

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 155 of 2013**

1. Omprakash S/o Kashiram Gendre, aged about 24 years, R/o village - Mohrenga, Thana - Kharora, District - Raipur (C.G.)
2. Umeshwar S/o Kashiram Gendre, aged about 23 years, R/o village - Mohrenga, Thana - Kharora, District Raipur (C.G.)

---- Appellants**Versus**

- State of Chhattisgarh Through : Aarakshi Kendra Kharora, District - Raipur (C.G.)

---- Respondent

For Appellants	:	Shri Basant Dewangan and Shri Dheeraj Wankhede, Advocates.
For Respondent/State:		Shri Subhash Yadav, Dy. G.A.

D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava
&
Hon'ble Smt Justice Rajani Dubey

Judgment On Board**22.01.2019****Per Manindra Mohan Shrivastava, J**

01. In this case, we found that the appellants are languishing in jail for last ten years. As no one was appearing for them despite repeated calls made on various occasions since long, an order was passed on 10.07.2017 and this Court directed to inform the appellants through Jail Superintendent, Raipur, that

if they wish to avail the facility of High Court Legal Aid Services Committee, the same may be provided to them. We further noticed from the record that the appellants were informed about the said order and they also expressed their willingness to avail the facility of High Court Legal Aid Services Committee. However, till date no lawyer through Legal Aid has been provided to the appellants.

We also find that earlier Shri Dheeraj Wankhede was the counsel to represent them but after his appointment as Government Advocate, he had given 'No Objection Certificate'. We appointed Shri Basant Dewangan, empaneled lawyer in the Legal Aid to assist the Court. We also requested Shri Dheeraj Wankhede to assist the Court.

02. The two appellants, who are brothers, have suffered conviction of life imprisonment under Section 302 IPC, vide impugned judgment of conviction and order of sentence dated 24.12.2012 passed by 7th Additional Sessions Judge, Raipur, in S.T. No.12/2011.

03. According to the prosecution, the deceased was the wife of appellant Umeshwar (A-2). The allegation is that when the deceased asked her husband, while he was leaving, as to where he was going, husband Umeshwar (A-2) got enraged and then Umeshwar (A-2) along with his brother Omprakash (A-1), the other appellant, poured kerosene on the deceased and set her ablaze by throwing burning match stick. She was

then thrown inside the room and the door was bolted from outside.

Strangely enough, according to the prosecution, one of the appellant took her to hospital where she was admitted on 10.10.2010. The relatives of the deceased, having come to know about the incident, reached the hospital.

04. It appears that on the date when the victim was brought to the hospital in burnt condition, she, as per the Doctor's report, was not in a condition to give any statement. On the next day i.e. on 11.10.2010, when again the police officer sought Doctor's opinion regarding patient's condition, the Doctor stated that the victim was in fit condition to give statement and then, on requisition made to Poonam Soni (PW/13), Executive Magistrate, she arrived in the hospital and on that day itself, it is said that dying declaration was recorded, in which victim stated that kerosene was poured on her and she was set ablaze by two appellants and then she was locked inside the room.

Later on, on 12.10.2010, Yogendra Kumar Sonwani (PW/8), brother of the victim, gave a written report. FIR was also registered on the same day and it is said that Kalika Prasad Shukla (PW/10), Investigating Officer, recorded the statement of the victim. Unfortunately, Manju succumbed to burn injuries on 15.09.2010. Investigation was completed and charge sheet was filed against the appellants for alleged

commission of offence under Section 302 IPC. The appellants, having abjured guilt, were put to trial. In order to prove its case, the prosecution mainly relied upon the dying declaration (Ex.P/7) said to be recorded by Executive Magistrate (PW/13) upon a fitness certificate given by Dr. Ritesh Navkhare (PW/6). The prosecution also came out with the evidence of Domar (PW/1), Leeladhar Kumar Sonwani (PW/2), Babita Bai (PW/3) and Yogendra Kumar Sonwani (PW/8) as evidence of oral dying declaration given by the deceased to these persons, her relatives, while she was remained admitted in the hospital and receiving treatment.

