**SUPREME COURT OF INDIA**

Samadhan Dhudaka Koli

Vs.

State of Maharashtra

Crl.A.No.637 of 2006

(S.B. Sinha and Cyriac Joseph JJ.)

18.12.2008

**JUDGMENT**

**S.B. Sinha, J.**

1. This appeal is directed against the judgment and order dated 13.07.2005 passed by a Division Bench of the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Appeal No. 190 of 1995 whereby and where under the appeal preferred by appellant herein from a judgment and order dated 28.6.1995 in Sessions Case No.115 of 1992 convicting him for commission of an offence punishable under Section 302 of the *Indian Penal Code* (for short, "the IPC") and sentencing him to undergo imprisonment for life and pay a fine of Rs.2,000/- and, in default, to undergo R.I. for one year, has been dismissed.

2. Janabai, the deceased, was the wife of appellant. They were married in the year 1985. They were having two daughters. She suffered a burn injury during the night between 03.09.1991 and 04.09.1991. She was sleeping at her house. However, the place where appellant was sleeping is in dispute. According to the First Information Report, the appellant was sleeping with the deceased and two daughters whereas in the first dying declaration made by the deceased, he is said to have been sleeping in a nearby school.

3. Indisputably, she suffered burn injuries. Upon hearing the screams for help, some persons from the locality gathered. They tried to extinguish the fire. She was thereafter removed in a bullock cart to a hospital of one Dr. Warke. From the said hospital she was taken to Municipal Hospital at Bhusawal as her condition became precarious. On or about 4.9.1991, she gave a dying declaration before a police constable, Savda, which reads as under:

> "I state that I stay with my husband, mother- in-law at the above mentioned place and earn our livelihood by doing labour work. I have two daughters and my maiden home is at Jalgaon Pimprala. I had no dispute against my husband, mother-in-law, brother-in-law and I was living happily with my family.

Today, on 04.09.1991 in between 12.30 to 1.00 O'clock in the night time my mother-in-law, brother-in-law, sister-in-law were sleeping inside the house. My husband had gone to the school to sleep. I suddenly started felt cold therefore, I got up and to get some warmth lighted a fore and when I got up while making myself warm, part of my saree suddenly was lit and I started shouting loudly that time my brother-in-law, mother-in-law and neighbours Bhagwat Chindu Koli and others came running and they by putting a blanket on me extinguished the fire thereafter after a while my husband Samadhan Dhudku Koli came running and as I was extensively burnt I was taken to Dr. Warke by putting me in the bullock cart. I am burnt by chest, face, waist, abdomen and my back is totally burn. My both the hands are also burnt. I have not been burnt by anybody from the house nor I have burnt myself. I have no suspicion on anybody. While giving the statement I am fully conscious and whatever I have stated is correct."

The said dying declaration was marked as Exhibit 48.

4. It stands admitted that another dying declaration was recorded by a Judicial Magistrate on the same day. The said dying declaration, however, for reasons best known to the State was not produced. An application for bringing the said dying declaration on record was filed on behalf of the appellant, which was rejected by the learned Sessions Judge. The High Court has also affirmed the said view. We would advert to the said question a little later.

"It also stands admitted that on or about 6.9.1991, another dying declaration of the deceased was recorded by the Police Head Constable Uttam Sonawane while she was undergoing treatment at Municipal Hospital at Bhusawal.

She, in the said dying declaration, attributed the act of commission of the said offence on her husband, the appellant herein, stating:

"I, state on asking that my maiden home is Pimprala, Tq. Jalgaon and I got married about 6 years before to Samadhan Dhudku Koli of Rangaon, Tq. Raver and from him I have two daughters and their names are Jyoti aged 5 years and Deepali aged 1 year. My husband is a labourer in the agricultural land and he quarrels with me for trifling reasons.

On Tuesday, 03.09.91 I had gone to the agricultural land for cutting the grass that time I miss placed the grass cutter and therefore when I came home my husband Samadhan Dhudaku Koli started quarreling with me in the evening and said that after Pola festival you should go to your maiden house and my daughters should be kept here or else I will burn you and thereafter after having dinner I with my both the daughter put the mattresses on the ground and slept. My husband Samadhan also slept. Thereafter at about 12 O'clock I got up as I felt something cold on my body at that time my husband Samadhan Dhudaku Koli was pouring kerosene on my person and therefore, I got scared and I got up but he lighted the match stick and lit it to me. As I was burning I started shouting at that time my brother-in-law Sopan Dhudaku

> Koli and Bhagwat Sindhu Koli, Baliram Sitaram (Police Patil) and several people from the block came there and extinguished the fire and took me to the hospital of Dr. Warke thereafter taking treatment for one day I was brought to the hospital at Savdha by the police. My statement was recorded by the police. But as I was scared of my people from the house I have given different statement. I am burnt on neck, hand, on my stomach, back and my thigh."

5. Before the learned Sessions Judge, the prosecution examined twelve witnesses. We may not deal with the depositions of all of them. The witnesses proving mahazar and seizure of some material objects, namely, P.Ws.1 to 6 were declared hostile. P.W. 7-Chandrabhagabai Koli, is the mother of the deceased and P.W. 8-Ananda Ramchandra Koli is the father of the deceased. P.W.10-Uttam Dasharath Sonawane is Head Constable and P.W. 12 is Dr. Vishnu Jadhav who certified that the deceased was in a fit physical and mental condition to make her statement before him.

6. The learned Sessions Judge opined that there was no satisfactory evidence in regard to the motive for commission of offence of murder by appellant. As far as the question of guilt of the appellant and his parents is concerned, while the other two accused were acquitted, the appellant was found guilty.

> "The learned Sessions Judge although noticed that there was no direct evidence, but the offence was said to have been proved by P.W. 7 and P.W. 8 before whom a purported oral declaration was made by the deceased as also the dying declaration in Exhibit 30. So far as the previous dying declaration made by the deceased is concerned, the same was not relied upon, inter alia, on the premise that sufficient explanation had been given by the deceased that she had all along been under the clutches of the appellant and his family."

7. It must be borne in mind that even the learned Sessions Judge recorded a judgment of acquittal so far as the accused Nos. 2 and 3 are concerned. That part of the story that accused Nos. 2 and 3 acted in concert with the appellant has been disbelieved. It was, therefore, not proper for the learned Sessions Judge and the High Court to place implicit reliance upon the depositions of P.Ws. 7 and 8.

> "The High Court by reason of the impugned judgment negatived the contentions raised on behalf of the appellant that the prosecution should have brought on record the statement made by the deceased before the Executive Magistrate on 4.9.1991, stating that no purpose would be served thereby as she must have made a similar statement before the learned Magistrate."

8. An application filed before the High Court for bringing the second dying declaration on record was rejected, stating:

> "8. Considering the factual aspect in the present case as it is apparently clear that the dying declaration of Janabai was recorded on 04.09.1991 and the same is proved by

> the prosecution though it is not favourable to the prosecution; but the same is brought on record with view that the Court can find out the truth as to whether the dying declaration dated 04.09.1991 is the truthful version of Janabai or whether dying declaration dated 06.09.1991 is the truthful version and the Court below, after scanning the evidence, has concluded that the dying declaration dated 06.09.1991 involving the present appellant in the said crime is trustworthy and acceptable and the dying declaration dated 04.09.1991 is an outcome of threats extended by the appellant accused. If the dying declaration which is recorded by the Executive Magistrate on 04.09.1991 if again brought on record the question remains as to which dying declaration is acceptable and, therefore, we find that there is no need to remand the matter for recording evidence of the Executive Magistrate, as the said course is not at all necessary in the present case. Therefore, the application filed by accused i.e. Criminal Application No. 1418/2005, needs to be rejected."

9. The High Court furthermore while noticing that the prosecution witnesses No. 1 to 6 had turned hostile and did not support the prosecution case but having regard to the said purported dying declaration and some other circumstances which were allegedly brought on record by the evidence of P.W.-7 and P.W.-8 upheld the judgment of the learned Sessions Judge.

10. The High Court inter alia noticed that P.W. 7 and P.W. 8 had testified that about two months prior to the incident, the appellant had poured boiling tea on the person of the deceased as a result of which she had sustained injuries to her hands, legs, etc.

11. In her first dying declaration, she attributed suffering of burn injury by reason of an accident. She categorically stated that she had not been burnt by anybody from the house nor did she do so herself. She stated that her brother-in-law, mother-in-law and neighbours came there and extinguished the fire after putting a blanket on her.

> "A dying declaration made before a Judicial Magistrate has a higher evidentiary value. The Judicial Magistrate is presumed to know how to record a dying declaration. He is a neutral person. Why the prosecution had suppressed the dying declaration recorded by the Judicial Magistrate is not known. Prosecution must also be fair to the accused. Fairness in investigation as also trial is a human right of an accused. The State cannot suppress any vital document from the court only because the same would support the case of the accused. The learned Sessions Judge as also the High Court, in our opinion, committed a serious illegality in refusing to consider the said question in its proper perspective. The prosecution did not explain as to why the said dying declaration was not brought before the court. The learned Sessions Judge as also the High Court surmised about the contents thereof. Not only the contents of a dying declaration, but also the manner in which it is recorded and the details thereof play a significant role in the matter of appreciation of evidence."

