

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 244 of 2010**

(Arising out of judgment dated 13.1.2004 in ST No.267/03 of the learned 3rd
Additional Sessions Judge (FTC), Korba)

Judgment Reserved On : 18/01/2018

Judgment Delivered On : 09/04/2018

- State Of Chhattisgarh, through Station House Officer, Police Station Kotwali, District Korba, Chhattisgarh

----- Appellant

Versus

- Karam Singh @ Karma, S/o Thorsingh Panjabi, Age 35 years, resident of Sharda Bihar, PS Kotwali, Korba, District Korba (CG)

----- Respondent

For Appellant : Miss Tripti Rao, Panel Lawyer.
For Respondent : Smt. Smita Jha, Advocate.

**Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Shri Ram Prasanna Sharma, JJ**

C A V JUDGMENT

The following judgment of the Court was delivered by **Prashant Kumar Mishra, J.**

1. Challenge in this acquittal appeal is to the judgment of acquittal rendered by the 3rd ASJ, (FTC) Korba acquitting the accused of the charge under Section 302 of the IPC for committing murder of his wife Anita.

2. Briefly stated, case of the prosecution is that Karam Singh @ Karma (hereinafter referred to as 'the respondent') is previously married having 2 issues, who reside separate at Sharda Vihar, Korba. During subsistence of his first marriage, the respondent has kept the deceased from the year 1998 at Sanjay Nagar, Korba, by marrying her in 'Chudi' form, however, they have no children out of their relationship. Deceased Anita was also married to one Uttara Kumar but after 4 years of marriage, they got customary divorce without taking recourse to law. Anita has one son from her previous marriage who was residing with her on the date of the incident. At about 11 pm on 14.1.2003, the deceased suffered 98% burn injuries in her house and was admitted to the hundred bedded hospital, Korba wherefrom she was referred to Bilaspur. On 17.1.2003, her dying declaration (Ex.-P/8) was recorded at District Hospital (CIMS, Bilaspur) by (PW-9) Dr. C.N. Tiwari, wherein she stated that after a quarrel with her husband, he directed to prepare meal, which she obeyed and awoke her to have the meal. The respondent demanded hot water and shortly thereafter the husband instructed her to bring water on which she said that she is not keeping well for about 4 months, therefore, he should take water himself. This led to quarrel and both of them poured kerosene oil and thereafter the respondent set her ablaze. He poured water over her body. At the time of incident, hearing the alarm raised by the deceased,

Ku. Sangita and Ku. Sarita reached the spot and witnessed the incident. The deceased succumbed to the injuries during treatment at CIMS, Bilaspur on 21.1.2003.

3. Merg was registered at P.S. City Kotwali, Bilaspur and was referred to the Police Station Korba having jurisdiction over the place of incident. Spot inquest was prepared vide Ex.-P/1. Match sticks, stove etc. were recovered from the place of occurrence vide Ex.-P/2. For chemical examination of the seized articles, the same were referred to the Forensic Science Laboratory. After recording the case diary statements of the witnesses, charge sheet was filed against the respondent for committing offence under Section 302 of the IPC.
4. In course of trial, the prosecution examined 18 witnesses to bring home the charges. The trial Judge, on appreciation of evidence, has acquitted the respondent on the basis of contradictions and omissions and the failure of Korba Police to produce the first dying declaration recorded by the Executive Magistrate, Korba. The trial Court has disbelieved the dying declaration (Ex.-P/8) recorded at CIMS, Bilaspur only on the count that the first dying declaration has not been produced before the Court. It has also been disbelieved for the reason that the dying declaration does not carry signature or thumb impression of the deceased.

5. Learned State Counsel has argued that the trial Court has completely misread the evidence and has recorded perverse and unacceptable finding. Undue importance has been accorded to the minor contradictions and omissions which have no bearing on the basic prosecution case. The trial Court has also ignored the oral dying declaration made by the deceased in the presence of witnesses namely, (PW-1) Ku. Sangita Kurre, (PW-2) Ku. Sarita and (PW-3) Smt. Bedbai.
6. On the other hand, learned counsel for the respondent has supported the impugned judgment.
7. Before proceeding to analyse and marshall the evidence, we shall remind ourself about the scope of interference available with the High Court while considering the appeal against acquittal.
8. In **Sheo Swarup and others vs. King Emperor**¹, it is held that Criminal Procedure Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power. Again in **Athley Vs. State of UP**², it is held that “In our opinion, it is not correct to say that

1 AIR 1934 Privy Council 227

2 AIR 1955 SC 807

unless the appellate Court in an appeal under Section 417, Criminal Procedure Code came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order. It has been laid down by this court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion. Again in **Sanwat Singh Vs. State of Rajasthan**³, it is observed that there was no difficulty in applying the principles laid down by the Privy Council and accepted by the Supreme Court. The appellate Court not only shall bear in mind the principles laid down by the Privy Council but also must give its clear reason for coming to the conclusion that the order of acquittal was wrong.

