

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.801 of 2012**

Surendra Nishad, S/o Shri Dev Singh Nishad, Aged About 31 Years, R/o
Village Dhavalpur, PS - Mainpur, Distt. - