

HIGH COURT OF CHHATTISGARH, BILASPUR

Shashidhar Kashyap S/o. Kaleshwar Prasad Kashyap, Aged about 30 years, R/o. Devi Koni, P.S. Balod, District Janjgir Champa Distict Janjgir Champa (C.G.) Presently R/o. Budhwari Bazar, Behind Gandhi Chouk, Police Chouky CSEB District Korba (C.G.)

Versus

---- Respondent

For the Appellant	:-	Mr. G.S. Ahluwalia, Advocate Ms. Anjali Singh Chouhan, Advocate
For the Respondent	:-	Mr. Subhash Yadav, Govt. Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Judgement on Board By
Manindra Mohan Shrivastava, J.

12.03.2019

1. By this appeal the appellant assails legality and validity of the judgment of conviction and order of sentence dated 30.09.2014 passed by the Additional Sessions Judge, Korba, District Korba, in Sessions Trial No. 2/2014, whereby the appellant has been held guilty for commission of offence under Section 302 IPC and sentenced to undergo imprisonment for life and to pay fine of Rs. 1000/- plus default stipulation.

2. Undisputedly, the deceased was the wife of the appellant. She sustained burn injury on 15.05.2013 at her residence. She was taken to Apollo Hospital as she had sustained extensive burns. She later on died on 22.05.2013. Inquest over dead body was prepared and the matter was taken in merg inquiry. Postmortem report prepared by the doctor declared that the deceased died due to extensive burn injuries. The matter was taken up in merg injury which culminated in registration of FIR on 10.07.2013 wherein it was alleged that the appellant set his wife ablaze in the house.
3. The FIR contained the statement regarding recording of dying declaration of the deceased by the Executive Magistrate (PW-3) on 21.05.2013 i.e. during the period the victim remained admitted in the hospital receiving treatment. During investigation, Investigating Officer claims to have recorded case diary statements of number of witnesses particularly that of the father of the deceased (PW-2). Statement of neighbour including that of Mohammad Salim (PW-12) was also recorded. The investigation eventually culminated into filing of charge sheet against the appellant on the allegation of having committed murder of his wife by pouring kerosene on her and setting her ablaze. Charges were framed and the appellant having abjured guilt was put to trial.
4. The prosecution mainly relied upon the dying declaration dated 21.05.2013 claimed to have been recorded by PW-3 - the

Executive Magistrate and the oral dying declaration given by the deceased to her father PW-2 to bring home the guilt. The accused /appellant came with the defence that it was a case of accident and the allegation that he set his wife ablaze is false and concocted. The dying declaration was assailed as doubtful and concocted document. The accused/appellant also came out with the case that while he attempted to save his wife, he also sustained burn injury and was admitted in the hospital for treatment. He examined himself as sole defence witness to prove his case.

5. The trial Court, however, disbelieved the defence, relied upon the prosecution evidence, particularly the dying declaration Ex.P-7 dated 21.05.2013 and the oral dying declaration evidence of PW-2 to order the conviction of the appellant.
6. Learned counsel for the appellant argued *in extensio* before us and contended that the prosecution case as regards the deceased having been set ablaze by the appellant is complete concoction. He would argue that the so called dying declaration Ex.P-7 uses the word " मृतिका " (deceased) which itself renders it doubtful that this document was prepared after death. It is next submitted that there is no evidence to show that at the time of recording of dying declaration of the deceased by PW-3 she was in a fit state of mind to understand and speak because the said dying declaration does not bear the endorsement to this effect by the doctor which also renders the dying declaration

extremely doubtful, particularly when the treating doctor has not been examined by the prosecution. Though PW-3 Executive Magistrate claims to have prepared the dying declaration on 21.05.2013 and after death, inquest on 23.05.2013 over the dead body, there is no whisper in the inquest report regarding dying declaration and the text and tenor indicates the burns were not suspected to be she having been set ablaze. He further argued that though the Executive Magistrate states that the dying declaration was handed over to the police authorities, evidence of PW-7 and PW-8 with regard to the receipt of dying declaration is extremely doubtful because they did not register any offence against the appellant for almost 49 days and what has been elicited in their cross examination also renders doubtful that any such dying declaration was ever handed over to the Police authorities immediately after 21.05.2013 or soon after the death of the deceased. It is then argued that the prosecution's own witness PW-12 supports the defence version that he was informed regarding the deceased having caught fire due to accident and the appellant's having also suffered burn injuries while attempting to save his wife. The entire case of the prosecution is thus doubtful and there is probability of false and concocted case being made out against the appellant of killing his own wife. Reliance has been placed on several authorities .¹

