

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 108 of 2012**

1. Mhetra S/o Siddharam Kashyap, aged about 57 years,
2. Smt. Chameli W/o Mhetra Ram aged about 50 years
3. Dinesh @ Bhuru S/o Mhetra Kashyap, aged about 33 years,
4. Ramesh @ Mootu S/o Mhetra Kashyap, aged about 31 years, R/o - Village Dhobghatti, Police Station Lormi, Distt. Bilaspur C.G

---- Appellants**Versus**

- State Of Chhattisgarh Through - S.H.O. , P.S. Lormi, Distt. Bilaspur C.G.

---- Respondents

For Appellants	:	Shri Rupesh Shrivastava, Advocate
For State	:	Shri Anil Pillai, Dy.A.G.

Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Order On Board****Per Manindra Mohan Shrivastava, J.****08/10/2018**

This appeal is directed against impugned judgment of conviction and order of sentence dated 30/11/2011 whereby the appellants have been held guilty of commission of offence under Section 302, 34 of IPC and sentenced to undergo R.I. of life imprisonment and fine of Rs.2000/- (in default of payment of fine, further R.I. of one year).

2. The prosecution story, as unfolded from the case is that Bimla was brought to the Government Hospital at about 6 AM early in the morning in extensively burnt condition by her husband Bhai Ram (PW2) and her son Ravichand (PW1). The injured

patient was immediately subjected to treatment by Dr. R.S. Ayaam (PW7). Information was sent to the police station and it is said that the police officer immediately arrived in the hospital, gave an application to the treating doctor for conducting MLC upon which, the doctor prepared MLC in Ex.P/8. It is then said that thereafter, a dying declaration was recorded in Ex.P/6 which contained recital in local dialect '*Chhattisgarhi*' that the appellants- Mhetra, Chameli, Dinesh and Motoo had threatened and they all set her ablaze. Her left thumb impression was taken in the dying declaration. According to the prosecution, this dying declaration was recorded in the presence of Dhanesh (PW4) and Narmada (PW3). The dead body was sent for post mortem and the post mortem was conducted by Dr. Ajay Pathak (PW8) who conducted post mortem and prepared report in Ex.P/11. According to doctor's opinion, Bimla died due to extensive burn injury. Charge sheet was filed before the jurisdictional Magistrate, who in turn committed the case to the Sessions Court. Learned Trial Court, on the basis of the material contained in the charge sheet, framed charges that sharing common intention, the appellants murdered the deceased by setting her ablaze. The appellants abjured guilt and were subjected to trial.

3. In order to prove its case, the prosecution examined as many as 13 witnesses. The appellants were examined under Section 313 CrPC in respect of the incriminating circumstances appearing against them. They denied all the adverse circumstances and stated that they have been falsely implicated and they are innocent. Two defence witnesses – Dau @ Baldau (DW1) and Saraswati Bai (DW2) were examined. Learned Trial Court, however, disbelieved the defence version and relying upon the evidence led by the prosecution, particularly the dying declaration (Ex.P/6) held that it is the appellants, who had murdered the deceased by setting her on fire.

4. Assailing correctness and validity of impugned judgment of conviction and order of sentence, learned counsel for the appellants argued that the conviction of the

appellants is based on dying declaration which is highly doubtful because it was not recorded by any Executive Magistrate but by the treating doctor and the dying declaration does not contain any certificate of the doctor that at the time of recording the said declaration, the injured was in fit state of mind and conscious to give statements. The next submission is that according to the evidence of the prosecution itself, the thumb of the victim was already burnt, therefore, how the thumb impression could be obtained, makes the story of the prosecution with regard to recording of dying declaration more doubtful. It is further argued that the prosecution story based on the evidence of Ravichand (PW1) and Bhai Ram (PW2), son and husband respectively of the deceased that prior to the incident of burning, there was a dispute due to raising of wall, is not supported by any other independent witness. It is further submitted that the evidence of Ravichand (PW1) and Bhai Ram (PW2) that oral dying declaration was given to them, is an improvement upon their respective diary statements. It is next contended that according to the prosecution, as soon as information was given to the police, the police officer reached the hospital and gave a letter to the doctor for conducting MLC but in that letter (Ex.P/8-A), there is nothing to indicate that by that time, a disclosure was made by anybody that the deceased was set ablaze by the appellants. Even in the MLC (Ex.P/8), no such history has been recorded. Learned counsel for the appellant further argued that even in the application for conducting post mortem, there is no whisper that the deceased was set ablaze by the appellants though according to the prosecution, before her death, the dying declaration was recorded. Lastly, it is submitted that the two independent witnesses of dying declaration, namely Narmada (PW3) and Dhanesh (PW4) have also not supported the prosecution story and have categorically stated that no dying declaration was recorded in their presence. Therefore, it is argued that the entire case of the prosecution has become highly doubtful and the benefit of doubt must be given to the appellants. Learned counsel for the appellants has relied upon decision of the Supreme Court in the case of **Ramilaben Hamukhbhai Khristi and anr. v. State of Gujarat** (with other

connected matters), **2002 (7) SCC 56**.

