

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.1063 of 2002**Judgment Reserved on : 17.8.2016Judgment Delivered on : 29.9.2016

Suresh, son of Purushottam, Occupation Transport, aged about 29 years, resident of Ganjpara, Durg, District Durg, Chhattisgarh

---- Appellant**versus**

State of Chhattisgarh, through District Magistrate, Durg, District Durg, Chhattisgarh

--- Respondent

For Appellant	:	Shri M.P.S. Bhatia, Advocate
For State/Respondent	:	Shri Vinod Deshmukh, Deputy Government Advocate

Hon'ble Shri Deepak Gupta, Chief Justice**Hon'ble Shri Justice P. Sam Koshy****C.A.V. Judgment****Per Deepak Gupta, Chief Justice**

1. This appeal is directed against the judgment dated 13.9.2002 delivered by the Third Additional Sessions Judge, Durg in Sessions Trial No.179 of 2001, whereby he convicted the accused of having committed an offence punishable under Section 302 of the Indian Penal Code (IPC) and sentenced him to undergo rigorous imprisonment for life.
2. The prosecution story, briefly stated, is that on 20.3.2000, on the day of the festival of Holi, two accused, i.e., Appellant Suresh and one Venkat, residents of Risali Sector went to the residence of Kachrabai (deceased). They wanted that Kachrabai should play Holi with them. When she refused to play Holi with them, they sprinkled kerosene on her and set her on fire. It is further alleged that Suresh had caught hold of Kachrabai so he also received injuries. Kachrabai raised an alarm and neighbours came to the spot and took her to the hospital.

Suresh was caught hold of by the neighbours and other accused Venkat ran away. Kachrabai was admitted in hospital, but could not survive and died on 29.3.2000. The Learned Additional Sessions Judge has mainly convicted the accused on the basis of the dying declaration of the deceased. Aggrieved by this judgment, the Appellant has preferred the present appeal.

3. We have heard Shri M.P.S. Bhatia, Learned Counsel appearing for the Appellant and Shri Vinod Deshmukh, Deputy Government Advocate appearing for the State/Respondent and have also perused the record.
4. The main grounds raised by Shri Bhatia are that the dying declaration is not reliable for various reasons. It was not recorded in the language of the deceased. According to Shri Bhatia, deceased Kachrabai only knew Chhattisgarhi and could not speak on Hindi in which language the dying declaration has been recorded. There is nothing to show that Kachrabai was in a position to make the statement. It is further contended that other witnesses including the husband of deceased Kachrabai did not support the prosecution story. There are contradictions between Dehati Nalishi and First Information Report recorded at the instance of Kachrabai.
5. Immediately after the occurrence which took place at 4:30–5:00 O'clock in the evening on 20.3.2000, the victim was taken to the hospital. On the top portion of the dying declaration, it is stated that it was recorded at 7:45 p.m. and at the end of the dying declaration the time is recorded as 8:15 p.m. This means that the dying declaration was recorded between 7:45 p.m. and 8:15 p.m. This dying declaration, Ex.P-4 has been recorded in question and answer form. In the opening portion of the dying declaration, opinion of the doctor has

been given that the victim is in a position to make a statement. There are some signatures below this also. In this dying declaration, the victim states that when she was at home at about 5:00 p.m. then Venkat Telugu and Suresh, who are residents of Risali, came to her house and wanted her to play Holi with them. When she refused then Suresh poured kerosene on her body and lit it with a match. She raised an alarm then other residents of the area came to help her. In answer to the third question, she states that the people of the colony caught hold of Suresh, but Venkat Telugu ran away. Thereafter, information was given to the police and she was admitted in hospital. She then states that she is married and her husband works in HSCL. Her daughter is also married and her son aged about 13 years lives in another village. She further states that she was alone at the house because on Saturday her husband had gone to the village where her son resides. She also stated that Venkat Telugu and Suresh used to come to meet her husband and on the day of occurrence in absence of her husband they came and wanted to play Holi with her and when she refused, Suresh poured kerosene on her and set her on fire. This dying declaration was also thumb marked. Below the dying declaration, there is a statement of the doctor recorded that the victim was fully conscious while making the statement.