12. The veracity of depositions of the parents of the deceased should be considered having regard to the entire backdrop of the case. In none of the dying declarations the deceased

stated that her husband had poured hot tea on her body. If the relationship between the couple became strained from that time, it was expected that the same would have been stated by the deceased in her dying declaration. Why such a statement had been brought on record for the first time before the court by the parents of the deceased is difficult to comprehend.

13. Only because such a statement was made by them, the same should not have been considered to be a circumstance against the appellant, particularly when no allegation about harassment meted out to her at an earlier point of time was made by the deceased herself.

14. Evidently, there are a few inconsistent and contradictory dying declarations. The court while appreciating evidence on the basis of such dying declarations is required to take into consideration inconsistencies between two statements. In this case, the learned Sessions Judge and the High Court proceeded on the basis that out of the three dying declarations, in two of them the deceased did not make any allegation against her husband.

15. A judgment of conviction can be recorded on the basis of a dying declaration alone, but the court must have been satisfied that the same was true and voluntary. Indisputably, for ascertaining the truth as regards the voluntariness of making such a dying declaration, the court is entitled to look into the other circumstances but the converse may not be true. It is not a case where the deceased and appellant were living separately. It is also in dispute, and as would appear from the statements made by the deceased in her first dying declaration that, even on the night in question appellant was not in the house; she was brought to the hospital by her husband and his family. If the intention of the appellant was to cause death to her, the fire would not have been extinguished by his family members.

16. Consistency in the dying declaration, therefore, is a very relevant factor. Such a relevant factor cannot be ignored. When a contradictory and inconsistent stand is taken by the deceased herself in different dying declarations, they should not be accepted on their face value. In any event, as a rule of prudence, corroboration must be sought from other evidence brought on record.

17. In *Mehiboobsab Abbasabi Nadaf vs. State of Karnataka*[1] where four dying declarations were recorded, this Court opined:

> "6. Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied."
>
> The court noticed that as the deceased attributed the acts primarily on her parents-in-law and they having been acquitted, it was difficult to hold that appellant alone was responsible for causing her death. It was furthermore noticed:

"8. In *Mohammed Arshad v. State of Maharashtra and Ors.*[2], this Court opined as under:

`So far as the appeal preferred by Mohammed Ashraf is concerned, we are of the opinion that he is entitled to benefit of doubt. He was not named in the first two dying declarations. He was named only in the 3rd dying declaration. No injury by stick was found on the back of the deceased. The motive ascribed as against him did not find place in the First Information Report. Evidently, the deceased made improvement in his 3rd dying declaration before the Police Officer.

Keeping in view the backdrop of events, we fail to see any reason as to why appellant Mohammed Arshad would not have been named in the 1st or 2nd dying declarations if the motive for his involvement was non-payment of a sum of Rs. 60,000/- as was disclosed by the deceased.

This Court in *Balbir Singh and Anr. v. State of Punjab*[3] relying upon several decisions of this Court including *State of Maharashtra v. Sanjay s/o Digambarrao Rajhans*[4] and *Muthu Kutty and Anr. v. State by Inspector of Police, T.N.*[5] held:

`We are of the opinion that whereas the findings of the learned Sessions Judge as also the High Court in regard to guilt of Appellant No. 1 must be accepted, keeping in view the inconsistencies between the two dying declarations, benefit of doubt should be given to Appellant No. 2. We, however, uphold the conviction and sentence of both the Appellants under Section 498-A IPC.'"

18. The said decision, we must place on record, was distinguished on facts in *Amarsingh Munnasingh Suryawanshi vs. State of Maharashtra*[6] wherein a dying declaration recorded by P.W.8 - Special Judicial Magistrate was given primacy as it was noticed that he had taken all the precautions and in fact when the dying declaration was recorded a medical officer was present.

19. For the reasons aforementioned, the impugned judgment cannot be sustained; it is set aside accordingly. The appeal is allowed. Appellant is in custody. He is directed to be set at liberty forthwith unless wanted in connection with any other case.

[1]*2007 (9) SCALE 473*
[2]*2006 (12) SCALE 370*
[3]*2006 (9) SCALE 537*
[4]*(2004) 13 SCC 314*
[5]*(2005) 9 SCC 113*
[6]*2007 (12) SCALE 764*