5. On the other hand, learned State counsel submits that as per the settled legal position, if the dying declaration is otherwise trustworthy and reliable, it can be acted upon without looking for any corroboration. Learned State counsel would emphasize that present is a case where injured, when brought to the hospital, was extensively burnt and the doctor who recorded the dying declaration was already treating her. The doctor had no reason to falsely implicate the appellants. The dying declaration has been recorded in most natural form in the way it was stated by the deceased in her own dialect '*Chhattisgarhi*'. There is nothing which could be elicited from the cross examination of the doctor to show that the doctor had any reason to falsely implicate the appellants in the case. He would further submit that as the doctor himself recorded the dying declaration, it was not necessary for him to put any certification in the dying declaration that the patient, at the time of giving declaration, was conscious and in fit state of mind to give dying declaration. It is also submitted that the doctor, in his evidence, has emphatically stated that at the time when he recorded the dying declaration, the patient was in her senses and able to make statement. Therefore, it is argued that present is a case where genuineness of the dying declaration cannot be doubted and consequently, there is no need to look for corroboration. Learned State counsel places reliance upon judgment of the Supreme Court in the case of **Gulzari Lal v. State of Haryana, 2016 (4) SCC 583**.

6. We have heard learned counsel for the parties and perused the records.

7. Before entering into the analysis and assessment of evidence on record, to find out whether the appellants' conviction can be rested on the dying declaration (Ex.P/6), we consider it necessary to examine the settled legal position in that regard.

8. To begin with, in the Constitution Bench judgment of the Supreme Court in the case of **Tarachand Damu Sutar v. State of Maharashtra, AIR 1962 SC 130**, as to what should be the relevant consideration, Their Lordships observed -

“21. It is always a difficult question to speculate why deceased accused a certain person of committing the crime, or why a witness deposes against a person with whom he has no ostensible cause of enmity or why the police, in the discharge of its public duty should influence persons to make inaccurate statements, when Courts come to the conclusion that the accusation or the evidence does not appear to be true and that there are reasons to suppose that the police had influenced the testimony of witnesses. Anyway, the same difficulty occurs in the present case. But it is clear that the relations between the wife and the husband were strained to such an extent that, according to the prosecution, the accused not only starved her, but also set fire to her clothes with the intention to cause her death. Such a conduct of the husband cannot be on account of ordinary domestic unpleasantness, but must be the result of a very acute feeling of desperation and a desire not to live any more with his wife. If such were the relations which one is inclined to infer from what the prosecution wants the Court to believe, it should not be difficult to imagine that the wife's motives in charging the husband falsely may be equally strong. She too must have been fed up with the misery of her life and might have committed suicide and put an end to her life, but when, as often happens, she was questioned, she accused her husband of setting fire to her clothes, not with a view to save herself from a conviction for attempting to commit suicide, but either on account of her feeling that her husband was responsible for all her troubles and that her desperate action was also due to the same cause or out of malice. Any way, a dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It, can only be believed if there are no grounds for doubting it at all.”

9. In another judgment of the Supreme Court in the case of **Waikhom Yaima Singh v. State of Manipur, 2011 (13) SCC 125**, it was held -

“20. There can be no dispute that dying declaration can be the sole

basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it.”

In the case of **Nanhar and ors. v. State of Haryana, 2010 (11) SCC 423**, those very principles were re-stated as below -

“33. In our considered opinion, the dying declaration should be such, which should immensely strike to be genuine and stating true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that it is genuine, true and not tainted with doubts.”

In another decision in the case of **P. Mani v. State of Tamil Nadu, 2006 (3) SCC 161**, it was held -

“14. Indisputably conviction can be recorded on the basis of the dying declaration alone but therefor the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on record suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them.”