Though, the accused in their statements recorded under Section 313 Cr.P.C. came out with the plea that at the time of alleged incident of burning, they were not at home, no defence witness was examined to substantiate this plea.

05. In the aforesaid conspectus of the evidence brought on record, learned trial Court held the charges proved and convicted the appellants.

06. Learned counsel from the legal aid and Shri Dheeraj Wankhede both strenuously argued and submitted that the case of the prosecution is highly doubtful and preparation of dying declaration is not free from doubt and only on suspicion, the appellants have been involved in the alleged commission of offence. According to them, the dying declaration becomes doubtful because even according to the prosecution

documents and evidence, the victim was severely burnt upto 92 percent. When she was admitted in the hospital on 10.10.2010, as the prosecution evidence goes, she was not in a condition to speak. However, on the next day, it is said that she was in fit condition to speak and dying declaration said to be recorded by Executive Magistrate Poonam Soni (PW/13) but there are contradictions in the evidence of Executive Magistrate Poonam Soni (PW/13), treating Dr. Ritesh Navkhare (PW/6) and Investigating Officer Kalika Prasad Shukla (PW/10). While Executive Magistrate Poonam Soni (PW/13) has stated that statement of the victim was recorded in the presence of Doctor and there was nobody else, Dr. Ritesh Navkhare (PW/6) says that after certifying the fitness, he had gone to attend the another patient. Investigating Officer Kalika Prasad Shukla (PW/10) states that at the time of recording statement by Executive Magistrate (PW/13), he and Doctor both were present. It is argued that this renders the entire proceedings of recording dying declaration highly doubtful. Next submission of learned counsel for the appellants is that even according to the prosecution witnesses, when some of them visited the victim on 12.10.2010, she was not found to be in a fit condition to speak. This further raises serious doubt on the entire prosecution story whether the victim was at all in a position to given dying declaration on 11.10.2010 ? Learned counsel for the appellants would further highlight that the corroborative evidence of oral dying declaration given by

Domar (PW/1), Leeladhar Kumar Sonwani (PW/2), Babita Bai (PW/3) and Yogendra Kumar Sonwani (PW/8) is also liable to be disbelieved because all of them, in their cross-examination, have admitted that when they had gone to the hospital, the victim was not in a condition to speak. Learned counsel would lastly submit that the prosecution case, may at the most, have involved the husband of the deceased but looking to the conduct of her brother-in-law namely Omprakash (A-1), who is said to have taken her to hospital for treatment, he may be acquitted by extending him benefit of doubt.

07. On the other hand, learned State counsel submits that the dying declaration has been recorded only after due certification by Dr. Ritesh Navkhare (PW/6) that the victim was in a fit state of mind to speak and give statement, which has remained unimpeached. The Executive Magistrate's (PW/13) statement inspires confidence and there is nothing to say that Executive Magistrate prepared a fabricated document only to please the relatives of the deceased. He would submit that the contradiction with regard to presence of Investigating Officer (PW/10) and Doctor (PW/6), by itself would not render the recording of dying declaration false.

08. We have heard learned counsel for the parties and perused the record.

09. The prosecution case that the appellants set the deceased on fire rests on three sets of evidence, which are as

below :-

- (A) *The dying declaration (Ex.P/7) recorded by Executive Magistrate Poonam Soni (PW/13).*
- (B) *Oral dying declaration given by the victim to Domar (PW/1), Leeladhar Kumar Sonwani (PW/2), Babita Bai (PW/3) and Yogendra Kumar Sonwani (PW/8)*
- (C) *Case diary statement of the victim taken by Investigating Officer Kalika Prasad Shukla (PW/10)*

10. Investigating Officer Kalika Prasad Shukla (PW/10) has stated that on 10.10.2010 an opinion was sought vide his letter (Ex.P/5) from the Doctor of the hospital as to whether victim Manju was in a fit condition to give statement. According to him, he had written another letter on 11.10.2010 (Ex.P/6) again inquiring as to whether the injured was in a condition to give statement. These two letters have been proved by him.

Dr. Ritesh Navkhare (PW/6) stated that the victim was brought to the hospital and he was the treating doctor. He has further deposed that memo was sent from Police Station, Kharora, seeking opinion whether Manju Bai was in a fit condition to give statement vide application (Ex.P/5) on which, he, after checking the patient, has stated that she was not in a position to give statement and has proved his endorsement

to this effect made in Ex.P/5 as also his signature. He deposed that on 11.10.2010 again an application was sent to give opinion whether Manju Bai was in a position to give statement vide Ex.P/6, on which, upon checking the patient, had given his endorsement in Ex.P/6 that she was now in a fit condition to give statement. This witness has further deposed that on that day itself, Executive Magistrate (PW/13) had also come and she asked as to whether the patient was in a condition to speak, on which, he stated that, though, because of swelling in the eyes, the patient could not see but she is in a condition to speak and hear, which endorsement was made by him in dying declaration (Ex.P/7) and has proved his signature. He deposes that thereafter, the Executive Magistrate (PW/13) recorded the statement. He further deposes that after the statements were recorded, he put his signature on the bottom also, though, he states that the statement was not recorded in his present. In his cross-examination, he has stated that after recording of the dying declaration, he met with the Executive Magistrate after about an hour and half and has also proved that at the time, there was a police officer and his signatures were obtained in that document and the document was dying declaration and its information.

11. Poonam Soni (PW/13) - Executive Magistrate, has deposed that she had received an information on 11.10.2010

from Police Station, Kharora at 7.38 PM for recording dying declaration of victim Manju Bai, admitted in the burn unit Room No.9 of the Hospital and then she reached there at about 9.00 PM and inquired from the duty Doctor whether the patient was in a condition to give statement and only after verification, she started taking the statement at 9.10 PM, in which, the patient stated that her husband Umeshwar (A-1) and brother-in-law Omprakash (A-2) poured kerosene oil on her and set her ablaze by throwing match stick and she got the statement recorded as per her statement. In her cross-examination, it has been elicited that at the time when she recorded statement, the police officer was not present and along with her, treating Dr. Ritesh Navkhare (PW/6) was present and he was there till she was present during recording of dying declaration. This witness has also been cross-examined to elicit that the thumb impression was got affixed by the treating Doctor and not by her.

12. As far as Investigating Officer Kalika Prasad Shukla (PW/10) is concerned, he states in his cross-examination that while the dying declaration was being recorded by the Executive Magistrate (PW/13), he and the treating Doctor were present.

13. If we carefully scrutinize the evidence of Dr. Ritesh Navkhare (PW/6), Kalika Prasad Shukla (PW/10) and Poonam Soni (PW/13), the treating Doctor, Investigating Officer and

Executive Magistrate respectively, in so far as certification given by Doctor (PW/6) on 11.10.2010 that at the time when injured was checked up, she was in a condition to give statement and endorsement to this effect, given by the Doctor has remained unimpeached. The Executive Magistrate (PW/13) has also emphatically stated regarding she having obtained the opinion of the Doctor whether the patient was in a fit condition to give the statement. We, thus, find that Dr. Ritesh Navkhare (PW/6) gave his opinion not only once but twice, firstly upon an application given by the police officer by giving endorsement on application (Ex.P/6) and thereafter, upon being inquired by the Executive Magistrate (PW/13) by giving an endorsement in writing and certifying fitness in the dying declaration Ex.P/7. According to the Executive Magistrate (PW/13), the statement was recorded only thereafter.

