

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1099 of 2012

- Raju S/o Late Girdhari Cherwa, aged about 28 years R/o Village Hansuli, Mahadevpara, Police Chowki Bariyon, PS - Dhourpur, Distt. Surguja (CG).

---- Appellant

Versus

- State Of Chhattisgarh Through - Station House Officer, Police Station Dhourpur, Distt. Surguja (C.G.)

---- Respondent

CRA No. 1107 of 2012

- Shivnath Ram, S/o Late Jagarnath Panika, aged about 23 years, R/o Hansuli Mahadeo Para, Police Chowki Bariyon , P.S. Dhourpur , Distt. Surguja C.G. , Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh, Through - SHO, P.S. Dhourpur, Distt. Surguja (CG)

---- Respondent

		<u>Cr. A. No.1107/2012</u>
For Appellant	:	Smt. Meena Shastri, Advocate
For Respondent	:	Shri Vivek Sharma, Govt. Advocate.
		&
		<u>Cr. A. No.1099/2012</u>
For Appellant	:	Shri Rahul Mishra, Advocate
For Respondent	:	Shri Vivek Sharma, Govt. Advocate.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Gautam Chourdiya

Judgement

Per P. Diwaker, J

20/06/2018

1. The above appeals since arising out of a common judgment, are heard together and being disposed of by this common judgment.

2. Challenge in the above two appeals is to the judgment of conviction and order of sentence dated 7.11.2012 passed by the 1st Additional Sessions Judge, Ambikapur in S.T. No.414/2011 whereby the learned Additional Sessions Judge has convicted the accused/appellants for the offences punishable under Section 302 of the Indian Penal Code (henceforth 'the IPC') and sentenced each of them to undergo RI for Life with fine of Rs.1,000/-, in default of payment of fine to undergo additional RI for 4 months.
3. The prosecution story, in brief, is that on 5.7.2011 at about 5 in the evening, the accused/appellants came to the deceased, who was working in his kitchen-garden, and demanded money from him for consuming liquor and on his refusal, accused Shivnath caught hold of both the hands of deceased and accused Raju poured kerosene on his head, back & shoulder from the bottle, which he was carrying with him, and set him ablaze. Hearing cries of the deceased, Vifalram (PW-4), Nanabau (PW-6) & Godhan (PW-11) rushed to him and extinguished fire. On seeing them coming, the accused ran away. Thereafter, the deceased went to the police station and lodged report of the incident based on which offence was registered FIR (Ex.P-14) against the appellants. Deceased was sent for medical examination to the hospital at Bariyon where he was examined by Dr. A. Kachhap vide Ex.P-12 and he noticed 90% burn injury on his person including hair, face, hands, back & thighs. The deceased was referred to the District Hospital, Ambikapur for better treatment and in the hospital when the Executive Magistrate was summoned to record his statement, he gave statement on 6.7.2011 in which the events leading to the incident in which he was set afire have been described by him. Immediately thereafter numbered FIR was registered under Section 307/34 of the IPC. The deceased succumbed to his burn injuries while

undergoing treatment in the hospital on 17.7.2011. On receipt of death intimation (Ex.P-3), merg intimation (Ex.P-4) was recorded on 17.7.2011. Inquest on the body of deceased was prepared vide Ex.P-6 on 31.3.2011. Body of deceased was sent for post-mortem examination which was conducted by Dr. Anupam Minj (PW-2) vide Ex.P-2 and he noticed about 60-65% superficial to deep burn on the body of deceased. He opined that cause of death of deceased was septicaemic shock due to 60-65% burn injuries. Statements of witnesses were recorded in the course of investigation.

4. After investigation, charge sheet under Section 302/34 of the IPC was filed followed by framing of charge under that section by the Court below against the accused/appellants. The prosecution in order to bring home the charge levelled against the accused persons examined 13 witnesses in all. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.
5. After hearing counsel for the parties and considering the material available on record, the trial Court by the impugned judgment convicted & sentenced the accused/appellants herein in the manner as described above.
6. Learned counsel for the accused/appellants submit that;
 - there are inconsistencies in the dying declaration and FIR lodged by the deceased and as such, dying declaration appears to be a concocted document prepared just to implicate the appellants falsely.
 - Even if the entire prosecution case is taken as it is, it is apparent that there was no intention of any of the appellants to cause death or such bodily injury as is likely to cause death of the deceased in

the ordinary course of nature. Therefore, the appellants, at best, can be convicted under Section 304 Part II of the IPC and not under Section 302/34 of IPC as has been done by the trial Court.

- the appellants are in jail for the last about seven years and therefore after converting their conviction under Section 304 Part II of IPC, they be sentenced to the period already undergone.

7. On the other hand, learned counsel appearing for the State has supported the impugned judgment and submitted that conviction of accused/appellants is strictly in accordance with law. He submits that version given by the deceased in the dying declaration and FIR are consistent that it was the accused/appellants who poured kerosene and set fire to him and thereby he sustained burn injuries for which he succumbed while undergoing treatment in the hospital. He further submits that the manner in which the deceased was set ablaze i.e. by pouring kerosene on him from his head, clearly shows that they had a pre-determined mind to kill the deceased. The offence would show that it is a cold blooded murder in a heinous manner by pouring kerosene over his body and set ablaze. In these circumstances, the sentence awarded by the trial Court is commensurate with the proved guilt of accused/appellants. It is neither harsh nor excessive and therefore no interference is called for.
8. We have heard learned counsel for the parties and perused the impugned judgment and record of the trial Court.
9. Ramashray Singh (PW-1) is the Revenue Inspector who prepared the spot map (Ex.P-1).
10. Dr. Anumpam Minj (PW-2) is the doctor who conducted post-mortem examination over the body of deceased and noticed 60-65% superficial to deep burn. He opined that mode of death was septicaemic shock due to

60-65% superficial to deep from with infected wounds.

11. Hareram Sharma (PW-3) is the person who gave intimation to the police regarding the death of deceased based on which merg intimation (Ex.P-4) was recorded.
12. Bifal Ram (PW-4), brother of deceased, did not support the prosecution case and turned hostile.
13. Dr. Jibnus Ekka (PW-5) is the person who certified that the deceased was in a fit state of mind to make his statement. According to this witness, the Executive Magistrate recorded the statement of deceased in his presence and at that time the deceased was conscious and in a position to give his statement.
14. Nanbau alias Budhram (PW-6) did not support the prosecution case and turned hostile.
15. Dr. A. Kachhap (PW-7) is the doctor who initially examined the deceased at Primary Health Centre, Bariyon and noticed 90% burn injuries on his body vide Ex.P-12.
16. Vishwas Rao Maske (PW-8) is the Naib Tahsildar, who recorded the statement of deceased. He has stated that on getting information from the Sub Divisional Magistrate, Ambikapur, that a man with burn injuries had been brought to the District Hospital, Ambikapur, he went there and after getting it certified from the doctor that he was fit to make statement, he recorded his statement vide Ex.P-10. He has stated in his statement that on his refusal to give money to the appellants for consuming liquor, appellant Raju poured kerosene oil on her body and appellant Shivnath set him ablaze. This witness has further stated that as the deceased was unable to hold pen due to burn injuries, therefore, his right thumb impression was affixed to the statement (Ex.P-10).
17. Shankar Kashyap (PW-9) & Laxman Prasad Rajwade (PW-10) have

assisted in the investigation. Godhan (PW-11) & Sukhdev (PW-12) have not supported the prosecution and as such declared hostile.

18. Jitendra Singh (PW-13) is the investigating officer who has duly supported the prosecution case.

19. In the case in hand, all the eyewitnesses have turned hostile and the sole basis of conviction of accused/appellants is dying declaration made by the deceased.

20. The principle of 'dying declaration' is based on legal maxim "*nemo moriturus proesumitur mentiri*"— a man will not meet his maker with a lie in his mouth. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. However, since the accused has no power of cross examination, the court has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant.

21. The Hon'ble Supreme Court in a long line of decisions has laid down the principles governing dying declaration which could be summed-up as under:-

- (i) A dying declaration stands on the same footing as any other evidence and it is to be judged in the surrounding circumstances and with reference to the principles governing the assessment of evidence.
- (ii) If the deceased had several opportunities of making dying declarations, apart from the official record of it and whether the statements have been made at the earliest opportunity and was not the result of torturing by interested parties.

(iii) The Court must, in order to test the reliability of a dying declaration, keep in view the circumstances like the opportunity of the dying man for observation should also be considered e.g. 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 of making the statement; 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,."

22. In a recent decision in the case of **Pawan Kumar v. State of H.P.** reported in **(2017) 7 SCC 780**, again the Supreme Court has held as under in regard to admissibility of dying declaration:-

"25. In *Atbir v. Government of NCT of Delhi*, the Court, after noting earlier judgments, has laid the following guidelines with regard to admissibility of the dying declaration:-

"22. The analysis of the above decisions clearly shows that:

- (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
- (ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
- (iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
- (iv) 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.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.”

23. Lord Chief Justice Baron Eyre {See. R. v. Woodcock, (1789) 1 Lea 502} expressed his view relating to dying declaration as follows: -

“...That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is

silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice...”

24. We shall now proceed to examine the dying declaration of the deceased on the touchstone of the aforesaid principles.

25. According to prosecution, in the present case, deceased Pitambar had made a dying declaration before the Naib Tahsildar Vishwas Rao Maske (PW-8) in the District Hospital, Ambikapur at 10.30 a.m. on 6.7.2011 where he was taken for treatment after the occurrence. The deceased made dying declaration before PW-8 stating that on 5.7.2011 at 1.00 p.m. when he was working in his kitchen-garden, the accused/appellants came there, started demanding money from him for consuming liquor, on his refusal they took him near the house of one Houri and there again demanded money from him and when he again refused, accused Raju poured kerosene on him and accused Shivrath set him ablaze. According to Naib Tahsildar (PW-8), on 6.7.2011 on the information received by the Sub Divisional Magistrate, Ambikapur regarding the burn case in the District Hospital Ambikapur, he went to the hospital and recorded the dying declaration of deceased Pitambar. He has stated that before recording dying declaration of the deceased, he had ascertained from the doctor, who was on duty, as to whether the deceased was capable of giving his dying declaration or not and the doctor had certified by making an endorsement at the top of dying declaration that the patient was conscious and fit to give statement. He started recording statement of deceased at 10.30 a.m. He had recorded the dying declaration of the deceased in questions and answers form. He has further stated that as

the deceased had sustained burn injuries on his fingers, he was unable to hold pen and therefore he had obtained right hand thumb impression of the deceased after recording of dying declaration was over. The testimony of Naib Tahsildar (PW-8) stands completely corroborated by testimony of Dr. Jibanus Ekka (PW-5) who has stated that dying declaration was recorded by Naib Tahsildar (PW-8) in his presence and he had certified that deceased Pitambar was conscious at that time and in a position to give his statement. PW-5 & PW-8 were subjected to cross-examination by the defence counsel but he failed to elicit anything from them which may persuade us to doubt the veracity of dying declaration of the deceased.

26. Thus, from the above evidence it is clear that the deceased was in a conscious and fit state of mind, which is also evident from the certificate appended at the top of the dying declaration, and he told the Naib Tahsildar (PW-8) that accused Raju poured kerosene oil on him and accused Shivnath set him on fire. The deceased had made dying declaration in question- answer form in Hindi. Nothing could be elicited by the defence counsel in the cross-examination of the prosecution witnesses to suggest that the deceased was not in a fit state of mind at the time of making the dying declaration (Ex.P-10). There is also nothing on record to show that the deceased harboured any grudge against the appellants, so there was no occasion for him to depose falsely against them, particularly when he himself was on the death bed. All this clearly establishes that the dying declaration of deceased Pitambar is truthful and it was voluntarily made by him when he was in a fit state of mind and that he has vividly stated that it was the accused/appellants who poured kerosene on him and set him ablaze. Hence, we find no reason to disturb the finding of guilt of accused/appellants recorded by the trial court.

27. Further, we find no force in the submission of counsel for the accused/appellants that the act attributed to the appellants does not bring them within the purview of Section 302 of IPC. Evidence on record clearly shows that both the accused persons came to the deceased, demanded money from him for consuming liquor and on his refusal, accused Raju poured kerosene on him from his head and accused Shivnath lighted him with a match-stick. Thus, it is apparent that the appellants had all the intention to kill the deceased and it can safely be held that the said act was done with the intention of causing death. Their act amounts to murder. Though the evidence shows that one of the appellants made some attempt to extinguish fire, but the same is not sufficient to bring their proved act within the purview of culpable homicide not amounting to murder. Pouring an inflammable substance like kerosene on the deceased and set him on fire are the acts which open the doors of the mind of the assailants. The effect of the act proved against is like throwing a lighted match-stick on gun powder. The Hon'ble Supreme Court in **Bandarupalli Venkateswarlu v. State of Andhra Pradesh** reported in **(1975) 3 SCC 492** has considered intention of pouring kerosene, causing fire and observed as under:-

“Relying on the circumstance that the appellant tried to put out the fire, learned Counsel for the appellant urged that the appellant had no intention to commit the murder of the deceased and cannot therefore be convicted under Section 302. It is impossible to accept this submission because if the appellant set fire to the deceased after accused No.6 had poured kerosene on his body, there cannot be any doubt that the intention of the appellant was to kill the deceased.”

28. For the foregoing reasons, this Court is of the considered opinion that the findings recorded by the trial Court convicting the accused/appellant under Section 302/34 IPC are strictly in conformity with the material available on record and the Court below has not committed any error in passing the judgment impugned. The appeal thus has no substance and it is liable to be dismissed. Dismissal recorded accordingly. Since the accused/appellants are already in custody no extra direction is needed regarding their surrender etc.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(Gautam Chourdiya)
Judge

roshan/-