

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 53 of 2009

- Ashok, S/o Budharu Navrang, aged about 40 years, R/o Amera, PS Palari, Distt. Raipur (CG)

---- Appellant

Versus

- State Of Chhattisgarh Through P.S. Palari, Distt.-Raipur (CG)

---- Respondent

For appellant : Shri Ravi Maheshwari, Advocate.
For Respondent/State : Shri Rahul Tamaskar, PL.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice I.S. Uboweja,

Per P. Diwaker, J

02/02/2016

This appeal arises out of the judgment of conviction and order of sentence dated 29.11.2008 passed by the First Additional Sessions Judge, Baloda Bazar, Distt. Raipur in ST No.14/08 convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life and pay a fine of Rs.500/- with default stipulation.

02. As per prosecution case, marriage of the accused/appellant and the deceased was solemnized about 15 years prior to the date of incident. It is alleged that the deceased used to suspect the appellant of having illicit relations with the girls of the village. On the date of incident i.e. 11.11.2007 there were certain hot talks between the appellant and the deceased and it is said that the appellant poured

kerosene on the body of the deceased and set her ablaze. When she was trying to save herself by running out from the house, the accused/appellant caught hold of her and locked her in the bedroom and in that process, he also suffered some burn injuries. After the incident the deceased was first taken to Community Health Center, Palari and from there she was referred to Medical College Hospital Raipur. On 13.11.2007 dying declaration of the deceased (Ex.P/3) was recorded by PW-16 Jeevan Prakash Kujur, Assistant Sub Inspector, in presence of PW-3 Rajesh, wherein she has stated that she was burned by the accused/appellant by pouring kerosene on her. During treatment she succumbed to her burn injuries on 16.11.2007. Based on the information from the hospital, Dehati Merg (Ex.P/14) and Merg Intimation (Ex.P/15) were recorded. Inquest over the body of the deceased was prepared vide Ex.P/2. The dead body was thereafter sent for postmortem, which was conducted by PW 15 Dr. Shivnarayan Manjhi on 17.11.2007 vide Ex.P/16 wherein he noticed 100% kerosene burn injury and opined that the cause of death was cardio respiratory failure as a result of burn and their implications, the injuries were caused with hard and blunt object and were not sufficient in the ordinary course of nature to cause death. On the basis of merg enquiry and after receiving postmortem report, on 9.12.2007 FIR (Ex.P/6) was registered against the appellant for the offence under Section 302 of IPC. Memorandum of the accused/appellant was recorded vide Ex.P/4 and seizure of one plastic container of kerosene oil, one burnt sari and broken bangles was made vide Ex.P/5. After investigation, charge sheet was filed under Section 302 of IPC and accordingly, charge was

framed against the appellant.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 16 witnesses. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned in para-1 of this judgment.

05. Learned counsel for the appellants submits as under:

(i) that the dying declaration recorded by the police has no evidentiary value and no explanation has been offered by the prosecution as to why Executive Magistrate was not called for recording such statement.

(ii) that the so-called oral dying declaration made by the deceased before PW-1 Ramkunwar Ratre, PW-2 Vishnu Ratre, PW-3 Rajesh, PW-5 Pushpa, PW-7 Shantanu Banjare and PW-8 Ambabai, is doubtful because all these witnesses are close relatives of the deceased.

(iii) that once the deceased had suffered 100% burn injuries, the question of making any such declaration by her does not arise.

(iv) that in the dying declaration (Ex.P/3) thumb impression of the deceased was obtained whereas in a case of 100% burn, obtaining of

thumb impression is not possible.

(v) that present appears to be a case of suicide or accidental burn, but unfortunately the appellant has been roped in this offence.

(vi) that considering the evidence available on record, in particular the fact that the deceased was unconscious throughout, the dying declarations, oral and documentary, become doubtful.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

(i) though the dying declaration has not been recorded by the Executive Magistrate but considering the nature of dying declaration and the manner in which it has been recorded, the same can be used against the appellant, at least as an additional evidence, apart from the other evidence on record.

(ii) that there is no reason for this Court to disbelieve the statements of PWs. 1, 2, 3, 5, 7 & 8 before whom oral dying declaration was made by the deceased. Merely on the ground of these witnesses being relatives of the deceased, their evidence cannot be discarded.

(iii) that it has come in the evidence that the deceased was conscious on the 3rd day when she made dying declaration before the police and oral dying declaration before the witnesses, therefore, the question of doubting the dying declaration does not arise.

(iv) that the witnesses have not been cross-examined properly by the defence to doubt the credibility of the dying declaration.

(v) that present being a case of house murder, the appellant was required to offer satisfactory explanation as to how the incident occurred, however, in his statement recorded under Section 313 of Cr.P.C. he has not offered any explanation as required under the law.

(vi) that from the spot map it is apparent that the accused/appellant burned the deceased after pouring kerosene on her and when she tried to run away from there to save herself, the accused/appellant caught hold of her, locked her in the bedroom and during that process, suffered some burn injuries. Had it been a case of accidental death, the place of occurrence could have been the kitchen only and not the bedroom.

(vii) that there is no evidence on record that the deceased made any attempt to commit suicide or that she caught fire accidentally.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Ramkunwar Ratre, mother of the deceased, has stated that about 10-12 years prior to the date of incident, marriage of the deceased was solemnized with the accused/appellant and he used to keep the deceased properly. On the date of incident she received a call from her other son-in-law that the deceased has been burned by the appellant and is hospitalized at Raipur and when she went there she saw her completely burnt and she regained consciousness within three days. On being asked, the deceased informed her that it is the accused/appellant who had burned her after pouring kerosene on her

body. In cross-examination she admits that the accused/appellant used to keep the deceased properly and there was no complaint against him. However, no question was put to this witness by the defence regarding her statement made in para-3 wherein she has stated about the oral dying declaration made by the deceased. In para-19 she has though stated that after receiving information about burning of her daughter/deceased, she was in anger and all the family members had decided to teach a lesson to the appellant and also took a decision to lodge a report against him.

09. PW-2 Vishnu Ratre, brother of the deceased, has stated that marriage of the deceased was solemnized with the appellant and his sister was second wife of the appellant. In the hospital when he met the deceased, she was serious and on being asked to make a fair statement as to how she got burned, she informed him that it is the accused/appellant who after pouring kerosene on her body set her afire. She further informed him that when she was trying to come out from the house and raised voice for help, the accused/appellant got scared, caught hold of her and locked her in the room, and after 2-3 days she expired. In cross-examination this witness remained very firm and nothing could be elicited from him by the defence to render his evidence untrustworthy or doubtful.

10. PW-3 Rajesh, who is distantly related with the deceased, is a witness before whom dying declaration (Ex.P/3) was recorded by PW-16. He is also a witness of oral dying declaration made by the deceased. He has duly supported the prosecution case. PW-4

Vishwanath, brother of the deceased, has stated that at Raipur when he met the deceased in the hospital, she informed him that it is the accused/appellant who burned her. PW-5 Pushpa, sister of the deceased, is also a witness of oral dying declaration made before her by the deceased in the hospital. PW-6 Satish Dhritlahre a witness of memorandum Ex.P/4 of the appellant and seizure Ex.P/5, has turned hostile. However, he has admitted his signature on both these documents. PW-7 Shantanu Banjare who is also distantly related with the deceased and the appellant, is a witness of oral dying declaration made by the deceased in the hospital. He has duly supported the prosecution case. PW-8 Ambabai is also a witness of oral dying declaration. She has stated that when she met the deceased in the hospital, she informed her that it is the accused/appellant who after committing marpeet with her, poured kerosene on her and set her ablaze. PW-9 Manvarram reached the place of occurrence upon hearing the cries of the accused/appellant, after it had taken place. PW-10 Kishore Soni, Assistant Sub Inspector, registered the FIR, PW-11 Gajjulal Sahu, Patwari, prepared the spot map (Ex.P/8), PW-12 Dashruram Sahu, Head Constable, helped in the initial investigation, whereas PW-13 Dr.A.R Nirala did MLC of the deceased Ex.P/13 and the appellant Ex.P/9. According to him, there was contusion marks of size 1 ½ inch x ½ inch and 1 inch x ½ inch over right hand of the deceased, she had suffered 100% burn injuries, which was fatal to her life. PW-14 Chandra Kumar Diwan, Constable, recorded numbered and unnumbered merg intimation. PW-15 Dr. Shivnarayan Manjhi conducted postmortem on the body of the deceased vide Ex.P/16 and

noticed 100% kerosene burn injury. In his opinion, the cause of death was cardio respiratory failure as a result of burn and their implications, the injuries were caused with hard and blunt object and were not sufficient in the ordinary course of nature to cause death. PW-16 Jeevan Prakash Kujur, investigating officer, recorded dying declaration Ex.P/3 of the deceased in presence of PW-3 Rajesh and the doctor, after obtaining consent of the doctor vide Ex.P/17. He has duly supported the prosecution case.

11. In the present case, conviction of the accused/appellant is substantially based on the dying declaration Ex.P/3 recorded by PW-16 and the orally made before PW-1 Ramkunwar Ratre, PW-2 Vishnu Ratre, PW-3 Rajesh, PW-5 Pushpa, PW-7 Shantanu Banjare and PW-8 Ambabai.