14. We have given our anxious consideration to vehement submission made by learned counsel for the appellants that the contradiction with regard to presence of police officer (PW/10) and Doctor (PW/6) renders recording of dying declaration by the Executive Magistrate (PW/13) highly doubtful. True it is that with regard to presence of the Doctor (PW/6) and police officer (PW/10), there is contradiction in the statements of all these witnesses. According to the Doctor (PW/6), when the dying declaration was recorded, he had

gone to attend duty in another room. Moreover, the presence of police officer is also doubtful because though the police officer states that he was present, the Executive Magistrate (PW/13) says that only Doctor (PW/6) was present. Having given our consideration on this aspect, we are of the view that as far as recording of dying declaration by the Executive Magistrate (PW/13) inspires confidence, irrespective of the presence of the Doctor (PW/6) and the police officer (PW/10), recording of dying declaration by the Executive Magistrate (PW/13) has to be believed. The only situation of doubt could be whether the injured was in a fit condition to give dying declaration or not. The evidence of Doctor (PW/6) in this regard, as we have seen earlier, is unimpeachable. What can be inferred is that the treating Doctor (PW/6), after having given his opinion regarding condition of the patient to the Police Officer (PW/10) and also to the Executive Magistrate (PW/13), did not stay all along when the dying declaration was recorded but he went to another room to treat some another patient. Only on this ground, we are not inclined to disbelieve what has been done by the Executive Magistrate (PW/13) because we have no doubt with regard to fitness and the condition of the patient while the dying declaration was recorded.

15. A doubt has also sought to be raised on the submission that the Executive Magistrate (PW/13) has admitted that after

having recorded dying declaration, she did not again read it over and explained nor is there such an endorsement. This, in our opinion, is not the requirement of law but in any given circumstances such an omission may be relevant. Here we do not find anything from the evidence of the Doctor (PW/6) or Executive Magistrate (PW/13) that the victim was in such a condition that without verification of the statement after having been recorded, the case of the prosecution should be treated as doubtful. Once the evidence of fitness is not doubtful, truthful recording of the dying declaration by the Executive Magistrate (PW/13) cannot be faulted with and no exception can be taken to that. Moreover, having gone through the contents of the dying declaration (Ex.P/7), we found it to be quite natural. Had it been a case of false implication on the fabricated ground, much more would have been written. In fact, the deceased has given statement that there was no dispute or quarrel between the parties and it was a trivial issue that she had just asked her husband (A-1) as to where he was going, which annoyed him, followed by the incident of pouring kerosene and setting her ablaze.

16. Learned counsel for the appellants have also very strenuously urged this Court to hold the case of the prosecution doubtful because the oral dying declaration witnesses PW/1, PW/2, PW/3 and PW/8 all have stated in their cross-examination that on 11th and 12th both, the victim was

not in a position to speak, therefore, the certification of the Doctor (PW/6) on 11.10.2010 that she was in a fit condition to give dying declaration would become highly doubtful.

17. In this case, the patient was brought to the hospital in a burnt condition. There may be situations when the condition of patient vary from time to time. On 10.10.2010 she was reported not to be in a condition to speak but on 11.10.2010 Doctor (PW/6) gave a certificate that she was in a condition to speak and on that day the dying declaration was recorded. May be that on the next, day her condition may have worsened or at that particular point of time, when witnesses PW/1, PW/2, PW/3 and PW/8 visited her, she might not be in a position to speak but when the dying declaration was recorded and when these witnesses have visited her either on 11 or 12, are not proximate so as to say that during that period she was not in a position to give dying declaration.

18. The prosecution has come out with the corroborative evidence of oral dying declaration of PW/1, PW/2, PW/3 and PW/8. However, as in our opinion, the dying declaration recorded by the Executive Magistrate (PW/13) is not impeachable, the conviction of the appellants would rest upon that clinching solitary evidence.

19. In view of our above consideration, we do not find any ground to interfere with the judgment of conviction and order of sentence. Accordingly, the appeal is liable to be and is

hereby dismissed.

20. Before parting with the case, we must appreciate the assistance provided by Shri Dheeraj Wankhede and Shri Basant Dewangan, Advocates to this Court.

21. On production of certified copy of this order by Shri Basant Dewangan, Advocate, before the Legal Aid office, he would be entitled for payment of fee on the scheduled rate applicable in the legal aid.

22. The appeal is thus dismissed.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge