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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 632 of 2000**

Trilokchand alias Pappu Agrawal son of Late Devi Prasad Agrawal, Aged 27 years, Resident of Brahma Road, Ambikapur, P.S. Ambikapur, District Surguja, Madhya Pradesh (Now Chhattisgarh).

---- Appellant

Versus

The State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For Appellant	:	Ms. Hamida Siddiqui, Advocate
For Respondent	:	Ms. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board**Per Navin Sinha, Chief Justice****18/11/2015**

1. The Appellant stands convicted under Section 302 IPC to life imprisonment with fine of Rs. 25,000/-, in the event of failure to pay which, he was required to undergo 18 months further imprisonment. The fine was directed to be paid as compensation to the minor son of the deceased, PW-9 Golu alias Rahul, by the Sessions Judge, Ambikapur in Sessions Trial No. 313 of 1998 by judgement dated 27.11.1999.

2. The deceased Savita aged approximately 23 years separated from her husband Runga, was residing in a one room tenement with her mother, Gangotri Bai and her father along with her minor son Golu alias Rahul, PW-9. She suffered 90% burn injuries inside the room on 21.7.1998 at about 9:30 pm and at the request of her mother was taken to the hospital by her neighbour PW-4, Sunita Chauhan. The Investigating Officer, S.C. Shukla, PW-8 reached the hospital on information about 11:00 pm. and obtained confirmation in writing, Exhibit P-7 from

Dr. M.K. Jain, PW-5 regarding her fitness to record her statement as dying declaration. The deceased named the Appellant as the assailant. The statement of the deceased was registered as F.I.R., Exhibit P-12.

3. Learned Counsel for the Appellant submitted that there is no eyewitness to the allegation that he had set fire to the deceased. PW-8, S. C. Shukla the Investigating Officer had deposed that the place of occurrence was a populated locality. Yet the prosecution had not led any evidence that the Appellant was seen either entering or leaving the house before or after the occurrence. Gangotri Bai, the mother of the deceased was residing with her in the same room and had called PW-4 Sunita Chouhan who took her to the hospital. Evidently Gangotri Bai was present in the room when the occurrence took place and was naturally the best witness to whatever may have happened. The prosecution has not examined her and no reason has been given why such an important witness was withheld. It raises a reasonable doubt and the possibility of the occurrence having taken place in a different manner cannot be ruled out. Drawing an adverse inference against the prosecution because of her non-examination, the Appellant is entitled to acquittal.

4. It was next submitted that according to the evidence by the prosecution there were three men in the life of the deceased and who were on visiting terms with her. Her ex-husband Runga, the Appellant and one Dilip whose photograph was found in the room. The Investigating Officer made no queries from her ex-husband and did not take steps to locate Dilip. If the Appellant had visited the house before the occurrence and the police by Exhibit P-3 seized utensils, kerosene jerry can, etc., and forensic experts visited the room, no explanation has been furnished why finger prints were not lifted. PW-4, Sunita Chauhan deposed that the deceased on way to the hospital had disclosed to her that she had caught fire accidentally from the stove.

5. PW-5, Dr. M.K.Jain conducted the MLC, Exhibit P-5 of the deceased at 11:40 pm after she was brought to the hospital and stated that she had 90% burns on her person. The time of admission mentioned in the Exhibit as 10:00 pm bears apparent over writing. If she had come with 90% burns she could not have been left unattended for one hour forty minutes. Curiously, the witness certified her fit to make dying declaration at 10:40 pm even before he examined the patient at 11:40 pm. Recording of dying declaration pertains to the jurisdiction of the police and therefore there was no occasion for PW-5 to have advised so by Exhibit P-6. The deceased was admitted in the female surgical ward at night but there is no reference to the presence of any female doctor or female nurse. The deceased expired on 2:55 am on 22.7.1998 which also demonstrates that she was in a precarious condition and may not have been in her senses to make a dying declaration.

6. The dying declaration, in the facts of the case is a highly suspicious document which cannot be relied upon for additional reasons apart from the above. PW-5, Dr. M.K.Jain states that the dying declaration of the deceased was recorded in his presence after which her thumb impression was taken. But he also states that he did not hear what the deceased may have said. The Investigating Officer, PW-8, S. C. Shukla on the contrary states that when he was recording the dying declaration, PW-5, Dr. M. K. Jain was not present in the room. The dying declaration. Exhibit P-7 the certification by the Doctor is a completely independent document with none of them mentioning any time.

7. PW-8, S. C. Shukla, the Investigating Officer claimed that he had sent requisition to the Sub Divisional Magistrate for recording dying declaration but did not mention any time or exhibit any document in support. It was clearly an after thought to lend credibility to what is otherwise a highly suspicious document, spinning stories by PW-8 for his own benefit of having resolved a crime, the Appellant being an easy target because the deceased was currently in

relationship with him. The alleged dying declaration being seriously suspect, lacking credibility cannot form the basis for conviction in the facts of the present case. Relying on AIR 1976 SC 2199 (Munnu Raja v. The State of Madhya Pradesh) in support of the submission that a dying declaration recorded by the police was suspicious and highly unreliable, it was submitted that the same principle has been reiterated in AIR 1979 SC 1173 (Dalip Singh v. State of Punjab). But the Learned Trial Judge has relied on the latter referring to the exception carved out for recording a dying declaration in exceptional circumstances without any discussion of how the present circumstances justified the same. If a requisition had been sent to the Sub Divisional Magistrate for recording dying declaration clearly there existed no exceptional circumstances for recording dying declaration by the police. Reliance was further placed on (2010) 9 SCC 1 (Atbir v. Government of NCT of Delhi) culling out the principles when a dying declaration alone could form the basis of conviction to submit that the principles when applied to the facts of the present case does not inspire confidence that it was actually made by the deceased in a fit state of mind voluntarily and recorded correctly, truthfully by the Investigating Officer who did not have the advantage of any independent witness to be available notwithstanding his efforts to do so.

8. Learned Counsel for the State opposing the appeal submitted that the Appellant was in a relationship with the deceased and suspected her character. A dying declaration can be the sole basis for conviction also. The deceased was in a serious condition. The Investigating Officer had sent requisition to the Sub Divisional Magistrate for recording dying declaration. If the deceased was not likely to survive till he came, the Investigating Officer committed no wrong in recording the dying declaration. The ratio in Dalip Singh (supra) has been correctly applied by the Trial Judge. There will be a presumption under Section 114 (e) and (f) of the Evidence Act that the police officer had recorded the dying declaration truthfully. The deceased died at 2:55 am the next morning suggesting

that she was in a precarious condition. There is no reason why the deceased would have falsely implicated the Appellant with whom she was in a relationship unless he was the actual perpetrator of the offence. Dr. M.K.Jain, PW-5 had also certified that the deceased was in a fit condition to make the statement. The deceased was admitted on 21.7.1998 at night and her dying declaration was recorded the same day. Merely because there may be some discrepancies of time cannot lead to any inescapable conclusion that everything was suspicious.

9. We have considered the submission on behalf of the parties and analysed the evidence on record also.

10. The deceased had left her earlier husband Runga but who was still on visiting terms with her. The photograph of one Dilip was found in the room and who was also on visiting terms with her. The police did not question either of them. The Appellant was also in relationship with her. The deceased lived in a one room tenement with her mother Gangotri Bai and her father alongwith her minor son PW-9, Golu alias Rahul. The deceased suffered burn injuries inside the room at night. Gangotri Bai called the neighbour PW-4, Sunita Chauhan. Evidently Gangotri Bai was in the room at the time of occurrence. She would have been the best evidence with regard to the manner of the occurrence including if the Appellant had visited the house immediately before the occurrence and left thereafter. It was the duty of the prosecution to lead the best evidence available under Section 60 of the Evidence Act. If it was not done and no reason has been furnished for it, the Court can legitimately draw an adverse inference under Section 114(g) of the Evidence Act raising reasonable doubt with regard to the manner of occurrence as alleged and the possibility that the occurrence may have actually taken place in some other manner cannot be ruled out. The Appellant in his defence under Section 313 CrPC had denied the allegations. The onus lay on the prosecution under Section 106 of the Evidence Act to establish the manner of occurrence by leading the evidence of Gangotri Bai. No evidence has been led by

the prosecution to even establish that the Appellant suspected the character of his wife except as stated in the suspicious dying declaration. The occurrence had taken place in a densely populated locality and yet the prosecution did not lead evidence that the Appellant was seen either entering or leaving the house after the occurrence.

11. In (2006) 3 SCC 374 (Zahira Habibullah Sheikh (5) v. State of Gujarat) with regard to the drawing of adverse inference if best evidence was withheld it was observed it was observed as follows :-

“28.It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short “the Evidence Act”) are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference.....”

Likewise in (2015) 7 SCC 178 (Tomaso Bruno v. State of U.P.) it was again observed as follows :-

“27.....Drawing of presumption under Section 114 Illustration (g) of the Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.”

12. PW-4, Sunita Chauhan deposed that on the way to the hospital, the deceased had told her that she had suffered burn injuries from the stove. No disclosure was made that the Appellant had set her on fire.

