

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 24th January , 2017
Decided on: 25th May, 2017

+ **CRL.A. 930/2001**

RAM SWAROOP

..... Appellant

Represented by: Mr. D.K. Mathur, Advocate.

versus

STATE OF DELHI

..... Respondent

Represented by: Mr. Hirein Sharma, APP for the
State with Inspector Saroj Bala
and SI Amit Kumar, PS
Ambedkar Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Convicted for offences punishable under Sections 376/306 IPC vide impugned judgment dated 22nd November, 2001 on the strength of dying declaration of the deceased prosecutrix and the testimony of her husband coupled with the medical evidence, Ram Swaroop prefers the present appeal.
2. Vide impugned order on sentence dated 22nd November, 2001 Ram Swaroop was directed to undergo rigorous imprisonment for a period of 10 years for the offence punishable under Section 376 IPC and rigorous imprisonment for a period of 8 years for the offence punishable under Section 306 IPC and directed to pay fine of ₹5000/- each on both the counts and in default whereof to undergone simple imprisonment for two years on each count.
3. Process of law was set into motion on receipt of DD No.25 Ex.PW6/A on 11th February, 2000 at PS Ambedkar Nagar which was handed over to PW 6 SI Manish Kumar. On reaching the spot along with Constable Gajraj,

he was informed that the injured has been sent to Safdarjung Hospital. An application was filed by SI Manish Kumar before the attending doctor for recording the statement of injured whereon the doctor opined the injured to be fit for making statement. Thus, the statement of prosecutrix who died later was recorded whereon FIR No. 43/2000 under Section 376 IPC was registered vide Ex.PW-6/B. After the death of the prosecutrix, Section 306 was added in the course of investigation. Statement of PW-3 husband of the prosecutrix was also recorded. The deceased in her statement disclosed that she was residing at Madangir and was aged about forty years. She had been working as a labourer and was having four daughters and a son. About one month ago, a contractor by the name of Ram Swaroop who resided in Sangam Vihar and with whom she was working, forcibly raped her. She did not disclose the incident of rape fearing disgrace. Thereafter, she tried several times to call him so that he may come and repent on his misdeed but he did not turn up. On 11th February, 2000 at about 3.30 PM when she was alone at her house and was feeling too much dejected because of the incident of rape, she poured kerosene oil and burnt herself, as she felt that she was not able to show her face to anyone. She further stated that her husband knew the contractor Ram Swaroop and his house.

4. Learned counsel for the appellant relying upon the decision of the Supreme Court reported as (2000) 6 SCC 671 Sudhakar & Anr. Vs. State of Maharashtra and the Division Bench of this Court reported as 2010 (4) JCC 2416 Sandy @ Ved Prakash & Ors. Vs. State contends that even as per the statement of the prosecutrix recorded soon before the death, since the alleged rape was committed one month prior to the incident, the same cannot be an instigation or abetment by the appellant driving the prosecutrix to commit

suicide. He thus contends that the appellant is entitled to be acquitted for the offence punishable under Section 306 IPC. He further states that the statement so recorded by the Investigating Officer is not sufficient to convict the appellant for the offence punishable under Section 376 IPC also as under Section 32 of the Indian Evidence Act, statement of the deceased recorded soon before the death can be used only when the circumstances leading to the death of the deceased are in question and not to convict the appellant for offence which happened one month prior to the incident.

5. The two issues raised in the present appeal i.e. whether the commission of offence of rape would amount to abetment of suicide and whether the dying declaration of the deceased was admissible in evidence and sufficient to base the conviction for offence punishable under Section 376 IPC came up for consideration before this Court in Sandy @ Ved Prakash (supra) wherein this Court on the first issue held: -

“31. Thus, we first proceed to consider whether the offenders (whoever committed the rape) could be held guilty for abetting the suicide of the deceased. While discussing this aspect we would be proceeding on the assumption that the deceased told that she was raped by the appellants and due to shame she decided to end her life. We may not be understood to mean that we have returned a finding against the appellants at this stage that they had raped the deceased. We shall be discussing this aspect at the next stage of our decision when we discuss the contours of Section 32(1) of the Evidence Act, 1872 and the evidence brought on record.