10. In the case of **Ramilaben Hamukhbhai Khristi and anr. v. State of Gujarat** (with other connected matters) **2002 (7) SCC 58**, the Supreme Court considered the circumstances when the Court may look for corroboration as of necessity. Relying upon its earlier decision, it was held as below -

24. So far the law regarding dying declaration is concerned, on behalf of the appellant, learned counsel for the appellants placed reliance upon some cases. [In \(2001\) 5 SCC 254 Uka Ram v. State](#)

[of Rajasthan](#), the Court observed "it has always to be kept in mind that though a dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it is essential for the court to insist that the dying declaration should be of such nature as to inspire full confidence of the court in its correctness. The court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or a product of imagination. Before relying upon a dying declaration, the court should be satisfied that the deceased was in a fit state of mind to make the statement."

25. As reference has then been made to the decision reported in (1999) 7 SCC 695 Paparambaka Rosamma and ors. v. State of Andhra Pradesh. In this case the deceased had received extensive burn injuries to the extent of 90%. The prosecution case solely rested on the dying declaration. It was observed that it was necessary to ensure that the statement was genuine and it was recorded when the injured was in a fit state of mind. The certificate, which was appended by the doctor in the end of the dying declaration, was that the injured was conscious at the time of recording of her statement, but there was no certificate to the effect that she was "in a fit state of mind to make the statement". It has been held that without medical certificate about mental fitness of the maker of the dying declaration, it would be very risky to accept the said manuscript. The subjective satisfaction of the Magistrate, recording the dying declaration, to the following effect :

"On the basis of answers elicited from the declarant to the above questions I am satisfied that she is in a fit disposing state of mind to make a declaration" was not considered acceptable in absence of certificate by the doctor about mental fitness to make statement who had only indicated that the declarant was conscious while making the statement.

26. In (2001) 6 SCC 118 Laxmi (Smt). v. Om Prakash and ors., this Court deprecated the practice of the police officers recording the dying declarations except where the condition of deceased was so precarious that no other alternative was left. The dying declaration is

supposed to be recorded by a Magistrate. It is further observed that number of declarations nor the length of the statement is the factor to be taken into account to rely upon them. The main test is the mental and physical fitness and capability of the declarant to make the statement. In all there were five dying declarations in the case including those recorded by the Magistrate, but it only contained a statement of the declarant in the end to the effect that he had given the statement in his full consciousness and senses.

27. Yet another case referred to is reported in (2002) 1 SCC 577 *Panchdeo Singh v. State of Bihar*, it has been held that it is necessary to have the certificate of the doctor regarding the fit state of mind of the deceased to make the declaration. The Magistrate recording his own satisfaction about the fit mental condition of the declarant was not acceptable particularly when the doctor was available.

Having considered the decisions rendered by it, Their Lordships in the Supreme Court finally concluded as below -

“28. Under the law, dying declaration, can form sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the words of the person making the declaration. But Court cannot be too technical and in substance if feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon, without any corroboration.”

11. In another decision in the case of **State of Orissa v. Parasuram Naik, 1997 (11) SCC 15**, the effect of absence of certificate that the deceased was medically fit was considered as below -

“6.It is relevant to note that Dr. Premananda Pattanaik

(P.W.1) has not certified that she was in her full senses and was medically fit to make a statement although he had certified that she was conscious. Having regard to the fact that she had sustained extensive burn injuries and died within 15 minutes immediately after recording the statement, it appears to us that she might not be in a proper and fit condition to make a statement as regards her cause of death. The High Court did not feel it safe to rely upon the dying declaration (Ext. 4) recorded by Dr. Premananda Pattanaik (P.W.1). Having regard to the facts and circumstances of the case we also do not think it safe to rely upon the dying declaration (Ext.4).

12. The last two decisions referred to by us as above have been taken note of as in the present case, dying declaration is not accompanied with any certificate of fitness endorsed on the dying declaration itself or separately that at the time of recording the declaration, the patient was in fit state of mind and conscious to give statement.