6. First of all her dying declaration was recorded. Thereafter, the complaint of the deceased was recorded at 8:30 p.m. on 20.3.2000 itself. In this complaint, which is thumb marked by Kachrabai, she states that she along with her husband resides in Newai *Basti*. Her husband works in HSCL. Deceased Kachrabai had one daughter, who is married and lives in her matrimonial home. Her son also resides in some other village. Her husband had gone to the village on Saturday. On that day, i.e., Monday, 20.3.2000, which was the day of Holi

festival, at about 4:30 p.m., she was alone at her home. At that time, one Suresh of Risali and Venkat, who both used to come and visit her husband very often, came to her house. They wanted to play Holi with her. When she refused to play Holi, Suresh and Venkat got angry. They picked up one container of kerosene lying there and poured the same over her body and set her on fire by lighting a matchstick with intention of killing her. The victim raised an alarm then neighbours came there and extinguished the fire of her body. Suresh was caught hold at the spot and his hands were burnt. Venkat managed to run away. Kachrabai and Suresh had been brought to hospital. Kachrabai had recorded the report which had been read over and explained to her. On the basis of this report (Ex.P-10), First Information Report (Ex.P-10A) was recorded at 10:30 p.m. on 20.3.2000.

7. The first question is whether we should rely upon the dying declaration (Ex.P-4) or not. The dying declaration was recorded by PW-9, Pulak Bhattacharya. He states that at the relevant time, he was posted as Naib-Tahsildar at Durg. On the directions of the Tahsildar, he went to record the statement of Kachrabai, the wife of Prahlad, resident of Newai, Police Station Newai, District Durg. According to him, at 7:35 p.m. a request was received to record the dying declaration of the victim and 2-3 minutes later, he was ordered to go to the hospital. According to him, he had already reached the hospital at Durg and Shri Das, Tahsildar was also present in the hospital. The witness states that at that time, some victims of an accident in a rural area had been brought to the hospital and, therefore, the entire administration was in the hospital. He further states that he met the doctor in the casualty and duty room. He inquired from the concerned doctor whether the victim was in a position to make statement and the doctor stated that she was in a position to make the statement. He

then narrates what has been stated in the dying declaration. He denied the suggestion that the statement had not been recorded properly. He further states that he was told that Kachrabai was illiterate. He then states that he cannot say whether Kachrabai was literate and knew how to sign. According to him, he would first ask a question thereafter Kachrabai would reply the same and then he noted down the same. The witness admitted the suggestion that Kachrabai was a Chhattisgarhi and that the questions and answers were orally spoken in Chhattisgarhi. According to him, at the time when the dying declaration was recorded, Kachrabai, he and the doctor only were present. He denied the suggestion that Kachrabai was not in a position to make a statement.

8. The other important witness is PW-5, Dr. Lal Mohammed. He states that Kachrabai was admitted in the hospital and an application was presented for recording her dying declaration. He after examining the patient and talking to her, made a report that she is in a position to make dying declaration. The application is Ex.P-3 dated 20.3.2000 and time 7:15 p.m. and the doctor in his handwriting written “बयान देने योग्य है” (fit to make a statement) and thereafter signed the statement. He then states that the statement of the victim was recorded by PW-9, Pulak Bhattacharya and he was also present when the statement was recorded. He has also proved his opinion on the dying declaration, Ex.P-4 that the victim was in a position to make the statement when it was recorded. In cross-examination, he again repeats that the victim was fully conscious and fit to make statement. He has further stated that he did not note down the blood pressure etc. on the statement because in his opinion it was not necessary to do so. He denied the suggestion that after the statement had been recorded by PW-9, Pulak Bhattacharya, he had put his signatures on the same.

He also denied the suggestion that he was not present when the statement was recorded. In cross-examination, he also stated that he did not remember where exactly the statement of the deceased was recorded. He stated that if he is shown bed head ticket, he would be able to tell these facts also.

9. PW-1, Hemkumari is a neighbour who turned hostile. However, she does state that when she was inside the house, she heard the sound 'बचाओ बचाओ'. She then came out and saw that a number of people had gathered there and Kachrabai was lying in burnt condition. However, she could not say how Kachrabai got burnt. Kachrabai was taken to the hospital. In cross-examination, she admits that it was the day of Holi. According to her, deceased Kachrabai did not know Hindi. The witness states that they used to converse with each other in Chhattisgarhi. She further goes to state that deceased Kachrabai was literate and could sign. She had signed in her presence on many occasions.

10. PW-2, Arjun Singh Yadav also turned hostile and states that he does not know how Kachrabai received the burn injuries. PW-3, Dr. S.R. Churendra carried out the post mortem and he opined that the deceased had died because of the burn injuries. The statements of PW-6, Ramayan Prasad Upadhyay and PW-7, S.S. Dhurve are not very relevant for deciding the case.