32. The word “suicide” in itself is nowhere defined in Indian Penal Code, however its meaning and import is well known and requires no explanation. “Sui” means “self” and “cide” means “killing”, thus implying an act of self-killing. In short a person committing suicide must commit it by himself,

irrespective of the means employed by him in achieving his object of killing himself.

33. Suicide by itself is not an offence under either English or Indian criminal law, though at one time it was a felony in England. In England, the former law was of the nature of being a deterrent to people as it provided penalties of two types namely: (i) Degradation of corpse of deceased by burying it on the highway with a stake through its chest; (ii) Forfeiture of property of deceased by the State. At present, there is no punishment for suicide under English law.

34. In India, suicide in itself is not an offence for successful offender is beyond the reach of law, however attempt to commit suicide is an offence punishable under Section 309, IPC.

35. The offence of abetment of suicide is made punishable by Section 306, IPC which reads as under:

“If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable for fine.”

36. Section 306 does not define the expression “abet” nor is the expression defined in Chapter II of Code, which deals with general explanations. However, Chapter V of Code makes provisions with respect to abetment. Section 107 in this Chapter defines “abetment” in following terms:

“A person abets the doing of a thing, who—

First—Instigates any person to do that thing; or

Secondly—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

37. As per the prosecution the deceased was raped in the fields. She returned home and decided to take poison as she thought that the humiliation heaped upon her has blackened her face and she had no face to show in the society. With this feeling of dejection, despair, humiliation and frustration she fed a sulphas tablet to her infant daughter and consumed sulphas tablets herself. The rapists have not been alleged to have conspired with the deceased for the doing of the act of consuming sulphas. The rapists have not been alleged of doing any act in conspiracy or any illegal omission. The rapists have not been alleged to aid, much less intentionally aid the deceased in consuming sulphas. Thus, the second and the third limb of Section 107, IPC are just not attracted. The question would be whether the first limb is attracted i.e. whether can it be said that the rapists instigated the deceased by their act of rape to consume sulphas.

38. The Madhya Pradesh High Court and the Andhra Pradesh High Court have taken diametrically opposite views. In the decisions Mohd. Hafeez v. State of M.P., MANU/MP/ 0238/ 2009 and Kokkiligadda Veeraswamy v. State of A.P., 2005 Cri. L.J. 869 it has been held that an accused by raping a girl instigates her to commit suicide if there is a proximate and live link between the offending act of the accused and the commission of suicide by the girl. Two Judges of the same Court have taken

the opposite view in the decisions Battula Konadulu v. State of A.P., MANU/AP/0833/2006 and Deepak v. State of M.P., 1994 Cri. L.J. 767 where the aforesaid question was answered in negative.

39. What is the meaning of the word “instigation” occurring in Section 107 of the IPC?

40. The answer to the aforesaid question can be found in the following observations of Supreme Court in the decision Chitresh Kumar Chopra v. State, (2009) 11 SCALE 24:

“Thus, to constitute “instigation”, a person who instigates another has to provoke, incite, urge or encourage doing of an act by the other by “goading” or “urging forward”. The dictionary meaning of the word “goad” is “a thing that stimulates someone into action: provoke to action or reaction” (See Concise Oxford English Dictionary); “to keep irritating or annoying somebody until he reacts” (See: Oxford Advanced Learner's Dictionary—7th Edition). Similarly, “urge” means to advise or try hard to persuade somebody to do something or to make a person to move more quickly and or in a particular direction, especially by pushing or forcing such person. Therefore, a person who instigates another has to “goad” or “urge forward” the latter with intention to provoke, incite or encourage the doing of an act by the latter. As observed in Ramesh Kumar's case (supra), where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide an “instigation” may be inferred. In other words, in order to prove that the accused abetted commission of suicide by a person, it has to be established that: (i) the accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction;

and (ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation.

In the background of this legal position, we may advert to the case at hand. The question as to what is the cause of a suicide has no easy answers because suicidal ideation and behaviours in human beings are complex and multi-faceted. Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating contributor to an individual's vulnerability to end his own life, which may either be an attempt for self-protection or an escapism from intolerable self. (Emphasis Supplied)”

41. In the decision Gangula Mohan Ready v. State of A.P., 2010 (1) SCALE 1, the Supreme Court observed as under:

“Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

The intention of the Legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306, IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.”

(Emphasis Supplied)

42. A similar view was taken by Supreme Court in the decision Sanju @ Sanjay Singh Senger v. State of M.P., (2002) 5 SCC 371, wherein it was observed as under:

“The word “instigate” denotes incitement or urging to do some drastic or unadvisable action or to stimulate or to incite. Presence of mens rea, therefore, is the necessary concomitant of instigation.” (Emphasis Supplied)

43. The ratio of the aforementioned decisions is that in order to convict an accused for an offence punishable under Section 306, IPC, in respect of the act of instigation, it has to be proved by the prosecution that the accused had the “intention” to instigate the deceased to commit suicide.

44. In the instant case, can it be said that the rapists had the “intention” to instigate the deceased to commit suicide?

45. The answer to the aforesaid question is an emphatic “no” for the reason there is no material on the record wherefrom it could be inferred that the rapists raped the deceased with an intention to instigate her to commit suicide.

46. Thus, we hold that in the facts of the instant case, the rapists of the accused cannot be held liable for the offence of having abetted the suicide of the deceased.”

6. The second issue that whether the dying declaration was admissible under Section 32 of Indian Evidence Act also came up for consideration before this Court in Sandy @ Ved Prakash (supra) wherein this Court held-

“48. With the advent of adversarial trials, it was recognized that oral evidence must be direct. In the context of the Indian Law of Evidence, Section 59 of the Indian Evidence Act, 1872 mandates that except for contents of documents and electronic records, facts must be proved by oral evidence. Section 60 of the Indian Evidence Act, 1872 mandates that oral evidence must, in all cases whatever, be direct i.e. if it refers to a fact seen it must be the evidence of he who saw; if it refers to a fact heard, it must be the evidence of he who heard and if it refers to a fact perceived by any

other sense or any other manner, it must be the evidence of he who says that he perceived. But, directed by necessity, exceptions to the said general rule of law were recognized under the common law and find a reference even under the Indian Evidence Act, 1872. The rule excluding hearsay evidence stands relaxed under Section 32 of the Indian Evidence Act, 1872 which makes admissible through the mouth of somebody else a statement of fact made by a person who is dead or cannot be found or becomes incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expenses, but limited to Clause 1 to Clause 8 of Section 32 of the Indian Evidence Act, 1872. It may be noted at the outset that statements of relevant facts made by a person who is dead are treated as a relevant fact.

49. Since we are dealing with an issue of the admissibility of a statement made by a dead person i.e. the deceased in the context of the charge for rape, in the backdrop of the circumstance that as per the prosecution, feeling ashamed by her being gang raped and feeling dejected as she thought that her face has been blackened in society, the deceased committed suicide; we need to discuss the applicability of Section 32(1) for the proof of the deceased being raped through the medium of her statement made to various persons. Since the deceased admittedly died soon thereafter and had made the statement after she had consumed sulphas tablets and death was in her contemplation, we shall be referring to the statement as a dying declaration as loosely understood and then determine whether in law as well the same can be treated as her dying declaration and admissible for the charge of rape.

50. In the context of a statement made by a person who is dead, Section 32(1) of the Evidence Act stipulates as under:

“When the statement is made by a person 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.”

51. A bare reading of Section 32(1) of the Evidence Act, 1872 makes admissible two types of statements i.e. those which fall

within either the first limb or the second limb of Section 32(1). The first limb of Section 32(1) uses the expression “as to the cause of his death” and the second limb uses the expression “as to any of the circumstances of the transaction which resulted in his death”. But, the second limb stands immediately qualified by the further expression “in cases in which the cause of that person's death comes into question”.