¹*Lingaiah Appellant v. State of Andhra Pradesh Respondent, Paparambaka Rosamma and others Appellant v. State of A.P. Responent, Shaikh Bakshu and Ors V. State of Maharashtra, Shankar Bareth v. State of Chhattisgarh, Brundaban Moharana and Anr v. State of Orissa, State of Maharashtra v. Hemant Kawadu Chauriwal etc.*

7. On the other hand, State counsel supports the judgment of conviction and order of sentence and submits that there is no reason why the Executive Magistrate would prepare a false document of dying declaration. He submits that even though, the treating doctor has not been examined, the Executive Magistrate has clearly deposed that he had recorded the dying declaration only after consultation with the doctor and to his satisfaction that the victim was in a fit condition to give dying declaration. He next submits that use of word " मृतिका " (deceased) is inadvertent and only on that basis the entire evidence of Executive Magistrate (PW-3) could not be doubted. He would next argue that PW-8 has clearly stated that while receiving merg intimation, dying declaration was also received in the Police Station. He would also argue that during that period, a merg inquiry was going which finally culminated in lodging FIR against the appellant on the basis of that very dying declaration. Therefore, only on the ground of registration of FIR with delay of 49 days would not render case of the prosecution suspicious. He would next argue that the evidence of neighbour would not absolve the appellant because he himself had not witnessed the incident and had spoken what was disclosed to him which he might have *bona fide* believed. The defence version of the deceased having sustained burn injuries while working in the kitchen is improbable and the manner in which

she sustained injuries, she being set afire by pouring kerosene on her can safely be inferred.

8. We have heard learned counsel for the parties and perused the record.
9. The entire prosecution case rests mainly on the dying declaration dated 21.05.2013 Ex.P-6 and the oral dying declaration evidence of PW-2 the father of the deceased. Since the entire argument of the learned counsel for the appellant revolves around the dying declaration, we need to carefully scrutinize the evidence on record particularly with regard to the truthfulness and reliability of dying declaration dated 21.05.2013 but, before that, we deem it appropriate to refer to some of the celebrated decisions of the Supreme Court with regard to the care and caution which the Court is required to observe while dealing with the murder cases based on dying declaration.
10. In the case of **Sher Singh v. State of Punjab, (2008) 4 SCC 265**, the Supreme Court also cautioned and laid down necessity of cautious approach to ensure that the statement was not as a result of tutoring or prompting or a product of imagination, in following words:-

“ 16. We may, now, refer to some of the judgments of this Court in regard to the admissibility and evidentiary value of a dying declaration. In the case of **Bhajju @ Karan v. State of M.P. [(2012) 4 SCC 327]**,

this Court clearly stated that Section 32 of the Evidence Act was an exception to the general rule against admissibility of hearsay evidence. Clause (1) of Section 32 makes statement of the deceased admissible, which has been generally described as dying declaration. The court, in no uncertain terms, held that:

“24.....It cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. The dying declaration, if found reliable, could form the basis of conviction. This principle has also earlier been stated by this Court in the case of Surinder Kumar v. State of Haryana (2011) 10 SCC 173 wherein the Court, while stating the above principle, on facts and because of the fact that the dying declaration in the said case was found to be shrouded by suspicious circumstances and no witness in support thereof had been examined, acquitted the accused. However, the Court observed that when a dying declaration is true and voluntary, there is no impediment in basing the conviction on such a declaration, without corroboration.

17. In the case of Chirra Shivraj v. State of Andhra Pradesh [(2010) 14 SCC 444], the Court expressed a caution that a mechanical approach in relying upon the dying declaration just because it is there,

is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by other persons and where these ingredients are satisfied, the Court expressed the view that it cannot be said that on the sole basis of a dying declaration, the order of conviction could not be passed.

Keeping in forefront the aforesaid legally settled position of law, we shall now advert to the material on record.

11. To begin with, we find that in the present case the victim was admitted in the hospital on 15.05.2013 in a burnt condition. Though the person who brought the victim to the hospital has not been examined, the MLC prepared in the Apollo hospital and received by Police authorities under Ex.P-11 shows that the victim was brought to the hospital by one Mr. Kashyap, father-in-law of the victim. In the document, the site of occurrences is stated to be the house of the deceased and the alleged cause is written as “while baking/cooking.” The doctor who prepared this document has not been examined but what we can infer is that when the victim had sustained burn injuries she was brought to the hospital by her father-in-law i.e. the father of the appellant and an impression must have been given that she sustained

injuries while baking/cooking which led to recording of such a note while giving intimation of burn to the police.

12. The most pivotal aspect of prosecution case is the delay of 6 days in recording of dying declaration of the deceased by PW-3 the Executive Magistrate after her hospitalization, on 21.5.2013. She has deposed in the Court that she had gone to the hospital on the oral instruction given by Sub Divisional Magistrate Bilaspur and had recorded the dying declaration at 6.10 hours in the Apollo Hospital. While PW-3, the Executive Magistrate states that the dying declaration was recorded after consultation with the doctor because victim Pragya was in extensively burnt, we do not find any such endorsement made in the dying declaration Ex.P-7. We do not find that in the memo Ex.P-6(A) which is said to be given to the doctor there is any endorsement as to whether the victim was in a fit condition to give statement. It simply contains an endorsement that “statement of patient – named Pragya Kashyap may be taken” which is referred to by PW-3 in her evidence. However, the concerned doctor has not been examined. The Executive Magistrate maintains that the injured was extensively burnt and was speaking in very low voice and was in a position to answer the questions. According to her evidence, deceased informed her when she was at home, her husband came and instead of taking meal he started abusing her, poured kerosene and set her ablaze. When she was asked as to whether her husband

attempted to extinguish fire, she denied the same. When she was asked as to what was the reason for quarrel, she expressed inability but said that her husband was a drunkard and in the drunken state he used to quarrel with her. The Executive Magistrate further states that when she was taking the dying declaration, the in-charge doctor of the burn unit was also present. But we find that this fact is not mentioned by way of any endorsement in the dying declaration Ex.P-7 nor the concerned doctor or any other doctor has been examined by the prosecution to this effect.

13. What renders the dying declaration quite doubtful is that the hands of the deceased were fully burnt, therefore, signature could not be taken. The dying declaration does not contain thumb impression much less any signature. How was the word "deceased" used by PW-3 if the victim was alive at the time of giving dying declaration? According to PW-3 - Executive Magistrate, having recorded the dying declaration it was handed over to the authorities of Police Station Sarkanda on that very day but in the dying declaration Ex.P-7, we do not find any endorsement of receipt on the same under signature of any police officer nor has the prosecution produced any document to prove the date on which it was actually received in the police station. This fact has been noticed by us because there is serious allegation that the dying declaration did not see the light of the day for 49 days until the FIR was recorded and there

was no mention of the dying declaration either in the merg or in the inquest. The Executive Magistrate PW-3, in her cross-examination, admits that she had not obtained opinion from the doctor that the victim was mentally fit to give dying declaration and in the same breath she admits that since earlier an opinion was taken from the doctor therefore, no question was put to the victim for his own satisfaction whether the victim was in fit condition to give dying declaration. She says that the doctor's satisfaction was her satisfaction. If that was so, in our opinion, the prosecution ought to have cleared the doubt by examining the doctor itself, which has not been done in the present case. In her further cross examination, she has admitted that in the dying declaration Ex.P-7, she has not mentioned regarding presence of any doctor at the time of recording dying declaration and even the time when this dying declaration was recorded has not been mentioned. After recording the dying declaration, whether it was read over to which, has also not been mentioned therein, though the Executive Magistrate states that she read over the contents.

