5.45 a.m. on 12.11.1991. At about 7.00 a.m. Shri Birajdar (PW 2), CJJD & JMFC, Nanded arrived at the hospital as per the request made to him by the CIDCO Police Station at Nanded and had contacted Dr. Manure. Shri Birajdar (PW 2) also told that Dr. Manure examined the patient and certified that she was fit to give her dying declaration. He told that only Dr. Mahure was present with him when he recorded the dying declaration. He proved the written dying declaration (Exh. 20), which was almost a one line declaration. It reads thus,

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This dying declaration bears an endorsement at the hands of the Magistrate that the thumb impression of the patient could not be recorded because, the skin on the thumb had peeled out. It may be noted that when the dying declaration (Exh. 27) was recorded by ASI Utkar, he had taken the thumb impression/mark of Sumanbai below the dying declaration. It is nobody's contention that, thereafter, the skin over the thumb had peeled out. Therefore, the explanation recorded on the dying declaration (Exh. 27) as to why the thumb mark was not recorded does not sound to be very correct. Shri Birajdar (PW 2) did not tell that he himself had asked any questions to Sumanbai to ascertain whether or not, she was able to give consistent and coherent replies. He does not even claim that he had asked such questions. He did tell that Dr. Mahure examined Sumanbai in his presence but, even then, it was not his narration that Dr. Mahure had asked the patient any questions in his presence. Shri Birajdar told in his deposition that he got read over

the dying declaration to the patient and that she admitted the contents thereof to be correct. No such written endorsement appears on the dying declaration (Exh. 20). It is, therefore, doubtful whether or not, the dying declaration was really read over to the patient. Surprisingly enough, on perusal of the contents of the dying declaration at Exh. 20, it is seen that there is no reference to the averment that the appellant had come home drunk and under the influence of the drink at night. It does not contend any story as to what had irritated the appellant to induce him to beat Sumanbai. The weapon of assault is not mentioned, but it is stated that she was probably lifted and thrown repeatedly on the ground (Aapto Aapto Marle). This dying declaration also states that kerosene was poured on her person and she was set on fire, presumably, according to the recorded version, in the residential house itself and not outside the house. The dying declaration (Exh. 20) recorded not that the woman had come out of her house in flames and had fallen at some place in front of the residence. But, on the other hand, reading of the dying declaration suggests that she had become unconscious in the house itself. If so, the question arises as how the woman had come out of the house near the lamp post where she was found by Bhagwan. The dying declaration, as such, does not state when Sumanbai herself had regained her consciousness so as to be able to disclose the event first to Bhagwan, then to Dr. Mahure, then to ASI Utkar etc. Again, the dying declaration does not state who had extinguished the fire on her person.

21 Thus, the common feature noted about the two written dying declarations, first recorded by PW 7 ASI Utkar and the second recorded by PW 2, Shri Birajdar, are that none of them had questioned the deceased to ascertain, whether or not, the patient was in a position to understand and answer any questions. If any questions were asked at all to her, those questions are not recorded so as to enable this Court to understand in what fashion the questions were asked. If the woman was not able to speak coherently and if she had answered the questions with any gestures, there is no description of such gestures recorded anywhere. Again, when the dying declaration (Exh. 27) which was earlier in point of time, did bear the thumb mark of the patient, the dying declaration (Exh. 20) recorded by the Magistrate Shri Birajdar, did not bear the same and the ground for not recording her thumb mark given by him does not appear to be very correct; and lastly but not

least, the written dying declaration, for the first time, introduced a story that the appellant had come home drunk and under the influence of the drink and yet no verification of that fact was sought to be made though the appellant was also simultaneously admitted to the hospital for examination and medical treatment.

22. Again, speaking generally about the dying declaration, there is not a single witness to tell that the appellant and his wife Sumanbai were not pulling on well and that there used to be instances of quarrel or thrashing between them. The statements of neighbours were recorded in the course of investigations. But, none of them was examined at the trial for no explicable reason. The Panchnama of the scene of offence does not disclose that the stains of kerosene were seen on the floor of the house or anywhere on the scene of offence. Neither Bhagwan nor ASI Utkar nor Dr. Mahure tell that the body of deceased Sumanbai smelt of kerosene at any point of time. Though the pieces of her saree were seized from the scene of offence, they were not sent to Chemical Analyser to ascertain, whether or not, the traces of kerosene were seen thereon and there was no evidence adduced on the point that at the time when Sumanbai was being thrashed and when she was in flames she had raised any cries which were audible to the neighbours.

23. There are two more oral dying declarations which were sought to be proved by the prosecution. PW 4, Parsuram, is the father of deceased Sumanbai. He learnt of the incident at about 12.00 noon on 12.11.1991 and he reached the General Hospital, as per his narration at 7.30 p.m. According to him, when questioned, Sumanbai narrated him the story which he narrated as follows :

'She told me that on the earlier night the accused had come home at about 11 or 11.30 p.m. in a drunken condition and he beat her, thrashed her on the ground and threatened to kill her. She also told that the accused then poured the kerosene oil on her person and set her on fire with the help of a lamp. So she got burnt,'

The exact words in which the facts were, allegedly, narrated to witness Parsuram by Sumanbai, were not ascertained by the learned Addl. Sessions Judge. It is to be noted that in addition to the theory of drunkenness of the appellant, this witness introduced also a story that the appellant had threatened to kill her. Again, he was

specific in narrating that Sumanbai had told him that she was set on fire with the help of lamp. This was the version which had appeared in Bhagwan's deposition. There is, therefore, some reason to suppose that this witness has been narrating the incident as it was, probably, reported to him by Bhagwan.

24. The last of the dying declarations was orally made to PW 5, Ashok, another brother of the deceased, who had reached the hospital, according to his own version, on 13.11.1991 at about 7.00 p.m. The version of this witness reads thus :--

'She told me that, at about 11.30 p.m. on 11.11.1991 her husband had beaten and thrashed her and then he poured kerosene oil on her person and set her on fire with the help of a lamp (chimney). She also told that at that time her husband was drunk and in the drunken condition she was beaten by him.'

Thus, it is clear from his deposition that he stuck-up to the theory regarding drunkenness of the accused and the thrashing given by him introduced in the written dying declaration as recorded by ASI Utkar rather than to the dying declaration as it was allegedly originally made to Bhagwan on the scene of offence with a difference that, unlike what was recorded by ASI Utkar, he told that the fire was set with a lamp.

25. With such varying dying declarations, it is hardly possible for the Court to arrive at a conclusion that the dying declarations had a ring of truth around them. The theory at the stage of investigation made by the neighbours was that this incident had occurred at about 3.00 a.m., whereas the subsequent dying declarations which were sought to be proved at the trial, have shifted the timing to 11.00 p.m. prior to that time. The condition of the scene of offence as noted in the Panchnama of the scene of offence as well as the condition of the pieces of clothes from the person of the deceased found on the scene of offence as well as the condition of the woman (other than burn injuries) do not warrant a clear conclusion that kerosene was poured on her person to set her on fire. True it is that the death in such circumstances could be homicidal, accidental or suicidal. True it is, again, that there are no circumstances on record to indicate the reasons for which the death could be suicidal or homicidal. Nobody knows whether the

death could be accidental and nobody knows the reasons as to why the name of the appellant came to be implicated in the whole thing. The glaring thing/fact is that though the appellant had several issues and eldest of them was about 15-years of age, as told by PW 4 Parsuram, none of the witnesses have referred to the presence of those children in the house and if there were other younger children of the age of understanding in the house, it is not known why the prosecution could not get the evidence of any one of them to state how the incident had happened. Thus, the genesis of the offence itself is not known from the evidence on record.

26. The learned Additional Sessions Judge was oblivious of all these considerations. We are at great pains to note the manner in which the learned 2nd Addl. Sessions Judge allowed the trial to be conducted with him. Though the police statements on record did show that at least five neighbouring witnesses were examined by the Investigating Officer, the learned 2nd Addl. Sessions Judge did not bother to require the prosecution to examine any one of them. He neglected his duty as a trial Judge which was emphasised upon by the Supreme Court in *Darya Singh v. State of Punjab* (supra). It was astonishing that though it had come on record that the issues of the appellant were of the age of understanding, the learned 2nd Addl. Sessions Judge did not think it necessary to have then examined as witnesses before the Court, in exercise of his powers as a trial Judge. We are also very sorry to note that Shri Birajdar, CJJD & JMFC who recorded the dying declaration, did not bother to keep himself abreast with the procedural requirements as to how a dying declaration should be recorded and to follow them when the occasion demanded so. In the light of the considerations recorded above, it is not possible for us to accept the dying declarations which were relied upon by the learned 2nd Additional Sessions Judge and to uphold the conviction. We hold that aforesaid dying declarations were not worthy of safe-reliance and that, therefore, the appellant deserved an acquittal.

27. Accordingly, we allow the Appeal and finding that the guilt of the offence is not proved against the appellant, we direct his acquittal, setting aside his conviction and sentence awarded by the Court below.

28. Mr. Shinde tells that the accused/appellant is still in jail. We direct his release forthwith, unless he is required in any other case.

29. We also direct that the copies of this judgment be sent for information and guidance to the learned Additional Sessions Judge who decided the case and the learned Judicial Magistrate, First Class Shri Birajdar (PW 2), who recorded the dying declaration.

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