52. Now, ex facie, the expression “cause of his death” does not mean “resulted in his death”. The two are distinct expressions and convey two different meanings. The first is narrower than the second. The first expression “cause of his death” may be linked to the well recognized principle of “causa causan” and in that setting, the expression “cause of his death” would mean the immediate act (cause) which resulted in death without any intervening event. It would mean that the death resulted as the immediate and direct consequence of the act and in the field of criminal law would require that the death of the person is an integral part of the offence of which the person against whom the accusation is made is charged of. The second limb of Section 32(1) does not have a root in the common law principle of law pertaining to dying declarations, but embodies “a policy of the law keeping in view the peculiar social circumstances in India”.

53. Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English law where only the statements which directly relate to the cause of death are admissible. The second part of Clause (1) of Section 32, viz., “the circumstances of the transaction which resulted in his death, in cases in which the cause of; that person's death comes into question” is not to be found in the English Law.

54. This distinction has been clearly pointed out in the decision Rajindra Kumar v. State, AIR 1960 Punjab 310, where the following observations were made:

“Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts

made by a person who is dead are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case, in which the cause of that person's death comes into question. It is well settled by now that there is difference between the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death. In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death.”

55. The aforesaid distinction pithily brought out by the decision of the Punjab High Court has been cited with approval in para 18 of the decision (1984) 4 SCC 116 : AIR 1984 SC 1622, Sharad Birdichand Sarda v. State of Maharashtra.

56. To what extent the expression “in cases in which the cause of that person's death comes into question, which expression immediately succeeds the preceding expression “as to any of the circumstances of the transaction which resulted in his death” restricts the span of the preceding expression.

57. If it is interpreted to mean that it restricts the sweep of the expression ‘as to any of the circumstances of the transaction which resulted in his death’ by limiting the same to the cause of the death of the person and cause meaning the direct cause without any intervening event, we find no escape from the conclusion that though appearing to be different, the two limbs of Section 32(1) would in essence be the same. Such an interpretation would violate the well recognized rule of interpretation that where the Legislature has used two expressions, it is presumed that the Legislature has intended to convey two different meanings and requires the Court, as far as the language permits, to interpret the words and phrases in a manner that nothing becomes otiose i.e. redundant.

58. *Dealing with Section 32 of the Evidence Act and quoting with approval passages from the “Law of Evidence” by Woodroffe and Amir Ali, in the decision AIR 1959 SC 18, Ratan Gond v. State of Bihar, the Supreme Court observed as under:*

“The only relevant clause of Section 32 which may be said to have any bearing is Clause (1) which relates to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. In the case before us, the statements made by Aghani do not relate to the cause of her death or to any of the circumstances relating to her death; on the contrary, the statements relate to the death of her sister.

In the ‘Law of Evidence’ by Woodroffe and Amir Ali, (Vol. II) the authors have collected all the cases at one place and indicated their conclusions thus:

To sum up, the test of the relevancy of a statement under Section 32(1), is not what the final finding in the case is but whether the cause of the death of the person making the statement comes into question in the case. The expression ‘any of the circumstances of the transaction which resulted in his death’; is wider in scope than the expression ‘the cause of his death’; in other words, Clause (1) of Section 32 refers to two kinds of statements: (1) statement made by a person as to the cause of his death, and (2) the statement made by a person as to any of the circumstances of the transaction which resulted in his death.

The words ‘resulted in his death’ do not mean ‘caused his death’. Thus, it is well settled that declarations are admissible Only insofar as they point directly to the fact constituting the res gestae of the homicide; that is to say, to the act of killing and to the circumstances immediately attendant thereon, like threats and difficulties, acts, declarations and incidents, which constitute or accompany

and explain the fact or transaction in issue. They are admissible for or against either party, as forming parts of the res gestae.”

59. The aforesaid passage clearly brings out two important legal facets. Firstly, the test of relevance is not what the final finding in the case is, but whether the cause of the death of the person making the statement comes into question in the case and secondly that the declarations would be admissible even when they constitute the res gestae of the homicide as long as the declarations pointedly direct to a fact constituting the res gestae of the homicide.

60. We may hasten to add by way of clarification that the expression res gestae used by the Supreme Court is not to be understood in the context of res gestae as understood under Section 6 of the Evidence Act. The Supreme Court has clearly used the expression in its generic sense.

61. To remove them away from the category of hearsay evidence it has to be ensured that the statements of the deceased even pertaining to circumstances of the transaction which resulted in his death and of course statements pertaining to what caused his death must have proximate relation to the actual occurrence. This has been highlighted by the Privy Council in the celebrated decision AIR 1939 PC 47, Pakala Narayana Swami v. Emperor. Lord Atkin had laid down the following tests:

“It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the ‘circumstances’ can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expressions

indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible.... Circumstances of the transaction” is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in ‘circumstantial evidence’ which includes evidence of all relevant facts. It is on the other hand narrower than ‘res gestae’ Circumstances must have some proximate relation to the actual occurrence.... It will be observed that ‘the circumstances are of the transaction which resulted in the death of the declarant’.”

62. As a matter of legal history, we may note that the aforesaid declaration of law in *Pakala Narayan Swami's* case has been consistently followed by various High Courts and was cited with approval in para 11 of the decision in *Sharad Birdichand Sarda's* case (*supra*).

63. In para 12 of the decision in *Sharad Birdichand Sarda's* case (*supra*), the Supreme Court cited with approval a passage from a decision of the Calcutta High Court *Protima Dutta v. The State*, 81 Cal WN 713 as under:

“This observation taken as a whole would, in my view, imply that the time factor is not always a criterion in determining whether the piece of evidence is properly included within ‘circumstances of transaction’ ‘In that case the allegation was that there was sustained cruelty extending over a period of three years interspersed with exhortation to the victim to end her life’. His Lordship further observed and held that the evidence of cruelty was one continuous chain, several links of which were touched up by the exhortation to die. “Thus evidence of cruelty, ill-treatment and exhortation to end her life adduced in the case must be held admissible, together with the statement of Nilima (who committed suicide) in that regard which related to the circumstances terminating in suicide’.”

64. Thus, it can safely be said that in addition to the two legal facets noted in para 59 above which flow out of the decision of the Supreme Court in Ratan Gond's case (*supra*) a third legal facet flows out from the aforesaid decision of the Calcutta High Court which has been approved by the Supreme Court, being that, even in cases of suicide statements of facts relating to the circumstances terminating in suicide would be admissible under Section 32(1) of the Evidence Act.

65. In para 21 of the decision in Sharad Birdichand Sarda's case (*supra*) 5 propositions were held as emerging from the language of Section 32(1) of the Evidence Act, being as under:

“(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes

place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of Clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.”

66. Let us have a look to Illustration (a) to Section 32 of the Evidence Act. It reads as under:

*“The question is, whether A was murdered by B;
or*

A dies of injuries received in a transaction in the course of which she was ravished.

*The question is, whether she was ravished by B;
or The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.*

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts."

67. We highlight the last part of the illustration, which pertaining to a case of rape, treats as a relevant fact statements made by the victim of rape as to the cause of her death referring even to the rape. The illustration brings out the umbilical relationship between an offence; the circumstances of the transaction pertaining to the offence and; the death. Indeed there exists a direct and organic relationship between the three and gives primacy to none. In the Treatises on the law of evidence: Sarkar's Law of Evidence (12th Edition) at page 353 the learned authors of the Treatises while bringing out the distinction between the English Law and Indian Law, with reference to case law have written:

"Under the English law, it is essential to the admissibility of dying declarations, first, that the declarant should have been in actual danger of death at the time when they were made; secondly, that he should have had a full apprehension of his danger; and lastly, that death should have ensued. These three things must be proved to the satisfaction of the Judge, before a dying declaration can be received: Both in England and America, evidence of this description (dying declarations, is not admissible in any civil case and in criminal cases it is not admissible upon charges other than homicide; or as to homicides other than that of the declarant. The latter part of this limitation was somewhat infringed in R v. Baker, 2 M & Rob 53. In R v. Hind, 8 Cox 300, in which R v. Baker (supra) was cited, POLLOCK CB, held adopting the doctrine of R v. Mead, 2 B & C 605, that the true rule confined the declarations to charges involving the homicide of the declarant. These restrictions do not appear in Section 32. It is not required that the maker should be in expectation of imminent death, nor is it restricted to cases of homicide only. It is admissible also in civil cases.

Summary—Thus under the Act—

(1) A dying declaration is relevant whether the person who made it was or was not, at the time when it was made under expectation of death, that is, it is immaterial whether there existed any expectation of death at the time of the declaration. In a Calcutta case it has been observed that the necessity of recording a dying declaration arises only when the hopes of life are given up. Upendra v. R, 52 CLJ 425. It is common sense that there is no need to record dying declaration until that stage is reached or it is apprehended that a person will not survive.

[In re Shk Tinoo, 15 WR 11 and R v. Ujrail, 2 NWP 12, it was held that before a dying declaration was admitted it should be proved that the person making it knew that he was dying or believed himself to be in danger of approaching death. It was decided under Section 29 of Act 2 of 1855 which was similar to the English Law with the exception that the declarant might have entertained hope of recovery].

(2) The admissibility of dying declaration is not confined to the case of homicide only, but it would be admissible, whatever the charge may be, provided the cause of death comes under inquiry: Illustration (a) shows that in a charge of rape, a woman's dying declaration is admissible as to the circumstances of the transaction resulting in her death. In England a dying declaration is not admissible to prove rape [R v. Newton, 1 F & F 641], or robbery [R v. Lloyd, 4 C & P 233].

(3) A dying declaration is admissible in this country in civil suits, under the terms, “whatever may be the nature of the proceeding in which the cause of death comes into question.” Thus in a suit for damages for death caused by a railway accident due to the negligence of the company, the declaration of the passenger killed, as to the cause of his death is admissible. Illustration (a) shows that it is receivable in civil as well as in criminal cases.”

68. *It thus stands crystal clear that the second limb of Section 32(1) of the Evidence Act, 1872 is not restricted by the fact that in the cases before the Court, with reference to the cause of the maker's death/the death has to be a fact in issue i.e. the death is not an ingredient of the offence. In whatever manner the cause of death comes into question, in a proceedings where the circumstances of the transaction have a proximate and a direct cause with the person's death, whatever be the offence under inquiry, the statements would be admissible in evidence.*

69. *This goes on to evince the fact that learned Judges and fraternity of Jurists could not have been impervious of the fact that there are two distinct expressions used in Section 32(1), and there are two distinct limbs of the said section; obviously, the second following the first and thus neither the two limbs nor the two expressions could be given a meaning which is but the same; the learned Judges and Jurists have been conscious of the fact that the two limbs and the two expressions embody two distinct meanings. They were conscious that any interpretation which disregarded the aforesaid had to be discarded as unacceptable."*

7. In Sudhakar & Anr. (supra) the Supreme Court held that the statement of the deceased should have a close nexus with the actual transaction. On the facts, it was noted that the statement of the deceased giving the circumstance in which she was allegedly raped by two accused was recorded by police 11 days after the occurrence and she committed suicide after 5½ months of the occurrence. At the time of making the statement there was nothing indicating the deceased's mind for committing suicide on account of the humiliation suffered by her due to rape, nor the circumstances stated in the statement suggested that a person making such statement would under normal circumstance commit suicide after a lapse of 5½ months. It was held that the statements did not constitute a dying declaration to be admissible

under Section 32 of the Indian Evidence Act. Further in view of the delay in lodging the FIR, medical examination, non-examination of the material witness and further witnesses turning hostile, it was held that the prosecution has failed to prove beyond reasonable doubt the charge for offence punishable under Sections 376/34 IPC as well.

8. In the present case, prosecution has relied upon three dying declarations of the deceased, first in the MLC, then to the Investigating Officer and the third one to her husband. PW-1 Dr. Rajat Kumar Prasad proved the MLC of the deceased Ex.PW-1/A wherein the alleged history given by the informant herself was noted as “*allegedly sustained burn injury when she poured kerosene oil over her while making tea and set her on fire. Allegedly she had sexual assault 1 month back.*” In the cross-examination Dr. Rajat Kumar Prasad stated that patient was able to speak when brought to the hospital and the alleged history was written by him in his own handwriting.

9. The second dying declaration was made by the deceased to the Investigating Officer PW-6 SI Manish Kumar who took the endorsement of the Doctor who opined the injured to be fit for statement vide Ex.PW-6/B and recorded the statement of the deceased vide Ex.PW-6/A. Contents of Ex. PW-6/B as recorded by SI Manish Kumar have been noted hereinabove in para-3.

10. The third dying declaration according to the prosecution was made to the husband of the deceased who deposed that on the date when his wife got burn injuries she told him that she was raped by the accused and as a result of the anguish she poured kerosene and lit herself. Thereafter he took his

wife to the hospital. He clarified that his wife had not disclosed about the incident of rape prior to the day when she got burn injuries.

11. Analyzing the facts in the present case on the touchstone of the law laid down by the Hon'ble Supreme Court in Sudhakar & Anr. (supra) and the Division Bench of this Court in Sandy @ Ved Prakash (supra), it can safely be held that there was no abetment/instigation by the appellant, even if the allegation of rape is accepted to be true, soon before the death of the deceased, forcing/persuading her to commit suicide. There was no proximate or live link between the commission of alleged offence of rape and the suicide committed. Hence the conviction of Ram Swaroop for offence punishable under Section 306 IPC cannot be sustained.

12. As noted above, no complaint of rape was lodged by the prosecutrix for one month thus, there was no medical evidence to corroborate the version of the deceased except the three dying declarations made. In the dying declaration made in the MLC the name of Ram Swaroop does not figure, whereas it is mentioned in the statement made to the police officer Ex.PW-6/B on the basis of which FIR was registered and as disclosed to her husband.

13. In the decision reported as 1958 SCR 552 Khushall Rao vs. The State of Bombay the Hon'ble Supreme Court held that it is not an absolute rule nor even a rule of prudence that has ripened to a rule of law that to sustain the order of conviction, dying declaration must be corroborated by other independent evidence. Rule of caution requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise

unreliable. Any evidence adduced for this purpose can only detract from its value but does not affect its admissibility. The dying declaration, therefore, may be tested as any other piece of evidence. Once the court reaches the conclusion that the dying declaration is true, no question of corroboration arises. The dying declaration cannot be placed in the same category as evidence of an accomplice or a confession.

14. It is thus settled by catena of decisions that if after careful scrutiny of the dying declaration the Court is satisfied that it is true and free from any effort to induce the deceased to make false statement and is coherent and consistent, there is no legal impediment to form such dying declaration, the basis of conviction even if there is no corroboration. As noted in the MLC though history of sexual assault is mentioned but the name of the assailant has not been mentioned. Further for one month the deceased did not disclose about the offence of rape to anyone including her husband. Testimony of her husband also did not disclose that during this period of one month the deceased felt depressed, neglected or had a changed behavior.

15. As against the evidence of the prosecution noted above, Ram Swaroop has examined witnesses in defence of which DW-1 and DW-3 are the neighbours of the deceased. The consistent statement of the defence witnesses is that the husband of the deceased used to hardly work for three-four days in a month and was in the habit of playing cards, gambling and drinking whole of the day. The deceased used to earn the livelihood for the family and there was a constant quarrel between the husband and the wife. Even in the night preceding the incident, a quarrel took place between the husband and the wife.

16. Further DW-2 is the daughter-in-law and widow of the pre-deceased son of PW-3 and the deceased. She also stated that a quarrel took place between the deceased and her husband on 10th February, 2000. PW-3 was not earning and he used to beat the deceased. When she consoled her mother-in-law, PW-3 warned her not to interfere. On the request of the deceased she had not gone to the job on that day. At about 3.00 PM, she had gone to the market to purchase vegetables and when she came back she found that her mother-in-law had set herself on fire.

17. In view of the evidence led by the prosecution and the evidence of the defence including that of the daughter-in-law of PW-3 and the deceased, conviction of Ram Swaroop for offence punishable under Section 376 IPC can also not be sustained.

18. Consequently the impugned judgment of the conviction and order on sentence are set aside. Appeal is disposed of.

19. The bail bond and the surety bond of the appellant are discharged.

20. TCR be returned.

21. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

(MUKTA GUPTA)
JUDGE

MAY 25, 2017
‘v mittal’