14. Coincidentally, it is this very Executive Magistrate, who later on, prepared the inquest over the dead body of the deceased in Ex.P-2 on 23.05.2013. We must hasten to mention here that victim Pragya died on 22.05.2013 and inquest of the dead body was prepared on 23.05.2013. But from the contents of the inquest prepared in the presence of *Panchas* including one

Pritesh, brother of the victim, there is no whisper of the deceased having been set ablaze. This assumes importance because the non mention of this fact would create doubt, firstly because the inquest was prepared by none other than the Executive Magistrate who had recorded the dying declaration on 21.05.2013 and secondly, it was prepared in the presence of the brother of the deceased. The dying declaration was already taken by the Executive Magistrate on 21.5.2013. That means it was within her knowledge. While preparing inquest report, this fact certainly would have found mention in one or the other form. But the inquest report gives an impression that it was case of simple burn. Secondly, in the wake of evidence of PW-2 the father of the deceased, when he visited the hospital after the incident, he was informed by him to his daughter that she was set ablaze which was informed by his wife on 15.05.2013 itself, it was wholly improbable that his own son Pritish would not know about this fact. If that was so, certainly this observation must have been made by the Executive Magistrate PW-3 while preparing inquest. We find that recoding of dying declaration by PW-3 becomes doubtful because in all subsequent proceedings mention of this fact was not made.

15. Chandrika Dahariya (PW-7) - the head constable has deposed that upon receipt of memo from the hospital regarding the hospitalization of the victim in burnt condition, he had applied to SDM for getting the dying declaration recorded and then he

had received a memo from the hospital on 22.05.2013 at about 4.00 pm regarding her death which led to recording of merg intimation Ex.P-9 in Police Station Sarkanda. He does not say that he had received dying declaration either from the Magistrate or from any other source. In the cross examination, it has been elicited that he does not know whether the Executive Magistrate had forwarded the dying declaration or not. He further states that after merg inquiry, the dying declaration was received which was forwarded to the Police Station City Kotwali, Korba. The prosecution did not come out with any clinching evidence of receipt of the date on which the dying declaration was received in Police Station at Sarkanda and why this fact was not mentioned in the merg inquiry. This witness has admitted that whenever receipt of information discloses that there is information regarding commission of cognizable offence, they are required to immediately lodge the report and then it is forwarded for further investigation to the concerned police station but he did not take any such step of registering any offence. In the absence any material placed by the prosecution to prove receipt of dying declaration in the concerned Police Chowki at Sarkanda on or after 22.05.2013, and the specific evidence of this witness that the dying declaration was forwarded after completion of merg inquiry, leaves one wondering as to where the dying declaration was kept all these days. This is relevant because it is not the case where the FIR was registered within couple of days. The FIR was

registered after 49 days which, for the first time, was mentioned in the dying declaration. The prosecution case with regard to this dying declaration thus, becomes further doubtful.

16. PW-8 the Investigating Officer admits in his cross examination that had he received any dying declaration in the merg inquiry, he would have immediately registered the FIR. He admits that before 10.07.2013 he did not receive any information with regard to the commission of cognizable offence.

17. PW-10 Head Constable of City Kotwali has come out with the statement that he had received merg intimation along with the documents from Police Station Sarkanda on 25.05.2013. He states that along with many documents he had received copy of dying declaration Ex.P-7 also. However, in his cross examination it has been elicited that in the merg intimation Ex.P-10, he mentioned only some of the documents and not all. He admits that whenever information with regard to commission of a cognizable offence is received, immediately FIR is required to be registered. He also admits that on 25.05.2013 he did not record any FIR because in the merg diary received from the Police Station Sarkanda, he did not contain any information with regard to commission of cognizable offence. His further admission that while recording merg intimation Ex.P-10, all the documents sent in the merg diary from Police Station Sarkanda, were seen and read over by him create serious doubt with regard to the veracity of the evidence

of this prosecution witness. If the dying declaration was received on 25.05.2013 by Police Station City Kotwali Korba from Police Station Sarkanda along with dying declaration, it would have certainly been mentioned in the merg intimation followed by FIR. Curiously enough, PW-8 the Investigating Officer has stated that upon receipt of merg diary from City Kotwali Korba, he did not get any material to form prima-facie opinion regarding commission of cognizable offence.

18. From the conjoint reading of the evidence of PW-7, PW-8 and PW-10, we find that the prosecution has not come out with the exact date on which the dying declaration Ex.P-7 was received in Police Station Sarkanda and when it was actually received in Police Station Korba and then onwards received by Investigating Officer PW-8. The dying declaration saw the light of the day 49 days after the date of incident when the FIR was registered on 10.07.2013. Where was the dying declaration lying all these days, nobody knows. None of the record of the Police station has been produced before the Court to prove that the dying declaration was forming the part of the merg diary. The case of the prosecution, therefore, becomes highly doubtful insofar as recording of dying declaration is concerned apart from other discrepancies which we have noticed, particularly non-examination of the doctor recording satisfaction of the patient being in a fit condition and used word the "deceased" in the dying declaration itself rendering it doubtful.

19. One of the prosecution witnesses PW-12 who is an independent witness and not related to any other parties but the neighbour of the deceased, has deposed that on 15.05.2013 the appellant and his wife both suffered burn injuries and in order to save themselves both of them had jumped into the water tank and when he went to their house, he saw them in burnt condition and were taken out from the water tank. When he asked Pragya as to how she sustained burn injury she told him that when she offered food, her husband he refused to eat the same and while she was attempting to roast bread, she caught fire. This witness has not been declared hostile by the prosecution and in cross-examination, he states that both Pragya and the appellant were taken to hospital for treatment where he accompanied them and thereafter, Pragya was shifted to Apollo hospital. He has further stated that when the Doctor in the hospital asked Pragya as to how she sustained injuries she told him the same thing as was stated before him.
20. This witness of the prosecution renders the prosecution story extremely doubtful with regard to manner in which the deceased sustained injuries. He has not been declared hostile and he being an independent witness, is quite natural because he was their neighbour.
21. The prosecution has also come out with the evidence of oral dying declaration given by the deceased to her father PW-2. According to this witness, when he went to the hospital upon

receipt of the information regarding his daughter having sustained burn injury, according to him, his daughter stated that she was set on fire. According to him, this statement was given by the victim on 15.5.2013. If according to this witness, Praygya had already disclosed her being set ablaze, there should have been an explanation as to why no report was lodged by this witness in the Police Station. No evidence has been led by the prosecution to prove that this witness had either orally reported or submitted any report in writing in Police Station for taking action against the appellant soon after 15.05.2013.

22. PW-1 deposed that the victim was brought to the hospital by her father-in-law. He had gone to meet her in the ward where she told him that she suffered burn injury and she was not able to properly speak and her voice was not clear. After having been declared hostile, this witness has stated that when she was brought to the hospital, she was saying that she may be saved. In his cross examination, he further admits that the deceased was his cousin. He further states that when he had gone to meet victim in the ICU room, her brother was also with him. According to this witness, the victim was, though, in burnt condition, she was feebly speaking but what she was saying was not quite clear. According to him, along with him, her brother Pritesh had also gone. If that was so, it would have been quite

natural on the part of the victim to disclose the incident of she being set ablaze to her brother Pritesh and cousin PW-1.

23. The appellant examined himself as the sole defence witness in which he has deposed that while working in the kitchen, his wife caught fire and when he came to save her, he also sustained burn injury and thereafter, to extinguish fire both of them jumped in to the water tank. The appellant has also stated that he was admitted in the hospital and treated for burn injury. He placed on record the documents Ex.D-1, D-2, D-3, D-4 and D-5 which are the papers relating to his admission and discharge from the hospital. His testimony gets corroborated from the evidence of prosecution witness PW-12 which renders the defence taken by the accused/appellant highly plausible and probable.

24. Dr. PW-13 who conducted postmortem of the dead body and proved nature and extent of injury and also cause of death has been subjected to cross examination where he has admitted that while conducting postmortem he did not find any sign of sooty blackening. He admits that where a person is set on fire by pouring kerosene, sooty blackening would be evident.

25. We find much weight in the opinion of the doctor with regard to nature of injuries which may be found in case of burning by pouring kerosene from the treatise on the subject in the authentic text of Modi Jurisprudence 26th Edition, where with

regard to the injuries that are likely to be found in case of burning by pouring kerosene it has been observed as below.

“Post-Mortem Appearance-External- “Burns caused by kerosene oil are usually very severe, and are known from its characteristic odour and the sooty blackening of the parts.”

26. Viewed from any angle, having carried out minute and thorough scrutiny of evidence on record, the case of the prosecution appears to be very doubtful and the defence of the accused appears to be probable and plausible. The doubt definitely must yield in favour of the accused and against the prosecution. Resultantly, the impugned judgment of conviction and order of sentence is unsustainable in law and is therefore set aside. The appeal is allowed and the appellant is acquitted of the charge. He be set free forthwith.

Sd/-
Manindra Mohan Shrivastava
Judge

Sd/-
Vimla Singh Kapoor
Judge