

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1100 of 2007**

- Manu Gunu @ Itwari Bhaina S/o Kapesar Bhaina, aged about 45 years, R/o Village Kansa, Police Station Nawagarh, District Janjgir-Champa, (C G)

---- Appellant**Versus**

- The State Of Chhattisgarh, through the Police Station Nawagarh, District Janjgir Champa (CG)

---- Respondent

For Appellant : Shri Rishi Rahul Soni, Adv. through legal aid.
For Respondent/State : Smt. Madhu Nisha Singh, Panel Lawyer.

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment On Board By
Justice Prashant Kumar Mishra

22/03/2017

1. The appellant has called in question his conviction under Sections 302 and 354 of the IPC and sentence of life imprisonment and RI for one year respectively and a fine of Rs.1,000/- for conviction under Section 302 IPC, in default, additional RI for 6 months. The said conviction is for committing murder of deceased Suhaga Bai,

at about 3 pm on 17.11.2006 by setting her ablaze after tying her to a cot.

2. Prosecution case, in short, is that the appellant is *Bada Sasur* (elder brother of father-in-law) of the deceased. The deceased was married with PW-3 Malikram in the year 2006 itself. On the date of the incident the appellant and the deceased were alone in the house as the mother-in-law of the deceased and her husband had gone to the nearby field to cut paddy. At about 3 pm the appellant allegedly either tried to commit rape with the deceased or on suspicion that she is having affair with some other person in the village, he tied the deceased with the legs of the cot and set her ablaze after pouring kerosene oil over her body. On hearing alarm raised by the deceased, PW-4 Jitendra Kumar Yadav reached the place of occurrence and soon thereafter husband (PW-3) Malik Ram and mother-in-law (PW-5) Arti Bai reached the place of occurrence. The other villagers also assembled and in their presence the deceased made oral dying declaration. The deceased was taken to the District Hospital, Janjgir where her first dying declaration was recorded by PW-12 Filman Toppo on 17.11.2006 vide Ex.-P/10, which has been proved by PW-6 Hulas Ram Kashyap, who has appended his signature as a witness over the said document. Thereafter the second dying declaration (Ex.-P/12)

was recorded by the Executive Magistrate (PW-9) D.R. Sidar on 17.11.2006 itself. The deceased succumbed to the burn injuries on 18.11.2006. The postmortem was conducted by Dr. Vijay Kumar Verma (PW-14) opining that the deceased died due to shock and septicemia, as a result of extensive burn injuries.

3. After completing the investigation, charge sheet was filed under Sections 354 and 302 of the IPC and on appreciation of evidence adduced by the prosecution, the trial Court has eventually convicted the appellant for committing both the offences.
4. Shri Soni, learned counsel for the appellant would submit that the deceased having suffered 100% burn injuries and from the evidence of PW-4 Jitendra Kumar Yadav, it is clear that she was unconscious, therefore, the evidence of oral dying declaration and the recording of dying declaration are not trustworthy. He would further submit that the deceased had probably committed suicide but since only the appellant was present in the house at the time of incident, he has been falsely implicated. He would also submit that there is absolutely no evidence for convicting the appellant under Section 354 of the IPC.
5. Per contra, learned State Counsel would submit that almost all the witnesses except PW-4 have supported the dying declaration both

oral and written. Therefore, the prosecution case is well founded and it does not suffer from any infirmity. She would further submit that from the contents of the dying declaration the ingredients of offence under Section 354 IPC are also proved, therefore, the appellant's conviction under Section 354 IPC also does not call for interference.

6. The prosecution case rests on evidence of oral dying declaration as well as written dying declaration. The principle as to when dying declaration is credible for sustaining conviction has been succinctly dealt with by the Supreme Court way back in the year 1958 in the matter of **Khushal Rao v. State of Bombay**¹ wherein the following has been held:-

“16. 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; (3) 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

1 AIR 1958 SC 22

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.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases,

but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case.”