12. Close scrutiny of the evidence makes it clear that on 11.11.2007 it is the accused/appellant who after pouring kerosene on his wife/deceased set her on fire as a result of which she sustained 100% burn injuries. She was first taken to Community Health Center, Palari and from there referred to Medical College Hospital Raipur where she succumbed to her burn injuries on 16.11.2007 during treatment. Her dying declaration was recorded by PW-16 Jeevan Prakash Kujur (ASI) in question answer form vide Ex.P/3 in presence of PW-3 Rajesh wherein in reply to Question No.7 she has stated that on account of quarrel the accused/appellant poured kerosene on her body and set her on fire. PW-3 Rajesh is also a witness to this dying declaration made by the deceased and has duly supported the prosecution case.

PW-16 has stated that before recording dying declaration of the deceased he had made an application to the concerned doctor and only after obtaining consent of the doctor vide Ex.P/17 to record statement of the deceased, the said declaration was recorded.

13 The principle of dying declaration is based on legal maxim “*nemo moriturus proesumitur mentiri*”—a man will not meet his maker with a lie in his mouth. Such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice. While dealing with the question of dying declaration, the Apex Court in the matter of State of U.P. v. Ram Sagar Yadav (AIR 1985 SC 416) has held that if the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. It is also a settled legal position that mere absence of doctor's certification as to the fitness of the declarant's state of mind would not *ipso facto* render the dying declaration unacceptable. It is for the Court to decide whether on the basis of statement of the person who has recorded dying declaration, the deceased was in fit state of mind or not and it is the authority who records the dying declaration to satisfy whether the injured is in a position to make statement or not.

14. If we examine the evidence of PW-4 and PW-16 minutely in light of the aforesaid principles of law, there appears to be no reason to doubt

the credibility of the dying declaration Ex.P/3 and the same appears to have been made in a fit state of mind, without any pressure or coercion.

15. This apart, the deceased also made oral dying declaration PW-1 Ramkunwar Ratre, PW-2 Vishnu Ratre, PW-3 Rajesh, PW-5 Pushpa, PW-7 Shantanu Banjare and PW-8 Ambabai. Argument of the learned counsel for the accused/appellant regarding reliability of statements of these witnesses being the interested witnesses does not convince the conscience of this Court because it is settled legal position that relationship *per se* does not affect credibility of witness; merely their being relatives of the victim of crime. Only because the witnesses are family members their evidence cannot *per se* be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In the present case, the witnesses to oral dying declaration have consistently stated that on being asked, the deceased disclosed that it is the accused/appellant who after quarrelling with her, poured kerosene on her body and set her on fire. Their evidence also finds due corroboration from the medical evidence, according to which corresponding injuries i.e. contusion and 100% burn were noticed by

the treating doctor as well as the autopsy surgeon. Though PW-1 Ramkunwar Ratre, mother of the deceased, has stated that the deceased was being kept well by the accused/appellant, but if her entire evidence is seen wherein she has categorically stated that the deceased informed her in the hospital that she was burned by the accused/appellant, it is of no help to the appellant. There is no reason for this Court to discard the testimony of these witnesses merely because they happen to be the relatives of the deceased.

16. Yet another important aspect of the case is that the present is a house murder. In such a case, it is extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon. In such cases, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house can not get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer any explanation. In the case in hand, it has come in the evidence that the accused/appellant and the deceased were the only inmates of the

house. PW-9 has stated that upon hearing the cries of the accused/appellant he went to his house and saw the deceased burning. As such, at the time of incident, the accused/appellant was very much there in the house. If the deceased had caught fire accidentally or she had set herself ablaze, the appellant being husband of the deceased was required to save her by all possible means, however, there is no such evidence to this effect that the appellant tried to save the deceased, rather there is evidence that when the deceased was trying to come out of the house to save herself, the appellant locked her in a room. The accused/appellant has not offered any satisfactory explanation in his statement under Section 313 of Cr.P.C. as to how the deceased suffered burn injuries and made only bald denial of all the incriminating circumstance appearing against him in the prosecution case. This circumstance also goes against the appellant and points towards his guilt.

17. Thus, keeping in view the dying declaration Ex.P/3 of the deceased recorded by PW-16 Jeevan Prakash Kujur, the oral dying declaration made before PW-1 Ramkunwar Ratre, PW-2 Vishnu Ratre, PW-3 Rajesh, PW-5 Pushpa, PW-7 Shantanu Banjare and PW-8 Ambabai, conduct of the appellant during the incident and subsequent thereto, failure of the appellant to explain the circumstances in which the deceased suffered burn injuries, especially when the present is a case of house murder, as also the medical evidence, the only conclusion which can safely be drawn is that it is the accused/appellant who set the deceased on fire by pouring kerosene on her and thereby

committed her murder. The findings recorded by the trial Court being based on proper appreciation of the entire evidence on record warrant no interference by this Court.

18. In the result, the appeal being sans merits meets the fate of dismissal. The accused/appellant is reported to be in jail, therefore, no further order regarding his surrender etc. is required.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(I.S. Uboweja)

Judge

Khan