11. PW-8 is Prahlad, the husband of deceased Kachrabai. He states that he did not know accused Suresh and Venkat. He further states that when he came to know that his wife had been burnt, he went to the hospital. He further states that he never talked to Kachrabai because she was unable to speak. He does not know how the occurrence took place. He was declared hostile and cross-examined

by the Public Prosecutor. He denied the suggestion that when he reached the hospital, he talked to Kachrabai. He further states that Kachrabai told him that Suresh had poured kerosene on her and set her on fire. He further states that he does not remember whether Kachrabai took the name of Venkat or not. When confronted with his statement, Ex.P-6, he stated that he had not named Venkat and he does not know how the police had recorded the name of Venkat in his statement under Section 161 Cr.P.C. In cross-examination by the accused, he states that when he reached the hospital, Kachrabai could not speak and, therefore, he could not talk with Kachrabai. He further states that in his earlier examination, when he had stated that a person named Suresh had poured kerosene on Kachrabai and set her on fire on the basis of information received from some other people. He further states that he does not know who is Suresh. In further cross-examination, he states that Kachrabai was his second wife and son-in-law Ravi had come to inform him that Kachrabai was in hospital. He states that his first wife lives in the village. He also states that Kachrabai had studied upto Class 5 and could sign. According to him, she could read newspapers. He further states that the accused never used to visit him at his house.

12. PW-11, R.P. Yadav is an Assistant Sub-Inspector. He states that on 20.3.2000, it was the day of Holi and he was on town patrolling duty in the police van. He received information on the wireless set that some woman has been burnt in Village Newai. He then went to Newai. The burnt woman was lying on the side of the road. A crowd had gathered there. He then went to the place of occurrence and secured it. He also states that accused Suresh had been caught by the villagers. He then brought this burnt woman and Suresh to the District Hospital, Durg. He also states that he made a request in writing to the doctor to certify

whether the victim was in a fit position to make a statement or not. This request is Ex.P-3. He has identified his signature on the same. He then made a request Ex.P-9 to the Magistrate Shri Das, who was present in the hospital and then PW-9, Pulak Bhattacharya recorded the dying declaration of Kachrabai. Thereafter, he (PW-11) inquired from victim Kachrabai as to what had happened and on the basis of her statement, he recorded Dehati Nalishi, Ex.P-10 and on the basis of the same, FIR, Ex.P-10A was recorded. He has also proved document, Ex.P-11, which is a request for medico legal examination of Suresh, son of P.L. Soni, who is none else than the accused.

- 13.** Shri Bhatia has placed reliance on two documents. One is Ex.P-13, which is the arrest warrant of accused Suresh and shows that he was arrested on 8.4.2000. Shri Bhatia has also relied upon another document which is not exhibited, but is purportedly signed by Dr. Lal Mohammed and in this document it is mentioned that on 27.3.2000, Suresh, son of P.L. Soni, aged about 27 years was admitted with burns and his hands and face were burnt and these burns were about 12 hours old. Relying upon these documents, it is urged by Shri Bhatia that the entire story set up by the police is false and no reliance can be placed on the dying declaration (Ex.P-4). Shri Bhatia has placed reliance on the judgment of Bombay High Court in **State of Maharashtra V. v. Gopichand Uttamchand Keswani, 1985 Cri.L.J. 784** and **Kashi Vishwanath v. State of Karnataka, (2013) 7 SCC 162** in which the Apex Court, dealing with the dying declaration, held as follows:

“30. The prosecution has failed to state as to why three dying declarations were recorded in Kannada, if the deceased Neelamma was talking in Telugu. It has also not been made clear as to who amongst the Tahsildar, PSI or SI or the doctors who had signed Ext. P-12, Ext. P-22 and Ext. P-29 had knowledge of

Telugu and translated the same in Kannada for writing dying declarations in those exhibits and that at the bottom of three dying declarations it has not been mentioned that they were read over in Kannada and explained in Telugu and that the deceased understood the contents of the same. The abovementioned facts create doubt in our mind as to the truthfulness of the contents of the dying declarations as the possibility of the deceased being influenced by somebody in making the dying declarations cannot be ruled out.”

Shri Bhatia has also placed reliance on the judgment of the Apex Court in **State of Gujarat v. Jayrajibhai Punjabhai Varu, AIR 2016 SC 3218**. The relevant portion of the judgment reads as follows:

“10. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

11. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

12. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can

be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. 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.”

14. On the other hand, on behalf of the State/Respondent, reliance has been placed on **Bakhshish Singh v. State of Punjab, AIR 1957 SC 904**, wherein it was held that since the language of the subordinate Courts and the police in the State of Punjab for recording statements was Urdu, the mere fact that the dying declaration was recorded in Urdu and not in the language of the deceased, was not a ground to reject the dying declaration. The Apex Court held as follows:

“5. As a matter of fact in the Punjab the language used in the subordinate courts and that employed by the Police for recording of statements has always been Urdu and the recording of the dying declaration in Urdu cannot be a ground for saying that the statement does not correctly reproduce what was stated by the declarant. This in our opinion was a wholly inadequate reason for rejecting the dying declaration.”

15. In **State of Rajasthan v. Bhup Singh, (1997) 10 SCC 675**, the Apex Court took a similar view and held as follows:

“10. Assuming that the deceased gave her statement in her own language, the dying declaration would not vitiate merely because it was recorded in a different language. We bear in mind

that it is not unusual that courts record evidence in the language of the court even when witnesses depose in their own language. Judicial officers are used to the practice of translating the statements from the language of the parties to the language of the court. Such translation process would not upset either the admissibility of the statement or its reliability, unless there are other reasons to doubt the truth of it.

11. Nor would a dying declaration go bad merely because the magistrate did not record it in the form of questions and answers. It is axiomatic that what matters is the substance and not the form. Questions put to the dying man would have been formal and hence the answers given are material. Criminal courts may evince interest in knowing the contents of what the dying person said and the questions put to him are not very important normally. That part of the statement which relates to the circumstances of the transaction which resulted in his death gets the sanction of admissibility. Here it is improper to throw such statement overboard on a pedantic premise that it was not recorded in the form of questions and answers.”

16. In Mohd. Hushan Andhra Pradesh v. State of Andhra Pradesh,

(2002) 7 SCC 414, the Apex Court held as follows:

“5. The High Court has noticed that Surender Rao, PW-1, the magistrate has testified that on 10.3.1988 he recorded dying declaration between 2.46 a.m. to 3.15 a.m. He has certified that he had signed it and had taken the endorsement of the doctor on duty that the deceased was in a fit state of mind to make a statement; the deceased had made the dying declaration in question-answer form in Urdu and he had translated the version and recorded the declaration in English. After recording her statement, he explained the statement in Hindi to the deceased who admitted its correctness. Thereafter, he took the thumb impression of the deceased on her declaration (exhibit P2). In cross-examination, he has stated that he could read and speak in Hindi; the deceased had made statement in Urdu which he could understand as Urdu and Hindi languages are almost similar and in Hyderabad, Urdu and Hindi languages are spoken in the same way, there being no much difference. PW-11, Dr.

Vidya Sagar, corroborated the statement of PW1, to the effect that the deceased was in a fit mental condition to make statement and that he was present when the statement was recorded by the magistrate.”

17. In **Meesala Ramakrishan v. State of Andhra Pradesh, (1994) 4 SCC 182**, the Apex Court went on to hold that a dying declaration can even be recorded on the basis of nods and gestures and the same possesses evidentiary value.
18. In the present case, none of the neighbours or even the husband of the deceased have come out to support the case of the prosecution. In any event, the occurrence did not take place in the presence of any witness. The statement of the husband of the deceased is neither here nor there. He gave three different versions in his statement. Therefore, one will have to go through the other evidence on record. PW-11, R.P. Yadav is the Assistant Sub-Inspector of Police, who came to the site after receiving the information on wireless. It is he who took Kachrabai (deceased) as well as accused Suresh to the hospital. He has proved the application, Ex.P-3, which he made to the doctor for recording the statement of the Kachrabai. He has also proved his signatures on the application made to the Tahsildar, Ex.P-9. He then himself recorded the statement of Kachrabai, which is Ex.P-10 and on the basis of this, FIR, Ex.P-10A was recorded. It was important to note that this witness in cross-examination has stated that accused Suresh is the same whom he had arrested at the spot. He further clarifies that when he had got admitted Suresh in the hospital, he had not arrested him. He further states that though he had not arrested accused Suresh, the villagers had caught hold of him.
19. The main argument of Shri Bhatia is that Kachrabai (deceased) was speaking in Chhattisgarhi and, therefore, her statement should