7. This Court in Cr.A. No.757/2003 (Smt. Mamta Verma Vs. State of Chhattisgarh) had an occasion to consider other judgments of the Supreme Court in paras-16 to 23 in the following manner:-

16. The Supreme Court in **Lallubhai Devchand Shah and Others v. The State of Gujarat**² held that a dying declaration must be closely scrutinized as to its truthfulness like any other important piece of evidence in the light of the surrounding facts and circumstances of the case, bearing in mind, on the one hand, that the statement is by a person who has not been examined in the Court on oath and, on the other hand, that the dying man is normally not likely to implicate innocent persons falsely. It was further observed that there can be no doubt that when a dying declaration is recorded the person who records the statement must be satisfied that the person who makes the statement is consciously making the statement understanding the implications of the words he uses. The expression ‘fit state of mind’ used in the case referred to above means no more than that. Negating the plea of commission of suicide by the deceased in the said case, the Supreme Court observed that no sufficient material has been placed before the Court to show that the deceased committed suicide nor any previous history of attempting to commit suicide or showing disgust for life and further that it is not shown what impelled her to commit suicide on that day.

17. In **State of Uttar Pradesh v. Ram Sagar Yadav and Others**³, the Supreme Court held that it is settled that, as a matter of law, a dying

² 1971 (3) SCC 767

³ AIR 1985 SC 416

declaration can be acted upon without corroboration. Referring to **Khushal Rao** (supra), **Harbans Singh and another v. The State of Punjab**⁴ and **Gopalsingh and Another v. State of Madhya Pradesh and Another**⁵ it is further observed that there is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear of convincing that the Court may, for its assurance, look for corroboration to the dying declaration.

18. In State of Orissa v. Parasuram Naik⁶ the Supreme Court did not consider the dying declaration to be reliable because the deceased died within 15 minutes of suffering extensive burn injuries.

19. Once again in Paparambaka Rosamma (supra) the Supreme Court refused to sustain the conviction for the reason that the deceased suffered 90% burn injuries and there was no certification by the Doctor that the injured was in fit state of mind at the time of making the dying declaration.

20. In Laxmi (Smt.) v. Om Prakash and Others⁷ the Supreme Court reiterated the principle that the conviction can be solely based on dying declaration, but Court can look for corroboration if the dying declaration suffers from infirmities. The Supreme Court also held that dying declaration made to police officer is also admissible in evidence, but ordinarily it should be recorded by Magistrate except where deceased was in such precarious condition that the police officer himself had to record the statement.

4 AIR 1962 SC 439

5 (1972) 3 SCC 268

6 (1997) 11 SCC 15

7 (2001) 6 SCC 118

21. In **Panchdeo Singh v. State of Bihar**⁸ the Supreme Court reiterated the principle that if the dying declaration inspires the confidence of the Court, it can be acted upon for convicting the accused and corroboration would be necessary in case of infirmity only. However, in **Ramilaben Hasmukhbhai Khristi** (supra) the Supreme Court though reiterated the principles but went further to observe that a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the words of the person making the declaration. But the Court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration. In this case, the Supreme Court raised a doubt on the dying declaration recorded by the Executive Magistrate because it was not in question-answer form, but was lengthy narration of what the deceased had spoken.

22. In **Lakhan v. State of Madhya Pradesh**⁹ the Supreme Court has considered almost all important previous decisions starting from **Kushal Rao** (supra) stating that the doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means ‘a man will not meet his Maker with a lie in his mouth’ and referring to Section 32 of the Evidence Act, 1872 it was held that the dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases. Referring to **Munnawar and Others v. State of Uttar Pradesh and Others**¹⁰ it was observed that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after

8 (2002) 1 SCC 577

9 (2010) 8 SCC 514

10 (2010) 5 SCC 451

recording of the dying declaration. There may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded. **Paras Yadav and Others v. State of Bihar**¹¹ was referred to reiterate that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the inured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement. The Supreme Court, thereafter, summarised the law in the following form in para 21 :

21. In view of the above, the law on the issue of dying declaration can be summarised to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinise the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.

23. The Supreme Court in a very recent case rendered in **Gulzari Lal v. State of Haryana**¹² held that a valid dying declaration may be made

11 (1999) 2 SCC 126

12 (2016) 4 SCC 583

without obtaining a certificate of fitness of declarant by a medical officer. While observing reference has been made to **Laxman v. State of Maharashtra**¹³.”

8. The principle is therefore well settled that a dying declaration can be acted upon if the Court is convinced that it is truthful reproduction of what the deceased has stated and that at the time of making such statement, the deceased was in fit mental condition. It is the satisfaction of the officer recording dying declaration and it is not necessary that on every such occasion when the dying declaration is recorded it has to be accompanied with certificate of physician. If the dying declaration inspires confidence of the Court, it can be acted upon for convicting the accused and corroboration would be necessary in case of infirmity only. Therefore, if on the basis of entire gamut of evidence, dying declaration inspires the Court's confidence, conviction can be based solely on the dying declaration.
9. When we examine the evidence available in the case at hand on the touchstone of the settled legal principles discussed above in respect of credibility of dying declaration, it is to be seen that PW-3 Malik Ram happens to be the husband of the deceased as well as nephew of the appellant. Thus he is related to the deceased as well as the appellant. He has fully supported the case of the prosecution by

13 (2002) 6 SCC 710

reiterating the contents of oral dying declaration as was informed by him to the police in his case diary statement. Similarly, PW-5 Arti Bai, PW-6 Hulas Ram Kashyap, PW-7 Ram Khilawan and PW-8 Ram Vilas have also supported the oral dying declaration. In addition, PW-1 Dr. PC Jain has also deposed that the deceased had informed him that the appellant has set her on fire. Even though his case diary statement has not been recorded because he is an expert witness, yet since this part of oral dying declaration was also recorded in his medical report (Ex.-P/1), it cannot be ignored.

10. When the deceased was taken to the hospital, her first dying declaration was recorded by PW-12 Filman Toppo vide Ex.-P/10 and thereafter second dying declaration was recorded by the Executive Magistrate (PW-9) D.R. Sidar vide Ex.-P/12.
11. As against the witnesses before whom the deceased has made oral as well as written dying declaration, there is only one witness namely PW-4 Jitendra Kumar Yadav who has deposed that the deceased was unconscious. It is very difficult, rather impossible, that all the witnesses would give false evidence to implicate the appellant in the crime. Even if, for the sake of argument, oral dying declaration can be doubted, in view of the evidence of PW-4 there is no reason as to why the Court should doubt the testimony

of independent witnesses namely, PW-9 D.R. Sidar and PW-12 Filman Toppo, who are officers of the Police and Revenue Departments respectively and have no axe to grind against the appellant so as to falsely implicate him in the offence.

12. On overall analysis of the evidence adduced by the prosecution, we are fully convinced that both the dying declarations were given by the deceased in a fit mental condition and they inspire confidence of the Court which can be acted upon to sustain conviction. There is nothing in the cross-examination of any of the important witnesses who supported the dying declarations so as to discredit their statement and even to doubt recording of dying declarations.
13. There is one aspect of the matter argued by learned counsel for the appellant that in dying declaration the deceased would state about the reason for setting her on fire was to commit rape whereas in other dying declaration she has stated that the appellant was suspecting her character, therefore, dying declarations should not be believed.
14. We are not impressed with the submission for the reason that in both the dying declarations, the deceased has attributed the act of setting her on fire to be committed by the appellant. Merely because in some dying declaration the allegation of attempt to

commit rape is levelled and in the other, allegation of having suspicion over her character is made, the dying declarations cannot be disbelieved because in all the dying declarations, the act of setting her on fire has been attributed to the appellant. In view of the settled legal principle that ordinarily a person on death bed would not falsely implicate any other person than the real culprit, would strengthen our finding that the above discrepancy of having two motives for the appellant to commit the crime would not discredit or make the dying declarations unbelievable. It might be true that the appellant was having suspicion over the character of the deceased, therefore, he also wanted to have intercourse with the deceased and, therefore, he tried to commit rape.

15. For the foregoing, we do not find any substance in this appeal, which fails and is hereby dismissed.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Rajendra Chandra Singh Samant)