13. Ravichand (PW1) and Bhai Ram (PW2) are son and husband respectively of deceased - Bimla. According to Ravichand (PW1), when his mother had gone to respond to the call of nature, he heard cries, upon which, he went outside and found that his mother was burning. According to him, it was about 4 AM early in the morning. When he asked his mother, she stated that she has been set on fire by appellants - Mhetra, Chameli, Dinesh and Motoo and he also states that he had seen the accused going away from a distance of about 50 mtrs. This witness further states that earlier, a dispute had taken place between them and the appellants concerning a wall. He further deposed that his mother had disclosed to his father Bhai Ram regarding she having been set ablaze and other villagers whose names he does not remember. In cross examination, he states that a dispute had arisen about 8 days before. He, however, states that those statement in the Court that there was a dispute between the appellants on one side and his mother, was not disclosed in the police statement and he does not know why he did not make such disclosure. Further omission has also

been brought about regarding oral dying declaration given to him by stating the fact that his mother stated that she was set ablaze by the appellants was not there in his police diary statement and he cannot explain such omission. He has been given suggestion that no dispute had ever taken place and he is not correctly stating and that it is not correctly stated that the appellants set his mother on fire.

14. Bhai Ram (PW2) has deposed that at about 4 AM early in the morning when his wife had gone outside to respond to the call of nature, he heard her cries and when he opened the door, he saw all the appellants running away and that his wife was burning. He attempted to extinguish the fire and at that time, his wife fell down and at that time, Saraswati arrived. He further deposed that his wife gave oral dying declaration that all the appellants had poured kerosene oil on her and she was set ablaze. According to him, when this disclosure was being made, there was nobody at the spot. In para 21 of his cross examination, omission regarding oral dying declaration given to him by his wife in the police diary statement, has been elicited and the witness says that he cannot explain why this fact was not stated by him at the time of recording his police statement. Moreover, in para 17 of his evidence, an important omission has been elicited regarding death after recording of dying declaration in the hospital and the witness states that such omission cannot be explained by him and the witness states that he is unable to explain the said omission. A suggestion of false implication has been given to this witness.

15. From the evidence of Ravichand (PW1) and Bhai Ram (PW2), it is seen that the evidence that deceased had given an oral dying declaration before them is a complete improvement upon their case diary statements and why this fact was not disclosed at the time of recording their case diary statement, they are unable to explain.

16. Ramnath (PW5) states that at about 5:30 AM, he had gone to see Bimla and

Bimla told him that she immolated herself. He also went to see Bimla in the hospital. When they were sitting in the police station and the police informed that after arrival of Tahsildar, statement of Bimla would be taken, in the meantime, Bimla died. This witness, at this stage, has been declared hostile and has denied having given statement in the police diary statement (Ex.P/7) regarding Bimla having been set on fire. He also denied suggestion that Bimla had deposed before the doctor that the appellants set her ablaze. He cannot say that earlier any dispute had arisen between the appellants on one side and Bimla on the other side.

17. Khushi Ram (PW6) has also turned hostile and states that he does not know whether any dispute had arisen between the parties 3-4 days before the date of incident. He denies that any threat was administered by the appellant - Mhetra to Bhai Ram.

18. Rajaram (PW10), the Head Constable states that he had written memo for examination of injured Bimla on 04/04/2011 vide Ex.P/8-A and has proved his signature. He states that the form was filled up at about 3 AM in the morning in the hospital. He further states that on the basis of memo sent from the hospital, he reached the hospital immediately. He further states that at the time when he was preparing memo in the hospital, nobody stated that Bimla was set ablaze.

We find that on the back side of the memo (Ex.P/8-A), the doctor has recorded his examination. But in none of these documents, there is any whisper regarding the deceased having been set ablaze. If according to Ravichand (PW1) and Bhai Ram (PW2), son and husband of the deceased, an oral dying declaration was already given to them, then naturally, at least some observation, though in brief, would have been mentioned in the memo (Ex.P/8A) and MLC (Ex.P/8). Furthermore, even in the application for conducting post mortem, there is no whisper that the deceased was set ablaze by the appellant, though according to the prosecution, before her death, dying

declaration was recorded. Even though it is not mandatory, non-mention of that fact coupled with the fact that in the other two letters MLC Ex.P/8A and Ex.P/8, no such history was recorded, requires independent corroboration.

With all aforesaid doubt and suspicion, had the dying declaration been supported by independent witnesses namely Narmada Prasad (PW3) and Dhanesh (PW4), things would have been different. But then, we find that these two witnesses of prosecution have not supported the case of the prosecution that the dying declaration was recorded in their presence, therefore, in the totality of circumstances, in the present case, applying the principles referred hereinabove, the so called dying declaration becomes extremely doubtful and we consider it unsafe to rely upon the so called dying declaration to hold the appellant guilty. The benefit of doubt has to be given to the accused.

19. In the result, conviction of the appellants is found unsustainable in law and is therefore set aside. The appellants be set at liberty forthwith.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge