

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 975 of 2011

1. Vijay Kumar Binjhwar, son of Late Shri Ant Ram Binjhwar, aged about 21 years,
2. Tulsi Bai, wife of late Shri Anta Ram, aged about 41 years,

Both R/o Village Bagdar, Police Chouki-Urga, P.S.-Korba, Distt.-Korba, (C.G.)

---- Appellants

Versus

- State Of Chhattisgarh through Police Chowki-Urga, Police Station-Korba, Distt. Korba (CG)

---- Respondent

For Appellants	:	Shri Yogeshwar Sharma, Advocate.
For Respondent/State	:	Shri Ravindra Agrawal, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgment On Board By Justice Pritinker Diwaker

15/01/2018

This appeal arises out of the judgment of conviction and order of sentence dated 15.11.2011 passed by the Sessions Judge, Korba in ST No.117/2010, convicting each of the appellants under Section 304B and 302 of IPC and sentencing them under Section 302 of IPC for it being the graver one, to undergo imprisonment for life and to pay a fine of Rs.2000/- with default stipulation.

02. In the present case, name of the deceased is Gouribai, wife of appellant No.1 Vijay Kumar and daughter-in-law of appellant No.2 Tulsibai. Marriage of the deceased with appellant No.1 was solemnized

about three years prior to the date of incident i.e. 11.8.2010 and at the time of her death she was carrying pregnancy. As per prosecution case, on 11.8.2010 at about 5 pm the accused/appellants after pouring kerosene on the body of the deceased set her afire. Immediately thereafter she was taken to hospital where on 14.8.2010 her dying declaration Ex.P/16 was recorded by PW-16 TR Bhardwaj, Executive Magistrate, wherein she has stated that she was burnt by the accused persons in the name of dowry. During treatment, she succumbed to her burn injuries on 16.8.2010. After receiving intimation (Ex.P/11) from the hospital, unnumbered merg Ex.P/10 was recorded on 16.8.2010 and based on which numbered merg Ex.P/15 was recorded on 20.8.2010. Dehati Nalishi Ex.P/19 was recorded on 21.8.2010 on the basis of merg. Inquest on the dead body was conducted on 16.8.2010 vide Ex.P/17. Thereafter, the dead body was sent for postmortem which was conducted on the same day vide Ex.P/13 by PW-12 Dr. Harisingh Chandel who noticed infected 2nd degree burn extending from chin to anterior aspect of neck, front of chest, abdomen, anterior aspect of both upper limbs and lumbar region; rigor mortis was present in all four limbs. On internal examination, the doctor found lungs, liver, spleen, kidney congested. In his opinion, the cause of death was shock and hemorrhage as a result of infected burn and its complication. The accused/appellant No.1 was also medically examined vide Ex.P/10 on 22.8.2010 and old healed burnt injury mark on his right hand was noticed by the doctor. While framing charge, the trial Court framed charges under Sections 302 & 304B of IPC against the appellants.

03. So as to hold the accused/appellants guilty, the prosecution examined 17 witnesses in all. Statements of the accused were also

recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. In defence, they examined two witnesses.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellants as mentioned above.

05. Counsel for the appellants submits as under:

(i) that the dying declaration has not been recorded in accordance with law and neither signature nor thumb impression of the deceased was obtained thereon.

(ii) that the evidence reflects that when the deceased was taken out from the room in burnt condition, the room was bolted from inside and thus the question of the appellants burning the deceased does not arise.

(iii) that appellant No.1 suffered burnt injuries while saving the deceased.

(iv) that the evidence also reflects that at the time of incident, appellant No.2 was not present in the house and thus, at least, she is entitled to get the benefit of doubt.

(v) that the deceased suffered burn injuries accidentally and this has come in the unexhibited report given by the police.

06. On the other hand, State counsel supporting the impugned judgment has submitted as under:

(i) that in the dying declaration (Ex.P/16), the deceased has

categorically stated as to the manner in which she was burnt by both the appellants.

(ii) that the dying declaration contains a specific note that as both the hands of the deceased were completely burnt, it was not possible to obtain her signature. Even otherwise, it is not mandatory for the prosecution to obtain thumb impression or signature of the declarant.

(iii) that if the hostile witnesses have supported the defence, it will be of no help to the accused/appellants, in particular when the other evidence unerringly points out towards their guilt, because the hostile witnesses speak in the Court like a parrot.

(iv) that in his statement under Section 313 of CrPC, the appellant No.1 has taken a defence that he was not present at the time of occurrence of incident, however, as per his medical report Ex.P/20, he suffered burn injuries and thus, his aforesaid defence stands belied from his medical report.

(v) that PW-1 Bahartu Ram, PW-6 Ram Shankar and PW-7 Manharan while supporting the prosecution case have stated as to the manner in which the deceased was subjected to cruelty by the appellants in connection with demand of dowry. Since there was a persistent demand of dowry by the appellants and they killed the deceased due to non-fulfillment of such illegal demands, their conviction under Section 304B of IPC is also just and proper.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Bahartu Ram, father of the deceased, has stated that he was informed by the deceased that the appellants used to harass her for

demand of dowry. In his Court statement, he states that the deceased also made oral dying declaration before him in the hospital. However, the said fact is not there in his diary statement.

09. PW-4 Dinesh Kumar, witness to inquest, has turned hostile. PW-6 Ramshankar, brother of the deceased, has stated that his sister was subjected to cruelty for demand of dowry. He is also an alleged witness of oral dying declaration made by the deceased before PW-1 but this appears to be an improvement in his evidence. PW-7 Manharan, uncle of the deceased, has also made allegation of demand of dowry against the accused persons. PW-8 Fatkuram has turned hostile. PW-9 Girjadas and PW-11 Durga Prasad are witnesses to Panchanama Ex.P/7. PW-10 Mohanlal Kaiwart, Patwari, prepared the spot map Ex.P/9.

10. PW-12 Dr. Harisingh Chandel conducted postmortem on the body of the deceased on 16.8.2010 vide Ex.P/13 and noticed infected 2nd degree burn extending from chin to anterior aspect of neck, front of chest, abdomen, anterior aspect of both upper limbs and lumbar region; rigor mortis was present in all four limbs. On internal examination, the doctor found lungs, liver, spleen, kidney congested. In his opinion, the cause of death was shock and hemorrhage as a result of infected burn and its complication. PW-13 Noharlal Sahu, PW-14 Phoolchand and PW-15 Mukesh Singh, police personnel, assisted in the investigation. PW-16 TR Bhardwaj, Tehsildar, recorded dying declaration Ex.P/16 of the deceased. He has stated that in the dying declaration the deceased had categorically stated that after pouring kerosene on her body, she was set on fire by the appellants and that

they used to demand dowry and commit cruelty with her in connection therewith. She also informed that she was carrying pregnancy. He also conducted inquest vide Ex.P/17. He has denied the suggestion that due to pain the deceased made statement with unfit state of mind. PW-17 Lallan Singh, investigating officer, has duly supported the prosecution case.

11. DW-1 Nareshwar has stated that at the time of incident appellant No.1 had gone to graze his cattle whereas appellant No.2 was working in the field and that hands of appellant No.1 got burnt while he was saving the deceased. DW-2 Naresh has also stated that at the time of incident appellant No.1 had gone for grazing cattle whereas appellant No.2 had gone to the agriculture field.

12. Close scrutiny of the evidence makes it clear that on 11.8.2010 it is the accused/appellants who after pouring kerosene on the body of deceased set her on fire and while she was in hospital her dying declaration Ex.P/16 was recorded in question and answering form by PW-16 TR Bhardwaj, Executive Magistrate, wherein she has stated as to the manner in which she was set ablaze by the appellants.

13. In the matter of ***Lakhan Vs. State of MP, (2010) 8 SCC 514***, the Supreme Court after discussing number of judgments on the point of dying declarations summarized the law in this regard as under:

“20. In view of the above, the law on the issue of dying declaration can be summarized 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 scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.”

14. In ***Shudhakar Vs. State of MP, (2012) 7 SCC 569***, the Supreme Court held as under:

18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

“3. 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. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has

always to 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. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

15. Thus, keeping in view the aforesaid principles of law we proceed to examine the evidence of the present case to see whether the prosecution has been able to bring home the charge against the appellants on the basis of dying declaration.

16. In her dying declaration, the deceased has categorically stated that on 11.8.2010 at about 4-5 pm her husband (appellant No.1) and mother-in-law (appellant No.2) caught hold of her, poured kerosene on her body and both of them set her on fire and at that time, her father-in-law was sitting outside the house. She has further stated that her marriage was solemnized one year ago and since then she had been harassed by the appellants for dowry; her husband also committed *marpeet* with her and that she was carrying pregnancy. She has specifically stated that the appellants burnt her with a view to killing her. The said declaration bears certification by the doctor that the declarant has been fully conscious while making such statement. More so, in cross-examination, PW-16 has denied the suggestion that due to pain the deceased made statement with unfit state of mind.

A tip has also been recorded by the Executive Magistrate (PW-16) who recorded the dying declaration that on account of both the hands of the deceased being fully burnt, it is not possible to obtain her signature. In para-3 of his deposition he has stated that due to burning the fingers of the deceased had glued to each other. The Executive Magistrate has duly supported the prosecution case and there is no evidence to suggest that he was having any ill-will or animosity with the appellants or any interest in their false implications. In these circumstances, we have no reason to disbelieve the dying declaration Ex.P/16 of the deceased and it is sufficient enough to hold the appellants guilty.

17. The dying declaration also finds due support from the un rebutted evidence of PW-1 Bahartu Ram, PW-6 Ramshankar and PW-7

Manharan who have categorically stated as to the manner in which the deceased was being subjected to cruelty by the accused/appellants in connection with demand of dowry. As regards oral dying declaration by the deceased before PW-1, it appears to be an improvement on the part of the witnesses and therefore, we are not placing any reliance on the said evidence but that will not affect the credibility of the dying declaration.

18. We find no substance in the argument of the defence that at the time of occurrence of the incident, the accused persons were not present in the house in question. Appellant No.1 himself suffered burn injuries and this fact is evident from his medical report Ex.P/20, according to which old healed burnt injury mark on his right hand was noticed by the doctor, which itself falsifies his defence that at the relevant point of time he was not present in the house. As regards appellant No.2's presence, though the defence witnesses have stated that at the relevant point of time, appellant No.2 was not present in the house in question, but their diary statements are quite at variance with their Court statements on this point. Even otherwise, as already discussed above, when in the dying declaration the deceased has categorically stated about the commission of the offence by the appellants, which has been held to be trustworthy and free from the suspicion of falsity, the evidence of the defence witnesses cannot override the same.

19. For the reasons stated above, we are of the opinion that the findings of guilt recorded by the trial Court are based on proper appreciation of the evidence available on record and as such, are

hereby affirmed. Resultantly, the appeal being without any substance is liable to be dismissed and is dismissed as such. The appellants are reported to be in jail, therefore, no order regarding their arrest/surrender etc. is required to be passed.

Sd/

(Pritinker Diwaker)
Judge

Sd/

(Sanjay Agrawal)
Judge

Khan