

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 205 of 2010****Judgment reserved on 23-2-2018****Judgment delivered on 6-4-2018**

• State of Chhattisgarh

---- Appellant

Versus

• Poonam Bai, aged about 31 years, widow of Girdhar Sahu, r/o. Gurur, Tikrapara, Opposite irrigation Colony, Police Station Gurur, District Durg (CG).

---- Respondent

For Appellant/State Mr. Rajendra Tripathi, Panel Lawyer

For respondent Mrs. Indira Tripathi, Advocate.

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

CAV Judgment**Per Ram Prasanna Sharma, J**

1. This acquittal appeal is preferred against the judgment dated 30-4-2002 passed by the Additional Sessions Judge, Balod, (for short, "the trial Court") Sessions Division Durg in Sessions Trial No. 24 of 2002 wherein the trial Court has acquitted the respondent from the charge of commission of murder of one Vimla Bai on 1-11-2001 at about 12.05 p.m., at Tikrapara, Irrigation Colony, Gurur.

2. In the present case, name of the deceased is Vimla Bai wife of Pilaram Sahu (PW/3). Pilaram Sahu (PW/3) and Balaram are brothers

and respondent Poonam Bai is daughter of Baalram. Pilaram Sahu (PW/3) was living in the house constructed on a land allotted in lease (patta). Pilaram Sahu (PW/3) had gone to the house of Balaram for demanding patta of the land on which he constructed the house and at this point of time some altercation took place between them. On the date of incident deceased was in the house and at the same time respondent Poonam Bai came there and quarreled with her and thereafter poured kerosene on her body and lit the match stick. Vimla Bai sustained burn injuries between 80 – 100% and succumbed to the injuries in hospital. The matter was reported to Police Station Gurur on the same day against the present respondent and investigated by the police authorities. After completion of investigation charge-sheet was filed against the respondent. Respondent did not plead guilty, therefore, trial was conducted. After examination of prosecution witnesses, statement of respondent under Section 313 of Cr.P.C., was recorded and after hearing both the parties, the trial Court acquitted the respondent as mentioned above.

3. Learned State counsel submits as under:

- i) There is ample evidence of the persons present on the spot that deceased made oral dying declaration to them to the effect that respondent poured kerosene oil on her body and lit the match stick, but the trial Court rejected the version of the witnesses terming to be exaggerated version.

- ii) Dying declaration before the Executive Magistrate corroborates the oral dying declaration earlier made to the witnesses and as per postmortem report cause of death is burn injuries, but the trial Court recorded subjective finding based on conjectures and surmises.
- iii) The trial Court has not appreciated the evidence in its true and correct perspective and gave too much weightage to the minor contradictions and omissions contrary to law.

4) On the other hand, learned counsel for the respondent submits that the finding arrived at by the trial Court is based on proper marshaling of the evidence as there was no eye-witness account to the incident and when the deceased sustained 100% burn injuries, her dying declaration is not possible. In support of her arguments, she has placed reliance on the decisions of Hon'ble Supreme Court in the matter of **Laxman vs. State of Maharashtra¹**, **Muralidhar alias Gidda and another vs. State of Karnataka²**, **Vijay Pal Singh and others vs. State of Uttarakhand³**, **Dilawar Singh and others vs. State of Haryana and other connected matters⁴**, **Golbar Hussain and others vs. State of Assam and another⁵**, **Yogesh Singh vs. Mahabeer**

1 (2002) 6 SCC 710

2 (2014) 5 SCC 730

3 (2014) 15 SCC 163

4 (2015) 1 SCC 737

5 (2015) 11 SCC 242

Singh and others⁶ and Krishnegowda and others vs. State of Karnataka by Arkaloud Police⁷.

- 5) We heard learned counsel for the parties and perused the material available on record.
- 6) The first question for consideration is whether this Court can disturb the finding of acquittal recorded by the trial Court and whether any limitation should be placed upon such power.
- 7) In **Shoe Swarup vs. King Emperor⁸** 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 UP⁹**, it is held that “In our opinion, it is not correct to say that 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 Rajasthan¹⁰**, 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

6 (2017) 11 SCC 195

7 (2017) 13 SCC 98

8 AIR 1934 Privy Council 227.

9 AIR 1955 SC 807

10 AIR 1961 SC 715

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.

- 8) 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 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**¹¹, 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

11 (2008)

5 SCC 368

court's interference with the judgment of acquittal would be warranted.

- 9) From the above principles it is clear that the appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
- 10) To substantiate the charge, prosecution has examined as many as 13 witnesses.
- 11) Dr. J.S. Khalsa PW/11 conducted autopsy of deceased Vimla Bai on 2-11-2001 at Civil Hospital, Dhamtari and noticed the following injuries.
- i) Rigor mortis present in limbs, mouth open and tongue was inside,. tooth open with burn
 - ii) The body was burnt from top to toe., swelling on the face with 100% burn. There were different degrees of burn and somewhere skin peeled out and somewhere seen parchment

He opined that cause of death is due to shock and extensive burn and burns are ante-mortem. He further opined that time of death is since 24 hours of the examination. Version of this witness is unshaken during cross examination and there is no other expert's opinion contrary to the opinion of this expert and we have no reason to disbelieve the same.

- 12) Now the point for consideration is whether death is accidental or suicidal. No such suggestion was ever made to any of the prosecution witnesses and there is no iota of evidence to say that it is accidental or

suicidal death by pouring kerosene oil on the body by the deceased.

13) The next question for consideration is as to whether the respondent poured kerosene oil on the body of the deceased and lit the match stick and thereby committed her murder. Date of incident is 1-11-2001 and the matter was reported to Police Station Gurur on the same day by Lalita Sahu (PW/2) who is daughter of the deceased and was present near the spot. She deposed that on hearing cries of her mother, she reached to her where the deceased made oral dying declaration that respondent poured kerosene oil in bulk on her body and lit the match stick. This witness is constant right from the day of the incident. She lodged a report on the same day and she is firm in her statement while deposing before the court. Pilaram (PW/3) is husband of the deceased and as per version of this witness, deceased made oral dying declaration that respondent caused burn injuries to her. Version of Lalita Sahu (PW/2) and Pilaram Sahu (PW/3) is challenged on the ground that they are having inimical terms with family of the respondent, but the case of prosecution is not based on statements of only these two witnesses. Apart from these two witnesses, Yashwant Kumar (PW/5) is an independent witness and he also deposed that deceased made oral dying declaration before him to the effect that respondent burnt her. Statement of this witness under Section 161 of Cr.P.C. is recorded on the same day of incident in which he has stated about the same oral dying declaration made by the deceased to him. PW/4 Parvati Bai who is also an independent

witness, has deposed that deceased made oral dying declaration to her that the respondent burnt her. This witness is also firm with her earlier statement recorded under Section 161 of the Cr.P.C., on the next day of the incident i.e., on 2-11-2001.

14) Again dying declaration of the deceased was recorded by the Executive Magistrate H.L. Gayakvad (PW/1) and as per version of this witness, deceased made dying declaration before him to the effect that first respondent made some quarrel regarding dispute of land and just thereafter she poured kerosene oil on her body and lit the match stick. Version of the Executive Magistrate is challenged on the ground that written dying declaration produced before the trial Court is a photo copy which is not admissible in evidence. In our view, records are prepared for memory of the witnesses and any paper submitted with charge-sheet is not a substantive piece of evidence. Substantive piece of evidence is the deposition before the court in which defence exercises its right of cross examination.

15) In **Khushal Rao v. State of Bombay**¹², 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

12 AIR 1958 SC 22

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 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.

16) The Supreme Court in **Lallubhai Devchand Shah and Others v. The State of Gujarat**¹³ held that a dying declaration must be closely scrutinized as to its truthfulness like any other important piece of evidence in the light of the surrounding facts and circumstances of the case, bearing in mind, on the one hand, that the statement is by a person who has not been examined in the Court on oath and, on the other hand, that the dying man is normally not likely to implicate innocent persons falsely. It was further observed that there can be no doubt that when a dying declaration is recorded the person who records the statement must be satisfied that the person who makes the statement is consciously making the statement understanding the implications of the words he uses. The expression ‘fit state of mind’

13 1971 (3) SCC 767

used in the case referred to above means no more than that. Negating the plea of commission of suicide by the deceased in the said case, the Supreme Court observed that no sufficient material has been placed before the Court to show that the deceased committed suicide nor any previous history of attempting to commit suicide or showing disgust for life and further that it is not shown what impelled her to commit suicide on that day

17) In **State of Uttar Pradesh v. Ram Sagar Yadav and Others**¹⁴, 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**¹⁵ and **Gopalsingh and Another v. State of Madhya Pradesh and Another**¹⁶ it is further observed that there is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear of convincing that the Court may, for its assurance, look for corroboration to the dying declaration.

18) In the matter of **Lakhan Vs. State of MP**¹⁷, the Supreme Court after discussing number of judgments on the point of dying

14 AIR 1985 SC 416

15 AIR 1962 SC 439

16 (1972) 3 SCC 268

17 (2010) 8 SCC 514

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.”

- 19) In the matter of ***Ramakant Mishra Vs. State of UP***¹⁸, (2015) 8 SCC 299, the Supreme Court observed as under:

“9 Definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:

“*Dying Declarations* - Statements made by a person who is lying at the point of death, and is conscious of his

18 (2015) 8 SCC 299

approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. *Shepard v. U.S., Kan.*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196.”

Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. Fed.Evid.R. 804(b)(2). Statement under the Belief of imminent Death”

10. When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to

conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration.”

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 appellant on the basis of dying declarations.

20) In the present case, Executive Magistrate is subjected to incisive and searching cross examination but nothing could be elicited in favour of the defence and at the time of cross examination no such objection was raised regarding photo copy of dying declaration. Statement of Executive Magistrate is challenged on the ground that deceased was burnt 100%, therefore, she was not in a position to speak. In our view, the deceased made oral dying declaration just after the incident to Lalita Sahu (PW/1), Pilra Ram Sahu (PW/3), Yashwant Kumar (PW/5) who were present near the spot and from their evidence it is clear that deceased was conscious at the time of making oral dying declaration and as per version of Executive Magistrate she was in conscious position at the time of making dying declaration before him.

21) Looking to the entire evidence, it cannot be said that the deceased was not in a position to speak at the time of making oral dying declaration or dying declaration before the Executive Magistrate. PW/13 J.P. Verma, is the Investigating Officer who seized a box

having some kerosene and burnt match stick from the spot and his version is supported by the version of Banshilal (PW/7).

22) All that we can say is that the finding of the trial court is perverse. In the statement recorded under Section 161 of the Cr.P.C., of Parvati Bai (PW/4), it is clearly mentioned regarding dying declaration made by the deceased to her to the effect that the respondent has burnt her, but the trial Court recorded (para 19) that no such statement was made by her to Police which shows that the Judge of the trial Court has not gone through the statement recorded under Section 161 of the Cr.P.C., of this witness. The trial judge again has written the same against independent witness Yashwant Kumar (PW/5) who also stated in his earlier statement regarding oral dying declaration made by the deceased against the respondent. There is no reason as to why the deceased will level false charge against the respondent at the cost of her life.

23) The finding of the trial Court is not based on evidence available on record. The trial judge concluded that the witnesses have exaggerated their version but it is not clear from the judgment of the trial Court as to what is exaggerated which hit the root of the case. The question before the trial Court was objective as to who caused burn injuries, but the answer is not objective. In our considered view, it is the respondent who poured kerosene on the body of the deceased and lit the match stick. Prompt reporting on the same day to Police with all its vivid details gives us an assurance regarding truth of

version of the deceased.

24) From the record, only one view is possible and that view is against the respondent and there is no reasonable doubt entitling the respondent to the benefit of doubt. We are satisfied that the deceased was in a fit state of mind at the time of making oral dying declaration to her daughter, husband and other independent witnesses and while making statement to Executive Magistrate. As oral dying declaration is made just after the incident, it was voluntary and in the fit state of mind and it does not suffer from infirmity of tutoring. We are also satisfied that in the facts and circumstances of the present case, judgment of the trial Court is not sustainable in the eye of law.

25) Considering all the facts and circumstances of the case, we are of the opinion that the case laws cited by learned counsel for the respondent are distinguishable from the facts and circumstances of the present case looking to the number of persons involved and objective evidence.

26) Accordingly, the appeal is allowed. Judgment of the trial Court is set aside. Respondent Poonam Bai is convicted under Section 302 of IPC for committing murder of Vimla Bai and sentenced to undergo RI for life and fine of Rs.500/-. The fine amount shall be recovered as per proviso to Section 421 of the Cr.P.C. The trial Court is directed to prepare supersession warrant and issue non-bailable warrant against the respondent and after her arrest she be sent to jail

for serving out the remaining part of the jail sentence. The trial Court shall submit the progress of the compliance by 30th May 2018.

**Sd/-
Judge
(Prashant Kumar Mishra)**

**Sd/-
Judge
(Ram Prasanna Sharma)**

Raju