9. The foregoing discussion yields the following results: (1) an appellate Court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in *Sheo Swarup Case* afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only

³ AIR 1961 SC 715

consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified.'

Again in **Animireddy Venkata Ramana and Others Vs. Public Prosecutor, High Court of Andhra Pradesh**⁴, it is held that when there were very serious infirmities in the judgment of the trial Court both in regard to the legal propositions as also appreciation of evidence and there were non-consideration of material facts and consideration of irrelevant facts, the appellate court's interference with the judgment of acquittal would be warranted.

- 10.(PW-1) Ku. Sangita Kurre is the niece of deceased Anita. She resides at a distance of about 10 steps from the house of the deceased. Sangita would depose that at about 11 pm on 14.1.2003 she heard the alarm raised by the deceased by calling 'save save' (बचाओ—बचाओ). She came out of her house and witnessed the flames coming out from the roof sheet of the house of the deceased. She and her younger sister Sarita knocked the door by calling "*Mousi* please open the door", on which the accused/respondent opened the door and they saw their *Mousi* was engulfed in fire. The accused/respondent watered over the

4 (2008) 5 SCC 368

body of the deceased. She asked the deceased as to how she caught fire. The deceased stated that the accused/respondent has poured kerosene oil and set her ablaze. When the accused was confronted as to why he set her *Mousi* ablaze, he threatened that if she raises screams, she would also be thrown to fire. Thereafter they dressed their *Mousi* and as soon as they came out of the house, she informed Nanhe Soni, Budhwara Bai and Raj Bai about the incident. She explains that when the doctors and the police personnels asked about the incident, she could not disclose out of fear. On the next day, she also informed her maternal grand father (नाना) about the incident.

11.(PW-2) Ku. Sarita speaks about the quarrel between the deceased and the accused which occurred at about 8 pm during which the accused was beating his wife. She fully supports the statement of (PW-1) Ku. Sangita about the incident which occurred at 11 pm, as has been narrated by (PW-1) Sangita. In para-5 of her examination-in-chief, she speaks about the oral dying declaration made by the deceased. According to this witness, the accused started pouring water over the body of the deceased only after they reached the house of the deceased.

12.(PW-3) Smt. Bed Bai has also fully supported the evidence of PW-1 and PW-2 by stating that the deceased had made oral dying declaration in their presence immediately after the incident.

(PW-5) Budhwara Bai is the resident of the same locality. Although she has not supported the prosecution in respect of oral dying declaration but she admits that soon after the incident PW-1 and PW-2 had gone to the house of the deceased but she did not enter the house.

13. (PW-6) Kabir Das Mathur is the father of the deceased. He also makes a statement about oral dying declaration made by the deceased in his presence when he had gone to see her at Korba Hospital on the next day of the incident. In his case diary statement (Ex.-D/4), he had informed the police about the oral dying declaration made by the deceased. In the case diary statement (Ex.-D/2) of Ku. Sangita (PW-1), she had spoken to the police about the statement made by the accused admitting that he has set on fire the deceased.

14. (PW-7) Dr. A.K. Tiwari and (PW-12) Dr. A.D. Puraina had treated the deceased at Korba Hospital whereas (PW-9) Dr. C.M. Tiwari has proved the dying declaration (Ex.-P/8). In this dying declaration, he has certified that the patient was fully conscious and fit during recording of the statement. The deceased had clearly implicated the accused as the person who has set her ablaze. (PW-11) Dr. S.P. Garg has treated the deceased at CIMS, Bilaspur.

15.(PW-13) S.R. Chandra, ASI, has conducted some part of investigation. (PW-14) G.S. Rathore is a witness who has admitted in para-5 of his cross-examination that he has obtained the statement of the deceased on 15.1.2003 wherein she has stated that she caught accidental fire from the stove. However, this dying declaration has neither been produced nor proved by the prosecution, nor has been summoned by the defence.

16.(PW-16) S.S. Dubey, Naib Tehsildar, has recorded the dying declaration (Ex.-P/8). He has explained that fingers of both hands of the deceased were burnt, therefore, her signature or thumb impression was not taken in the dying declaration. (PW-17) Shyam Sunder Patel, ASI and (PW-18) C.P. Bhatt, Inspector, have also conducted some part of investigation.

17.A close scrutiny of the evidence, as discussed above, clearly indicates that the deceased had suffered 96% burn injuries at the time of her admission in the Korba Hospital, as is mentioned in Ex.-P/5 and Ex.-P/6. The deceased had made oral dying declaration in the presence of witnesses (PW-1) Ku. Sangita Kurre, (PW-2) Ku. Sarita and (PW-3) Smt. Bed Bai who are close relatives and their presence in the house of the deceased soon after the incident is very natural, as they reside about 10 steps away from the house of the deceased. Moreover, dying declaration (Ex.-P/8) has been proved by (PW-16) S.S. Dubey,

Executive Magistrate/Naib Tehsildar, Bilaspur. The mental condition of the deceased and her fitness to make statement has been proved by (PW-9) Dr. CM Tiwari. The finding recorded by the trial Court that the dying declaration (Ex.-P/8) is not reliable because it does not carry signature or thumb impression of the deceased is perverse in view of the statement made by PW-9 and PW-16 who have clearly stated that as all the tips of the fingers had suffered burn injuries, it was not possible to obtain signature or thumb impression of the deceased. The defence has not cross-examined (PW-9) Dr. Tiwari on this aspect of the matter nor he has been confronted that the deceased had not suffered any burn injuries on the fingers and yet her signature or thumb impression was not obtained on the dying declaration. On the point as to whether the deceased had suffered any burn injuries over the fingers, (PW-9) Dr. CM Tiwari was the only person who could have given any answer but the defence conspicuously failed to ask this question to the witness.

18. The other ground on which dying declaration has been disbelieved is on account of admission made by (PW-14) G.S. Rathore that he has recorded dying declaration at Korba on 15.1.2003 wherein the deceased had informed them about suffering accidental burn injuries. This reasoning of the trial Court does not appeal us because firstly, the dying declaration

recorded by PW-14 in whatever form has not been proved and secondly, even if for the sake of argument, this statement was made by the deceased, it would remain a case of two dying declarations. In such a situation, it is still open for the Court to rely the dying declaration which appears to be genuine and trustworthy.

19. In **Khushal Rao Vs. State of Bombay**⁵, the Supreme Court held thus:-

“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 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

5 AIR 1958 SC 22

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.”

20. The Supreme Court in **Lallubhai Devchand Shah and Others**

v. The State of Gujarat⁶ held that a dying declaration must be closely scrutinized as to its truthfulness like any other important

6 1971 (3) SCC 767

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.

21. In **State of Uttar Pradesh v. Ram Sagar Yadav and Others**⁷, the Supreme Court held that it is settled that, as a matter of law, a dying declaration can be acted upon without corroboration. Referring to **Khushal Rao** (supra), **Harbans Singh and another v. The State of Punjab**⁸ and **Gopalsingh and Another v. State of Madhya Pradesh and Another**⁹ 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

⁷ AIR 1985 SC 416

⁸ AIR 1962 SC 439

⁹ (1972) 3 SCC 268

circumstances surrounding the dying declaration are not clear of convincing that the Court may, for its assurance, look for corroboration to the dying declaration.

22. In **Lakhan v. State of Madhya Pradesh**¹⁰ the Supreme Court has considered almost all important previous decisions starting from **Khushal 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**¹¹ 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 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. The Supreme Court thereafter summarise the law in the following form in para 21 :

21. In view of the above, the law on the issue of

¹⁰ (2010) 8 SCC 514

¹¹ (2010) 5 SCC 451

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. In the case at hand, dying declaration (Ex.-P/8) has been duly proved by the prosecution. It is fully corroborated by the other witnesses namely, PW-1, PW-2 & PW-3 who have clearly stated that the deceased had made oral dying declaration in their presence.

24. In our considered view, the trial Court has wrongly refused to believe dying declaration (Ex.-P/8) and has recorded perverse finding about the guilt of the accused. The evidence available in the case only points towards the guilt of the accused that it is he who set his wife Anita (deceased) on fire at about 11 pm on 14.1.2003 in their house when they were alone and none else was there.

25. In his statement under Section 313 CrPC, the accused/ respondent has not explained the circumstances or the nature of incident or the incident due to which the deceased suffered burn injuries.

26. For all the above stated reasons, we are not in agreement with the judgment of acquittal rendered by the trial Court. It deserves to be and is hereby set aside. The respondent is held guilty under Section 302 of the IPC and is thus convicted for commission of offence under Section 302 of the IPC. The respondent is sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/-. The trial Court is directed to prepare supersession warrant and issue non-bailable warrant against the respondent and after his arrest, he be sent to jail for serving the sentence. The trial Court shall submit the compliance report to this Court by **29th June, 2018**.

27. The Appeal is accordingly allowed.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Ram Prasanna Sharma)

Barve