

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 424 of 2006

Arising out of P.S.Case No. 173 Year - 2004 Thana - Araria District - ARRARIA

Premila Devi, Wife of Baijnath Sharma, resident of village - Araria, Ward No. 5,
P.O. & P.S. Araria, District - Araria

.... Appellant

Versus

The State of Bihar

.... Respondent

With

Criminal Appeal (DB) No. 501 of 2006

Arising out of P.S.Case No. 173 Year - 2004 Thana - Araria District - ARRARIA

Bimla Devi, Wife of Ramchandra Rajak, Resident of Om Nagar, Ward No. 6,
Araria, P.S. – Araria, District - Araria

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

(In CR. APP (DB) No. 424 of 2006)

For the Appellant : Shri Nirmal Kumar Sinha No. 3, Advocate
Shri Arun Kumar, Advocate

For the Respondent : Shri Dilip Kumar Sinha, A.P.P.

(In CR. APP (DB) No. 501 of 2006)

For the Appellant : Shri Sarangdhar Jha, Advocate

For the Respondent : Shri Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 04-02-2015

These two appeals arise out of the judgment of conviction dated 22.04.2006 and order of sentence dated 24.04.2006 passed in Sessions Trial No. 165 of 2005/003 of 2005 by the learned Presiding Officer, F.T.C. IV, Araria by which the two appellants were held guilty of committing offences under Sections 302/34, 326 and 447 of the Indian Penal Code. The appellants were heard under Section 235

Cr.P.C. and each of them was directed to suffer rigorous imprisonment for life, rigorous imprisonment for three years and rigorous imprisonment for three months respectively on each of the three counts for their individual conviction. The learned trial Judge also directed the appellants to pay up Rs.5,000/- as fine and in case of default directed them to suffer simple imprisonment for three months. We do not know as to under what Section of the individual conviction of the appellants, the sentence of fine was imposed as there is no indication of the same in the operative part of the judgment. At any rate, the appellants preferred their individual appeals to challenge the judgment of conviction and order of sentence and this is how the two appeals have been heard by us and are being disposed of by the present common judgment.

2. Gauri Kumari, who happened to be the daughter of P.W. 7 Laxmi Devi stated to P.W. 10 Sub-Inspector, Nilamber Bharti while she was hospitalized in Sadar Hospital, Araria that the two appellants had burnt her. It was stated by her that appellant Pramila Devi poured kerosene oil upon her and appellant Bimla Devi lit a matchstick to set her at fire. The victim Gauri Kumari who happened to be the deceased of the case, raised alarm which attracted persons of the neighbourhood who doused the flames and shifted her to the local Sadar Hospital in Araria where she gave her statement during treatment.

3. The statement recorded by P.W. 10 in the form of

Ext. 6 indicates as if the statement was signed by two officials - Dr. Milind Kumar (P.W. 1), the Medical Officer In-charge, on duty on that particular day, i.e., on 02.07.2004 and Sri Jai Kumar Dwivedi (P.W.8) who was the Executive Magistrate next senior to SDM, Araria and who had arrived, as we believe on requisition of the police to record the dying declaration. These facts emerge from the evidence of the police officer-cum-Investigating Officer P.W. 10 Nilamber Bharati who was the author of Ext. 2 and further from the evidence of P.W. 1 Dr. Milind Kumar and P.W. 8 Jai Kumar Dwivedi.

4. The learned trial Judge while convicting the appellants, was placing reliance mainly upon the fardbeyan of the deceased Ext. 6 treating it as a statement admissible under Section 32(1) of the Evidence Act indicating the cause of death of deceased Gauri Kumari as also the circumstances of the transaction which had resulted in her death. The learned trial Judge while proceeding to accept the veracity of the document, was brushing aside the evidence of the mother Laxmi Devi (P.W. 7) and the other witnesses who had stated that after being burnt to the extent of 99%, which appears from the evidence of Dr. Rajesh Kumar (P.W. 9), the deceased had gone unconscious and did not speak a single word ever till her death. For drawing the above inference, the learned trial Judge was latching on the opinion of P.W. 9 Dr. Rajesh Kumar in paragraph - 2 of the deposition that it might be possible that a

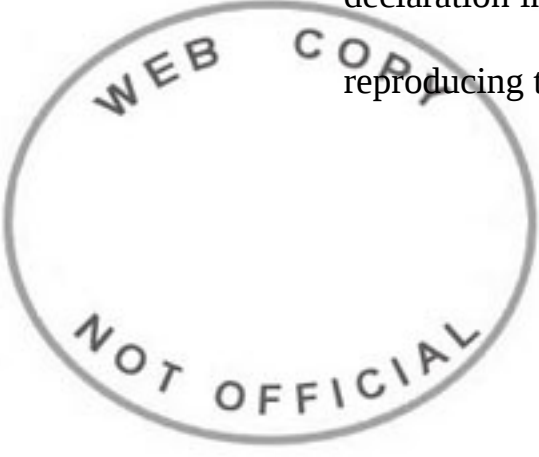
person with 99% burn injuries may remain conscious in the beginning.

5. However, the defence was setting up a very serious challenge not only to the opinion of P.W. 9, but also to the evidence of P.Ws. 1 and 10 that the deceased Gauri Kumari was in a fit state of mind and health to make statement and has challenged the document as not admissible or fit to be acted upon.

6. We do not want to consider the evidence of the witnesses because the learned trial Judge also concluded that the witnesses were speaking in one voice that the deceased after having received the burn injury to the extent found by P.W. 9 Dr. Rajesh Kumar was not in a state of making statement. What we propose to do is to scrutinize the veracity of the document in the light of some of the settled principles as regards appreciation of the evidentiary value of such a document.

7. We begin with a decision reported in **AIR 1958 SC 22 Khushal Rao v. State of Bombay** in which case the appeal under the certificate of fitness under article 134(1)(c) of the Constitution was taken up for decision by the Apex Court and in spite of finding that the certificate was not fit to be acted upon, the Apex Court went on to consider the factual matrix of the case so as to judging the merit of the appeal. The question of reliability of the dying declaration, which was the core evidence in the case, was considered by the Apex Court and

their Lordships laid down the criteria or test of reliability of a dying declaration in paragraph-16 of the judgment. We want to be benefited by reproducing that paragraph. It runs as under:-



“On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (a) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the 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, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; 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; that the statement has been consistent throughout if he 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 tutoring by interested parties.”

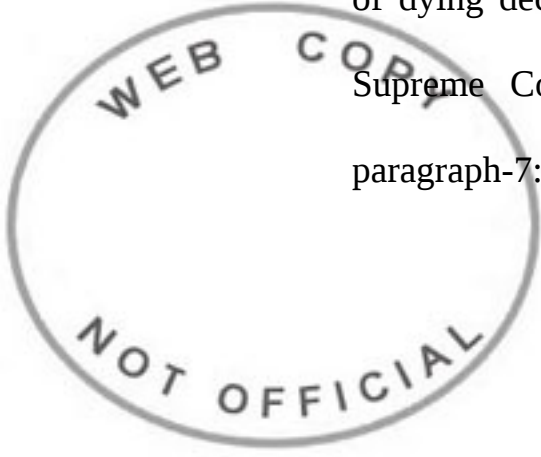
8. As may appear from the above observations, the test of reliability of a dying declaration besides other factors happens to be the capacity of a man or the person to remember and reproduce the facts stated if the capacity of that man to observe, remember, retain and

narrate the facts of the incident had not got impaired on account of the state of his health. In other words, if the state of health, and especially the mental health of such a person, indicated that he or she could not have been in a position to relate the facts of the incident to the authority or to person who had recorded his or her dying declaration, then no Court should act upon such a piece of evidence.

9. Another judgment which comes to our mind is that of ***Munna Raja and Another v. The State of Madhya Pradesh*** reported in ***AIR (1976) 3 SCC 104***. In that decision also the Supreme Court had held that a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, but in spite of that there was no rule of law nor a rule of prudence which had hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated.

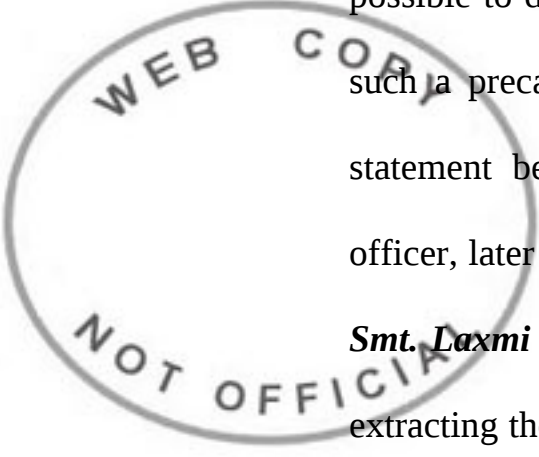
As regards a dying declaration like the one presently in hand, the decision of the ***apex court in Ramawati Devi v. State of Bihar*** reported in ***AIR 1983 SC 164*** was laying down that there was no requirement of law that a dying declaration must be necessarily made to a Magistrate. What evidentiary value or weight has to be attached to such a statement must necessarily depend on the facts and circumstances of each particular case in a proper case. It may be permissible to convict a person only on the basis of the dying declaration in the light of the

facts and circumstances of that particular case. So far as the admissibility of dying declaration recorded by a police officer was concerned, the Supreme Court in Ramawati Devi (supra) was holding as under paragraph-7:-



“In our opinion neither of these two decisions relied on by the appellant is of any assistance in the facts and circumstances of this case. These decisions do not lay down, as they cannot possibly lay down, that a dying declaration which is not made before a Magistrate, cannot be used in evidence. A statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible under section 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case. In the instant case, the dying declaration has been properly proved.”

10. In yet another decision of the Supreme Court which was cited before us by the learned counsel appearing for the appellants, i.e., **Smt. Laxmi v. Om Prakash & Ors.** reported in **2001 SAR (Criminal) 593**, the Supreme Court was perusing some of their earlier decisions and were holding in paragraph 29 that dying declaration made before the police officer is admissible in evidence. However, the practice of dying declaration being recorded by the Investigating Officer has to be discouraged and the Investigating Officers should avail of the



services of Magistrates for recording dying declarations if it was possible to do so and the only exception was when the deceased was in such a precarious conditions that there was no alternative except the statement being recorded by the Investigating Officer or the police officer, later to be relied upon as a dying declaration. The Apex Court in **Smt. Laxmi** (supra) was also referring to **Munna Raja** (supra) and was extracting the observations of the Apex Court as to why the recording of dying declaration by a police officer was to be discouraged which is as follows:- “Investigating Officers are naturally interested in the success of the investigation and the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged.”

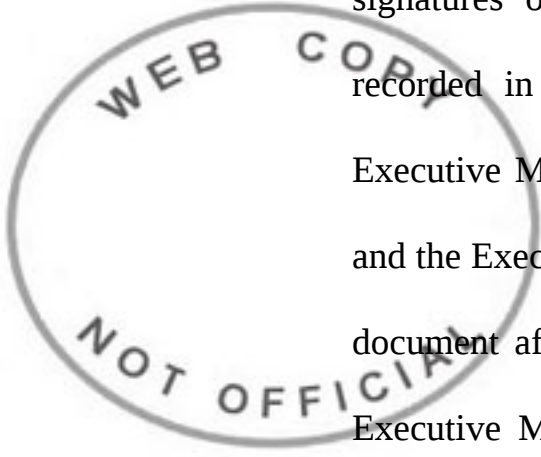
11. We do not have any prejudice if the statement of a dying man was recorded by a police officer, may be that a person who was inflicted injuries during the commission of an offence might not be expecting death imminently and in such a situation, the police officer may innocently record his statement and it may be a case that such a person died subsequently. If such a statement recorded by a police officer under the circumstances just pointed out by us, is placed before a Court for its consideration, then we do not have any hesitation to say that it might be carrying some purity and, as such, should have the trust of the Court to place its reliance upon it. But, otherwise and under the

circumstances when authorities independent and having no charge of investigation are available, then in that particular circumstance, the police officer should desist themselves recording the statement of a person who is imminently in danger of losing his life. In a case where the statement recorded bonafide and in innocence, as observed by us, has been recorded which turns into a dying declaration subsequently as noted by us just above, we may recommend it as desirable that the investigation must be carried out by an officer other than the one who had recorded the statement of the deceased in such a case.

12. P.W. 9 Dr. Rajesh Kumar who had held postmortem examination on the dead body of deceased Gauri Kumari had deposed that the dead body was bearing 99% burn injuries. P.W. 1 was the doctor who had admitted her and treated her initially. His evidence indicates great persuasion on the part of the defence to elicit from him as to what was the percentage of injuries on the dead body but later part indicates that he was simply evading to point out the percentage of burn which was on the person of the deceased Gauri Kumari. He had come to depose in Court after being asked by the prosecution to do so but the curious aspect of the matter was that neither he himself nor the Public Prosecutor thought of directing him to bring the necessary records, like, the Bed Head Ticket before the Court so as to testify to the actual percentage of burn the deceased had suffered. We find that he was repeatedly telling

the Court in answer to questions put to him that he cannot testify to the actual percentage of the burn injuries received by the deceased unless he had looked to the concerned records. We, as such, do not have any reason not to believe the words of Dr. Rajesh Kumar (P.W. 9) that the burn injuries were in 99%. The mother of the deceased Laxmi Devi (P.W. 7) had stated that after receiving the burn injuries, her daughter had gone on unconscious and for a few seconds, she had been consciousness as per the witness P.W. 7 Laxmi Devi. The evidence of P.W. 1 Dr. Milind Kumar in paragraph-1 of the deposition indicates that neither any certificate was solicited by the police officer P.W. 10 Nilamber Bharti nor in performance of his duty as the Medical Officer, Incharge of the Hospital, he himself thought it appropriate to append a certificate regarding the physical and mental fitness of the deceased Gauri Kumari. His evidence in paragraphs-1 and 8 indicates that the deceased had been mobbed by a huge number of persons who were her close relatives and neighbours and who had exerted pressure to the extent that they had not allowed the lady to be shifted to Purnea for better treatment. This all is available to us in the evidence of P.W. 1 who had stated that he had referred the patient for better treatment to Purnea as appears from his evidence in the same paragraph-8 at page-11 of the paper book. The evidence of both P.W. 1 and the Executive Magistrate (P.W. 8) Sri Jai Kumar Dwivedi indicates that they were simply required

to sign the document Ext-6 and they readily agreed to put their signatures on the document. P.W. 1 stated that the statement was recorded in his presence by P.W. 10 and also in presence of the Executive Magistrate and both of them, i.e., P.W. 1 Dr. Milind Kumar and the Executive Magistrate Sri Jai Kumar Dwivedi (P.W. 8) signed the document after it had been recorded. But Sri Jai Kumar Dwivedi, the Executive Magistrate stated that he signed the document because the time he arrived at the hospital, he found that the statement had already been recorded and the same had been recorded by the doctor, i.e., P.W. 1 Dr. Milind Kumar and not by the police officer. P.W. 10 Nilamber Bharti and the document Ext. 6 which was treated as dying declaration indicate that the document had been created by P.W. 10 Nilamber Bharti after the deceased had made the statement. P.W. 8 Sri Jai Kumar Dwivedi gave some interesting evidence on the mental and physical state of the lady in paragraph-2 of his deposition. He stated that when he reached the hospital, he found the deceased in an unconscious state and again volunteered that she was not very much in her senses and then became categorical by stating that she was not in a state of speaking any word and whatever she was speaking was in a very low volume. The evidence as we have just noticed, does not lead us to any concrete conclusion as to whether the deceased could have been in a fit state of health to speak out so that a long narration as appears recorded by P.W.



10 in the form of Ext. 6 could have been recorded. P.W. 8 also stated that when he reached, the statement had already been written and he along with the police officer as also P.W. 1 signed the document. The doctor was pointing out that he had himself written the statement of the victim as appears from paragraph-3 of the evidence of P.W. 8. However, what appears from the evidence of P.W. 8 is that besides the police officer, he himself and the doctor, there were other persons present there.

The manner of recording of the document as regards the state of health of the deceased has also been stated by P.W. 10 Nilamber Bharti in his deposition in paragraph - 21 of the deposition. He stated that before proceeding to record the fardbeyan (Ext. 6), he did not obtain a certificate of fitness from the doctor especially the one that deceased Gauri Kumari was in a fit state of health to make a statement and was understanding the questions. The doctor, of course, signed the document after writing over it that the above statement was made by the girl in his presence but what we find absent from Ext-6 is that if she was making the statement in presence of the doctor, the general practice which has transformed into something of a rule of law of getting a certificate about the mental and physical fitness of the deceased, was not followed by the police officer. What we find after considering the evidence is that the evidence on recording of the dying declaration is quite suspect and the

evidence also suggested as if the deceased might not have been in a fit state of mental and physical health to make the statement.

13. The learned trial Judge has read one line from here and other from there from the evidence of the four witnesses, i.e., P.W. 1, 8, 9 and 10 and had brushed aside the probability that the deceased may not have been in a state of fit mental health to make the statement. In our opinion, the dying declaration appears a suspect document and, as such, it was not fit to be relied upon and used as sufficient evidence for convicting the appellants of offences they were held guilty of.

14. In the result, we allow the two appeals by setting aside the judgment of conviction and order of sentence passed upon the appellants of the two appeals. The two appellants are acquitted of the guilt, they had been indicted to. Appellant Pramila Devi is still languishing in prison, she shall be released forthwith, if not wanted in any other case. Appellant Bimla Devi is on bail. She stands discharged from the liabilities of her bail bond.

(Dharnidhar Jha, J.)

(Gopal Prasad, J.)

Brajesh Kumar/Kundan
A.F.R.

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