13. The accident occurred in the house about 9:30 pm. The Investigating officer, S.C. Shukla, PW-8 came to the hospital about 11:00 pm and sought consent by Exhibit P-7A of the Doctor PW-5 to record the statement of the deceased at 10:40 pm. The MLC report of the deceased, Exhibit P-5 is timed 11:40 pm. The time of admission mentioned in the MLC report is 10:00 pm which

bears apparent overwriting. If the deceased was brought at 10:00 pm in a serious condition with 90% burns obviously she could not have been left unattended for one hour forty minutes. If the Investigating Officer came to the hospital at 11:00 pm and sought consent to record her statement there was no occasion for the Doctor PW-5 to give the consent at 10:40 pm. PW-5, the Doctor states that he was present in the room when the deceased made the dying declaration but states that he did not hear what she was saying. The Investigating Officer who recorded the dying declaration stated that the Doctor was not present in the room at that time. The Doctor PW-5 has not certified the dying declaration as having been made in his presence and with fitness of mind. The certification of fitness for the statement is a separate document unconnected with the dying declaration. All of them bear no indication of time. The Investigating Officer PW-8 stated that that he had requisitioned the Sub Divisional Magistrate to record the dying declaration but did not exhibit the requisition and neither stated through whom it was sent and at what time. All these factors create very serious doubt about the genuineness of the deceased having actually made any dying declaration.

14. The sanctity attached to a dying declaration admissible under Section 32 of the Evidence Act is no more *res-integra* and we may for brevity of discussion refer to (2014) 7 SCC 405 (Umakant v. State of Chhattisgarh). But it has not been considered absolute and the complete basis for conviction irrespective of all attendant surrounding circumstances observing :-

“20. The philosophy of law which signifies the importance of a dying declaration is based on the maxim *nemo moriturus praesumitur mentire*, which means, “no one at the time of death is presumed to lie and he will not meet his Maker with a lie in his mouth”. Though a dying declaration is not recorded in the court in the presence of the accused nor is it put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence. The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is

that such declaration is made by the victim when he/she is on the verge of death.”

15. The recording of the dying declaration by the Investigating Officer PW-8, with the presence of the Doctor PW-5 at that time being doubtful and absence of any proof that requisition had ever been sent to the Sub Divisional Magistrate coupled with other attendant circumstances discussed hereinbefore, the ratio in Munnu Raja (supra) relied upon by the Appellant, the facts being similar, becomes relevant observing as follows :-

"11. We might, however, mention before we close that the High Court ought not to have placed any reliance on the third dying declaration Ex. P-2, which is said to have been made by the deceased in the hospital. The investigating officer who recorded that statement had undoubtedly taken the precaution of keeping a doctor present and it also appears that some of the friends and relations of the deceased were also present at the time when the statement was recorded, but if the investigating officer thought that Bahadur Singh was in a precarious condition, he ought to have requisitioned the services of a Magistrate for recording the dying declaration. 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. We have therefore excluded from our consideration the dying declaration, Ex. P-2, recorded in the hospital."

16. The Trial Court in our opinion has erred by relying on the dying declaration recorded by the Investigating Officer, PW-8 placing reliance on Dalip Singh (supra) which essentially reiterates the law laid down in Munnu Raja (supra). The exception carved out in the latter stands unanswered by the prosecution in the facts of the present case. If the dying declaration is shrouded in mystery and doubts arise about its genuineness, in the cumulative facts of the case it shall not be safe to sustain conviction on the basis of dying declaration alone. In the facts of the present case, we are satisfied that the dying declaration required corroboration and could not be the sole basis for conviction.

17. In Atbir (supra) relied upon by the Appellant, the principles with regard to the admissibility and reliability of dying declaration were culled out as follows:

"22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eye witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration. "

18. Applying the aforesaid principles to the facts of the present case for assessing the credibility of the dying declaration as admissible under Section 32 of the Evidence Act to uphold the conviction, we are of the considered opinion that in view of the discrepancies noticed by us as discussed, it cannot be said with certainty that the deceased was in a fit condition of mind to make the statement and also that the statement was in fact made by her. Doubts arise about the credibility of the statements of the Doctor PW-5 and PW-8, the Investigating officer. The benefit of the doubt has undoubtedly to go to the accused.

19. Upon analysis of the evidence led by the prosecution and consideration of the same, we are of the considered opinion that not only has the prosecution withheld the best evidence, it has failed to establish the presence of the Appellant at the time of

occurrence, but also that the dying declaration sought to be relied upon was highly suspicious and unreliable let alone its genuineness to sustain the conviction.

20. Consequently, the appeal is allowed and the conviction of the Appellant is set aside but subject to the conditions enumerated in Section 437A of the CrPC.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE

Subbu