have been recorded in Chhattisgarhi. It is true that the statement should be recorded in as close a language as is possible to the deceased. However, Chhattisgarhi has no script. No question has been put to the Tahsildar/Magistrate that he did not know Chhattisgarhi. Chhattisgarhi is quite similar to Hindi and a person who is working as Naib-Tahsildar/Tahsildar can be presumed to have knowledge of Chhattisgarhi. The statement had to be recorded in Devnagari Script. The witness (PW-9, Naib-Tahsildar) has recorded it in a language which he is more comfortable with him. No suggestion has been put to him that the witness does not know Chhattisgarhi. In fact, this witness clearly states that the questions answers were exchanged in Chhattisgarhi. There is nothing unusual if the statement was recorded in Hindi. The Apex Court in two judgments, which are cited above, has held that merely because the dying declaration was recorded in a different language is not a ground to discard the same. We must also keep in mind the fact that PW-5, Dr. Lal Mohammed has fully supported the version of PW-9. He states that he had, after examining the victim, certified that she was fit to make a statement. This fact is also recorded in the opening portion of the dying declaration. Thereafter, the dying declaration has been recorded in question answer form and at the end of the dying declaration it has been mentioned that the dying declaration was read over and accepted to be correct by the victim. Thereafter, there is another note of the doctor that at the time of making of the statement, the victim was fully conscious. Therefore, we find no reason why the dying declaration should not be relied upon.

- 20.** Shri Bhatia has placed great reliance on the statement of PW-1, Hemkumari neighbour and PW-8, Prahlad, the husband of the deceased, where they have stated that the deceased could read and

write and that she could sign. This argument in itself is contradictory. On the one hand, it is urged that the deceased could only speak Chhattisgarhi and knew no other language and on the other hand, it is argued that she was semi-literate and could even read newspapers. As pointed out earlier, Chhattisgarhi has no script. Therefore, the only newspaper which Kachrabai (deceased) could have read would be the Hindi newspaper. If she could understand Hindi newspapers then mere fact that her statement was recorded in Hindi would not make the statement unreliable. Another important factor is that PW-11, R.P. Yadav has stated that he had taken Suresh from the place of occurrence straightway to the hospital. A suggestion has been put to him that this part of the statement is false, but he has denied the same and again he has reiterated the same that Suresh is the same person who was caught hold by the villagers and whom he had taken to the hospital. This statement of PW-11, R.P. Yadav is supported by the document, Ex.P-11, which clearly shows that one Suresh, son of P.L. Soni, aged 27 years was brought to the hospital for medico legal examination. It is true that the prosecution has been lax in not proving the documents relating to the admission of Suresh in hospital on 20.3.2000.

21. Next reliance has been placed by Shri Bhatia on unexhibited document allegedly signed by PW-5, Dr. Lal Mohammed, which would indicate that Suresh was taken to the hospital on 27.3.2000. However, Dr. Lal Mohammed, when he appeared in the witness box, was not confronted with this document and he was not asked any question in this regard.

22. There are in fact not one dying declaration but there are two dying declarations, one recorded by PW-9, Pulak Bhattacharya, Naib-Tahsildar and another recorded by PW-11, R.P. Yadav, Assistant Sub-

Inspector in the form of the statement of the victim as a Dehati Nalishi. This is also thumb marked by the victim. There is no effective cross-examination of PW-11 in this regard.

23. Another argument of Shri Bhatia is that the dying declaration as well as the Dehati Nalishi have not been signed by the victim but have been thumb marked. When a person has been burnt even though the person may be asked it is not possible for that person to sign a document and there is nothing unusual in getting it thumb marked. We must also remember that PW-5 and PW-9 are a doctor and a Naib-Tahsildar, respectively. They are independent witnesses. They have no personal axe to grind. We cannot disbelieve their statements. Nothing has been brought on record to show why these people should tell a lie and why they should have created a false document with a view to implicate the accused. The fact that Suresh was caught hold of by the villagers and was brought to the hospital itself indicates that he was at the spot and he has given no explanation in this regard.

24. Keeping in view all these facts, we are of the considered view that the Learned Trial Court was fully justified in relying upon the dying declaration (Ex.P-4). There is no merit in the appeal. We, therefore, dismiss the appeal and uphold the impugned judgment. The Appellant is on bail. He is directed to surrender before the Trial Court or he shall be taken into custody forthwith for undergoing the remaining part of sentence.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE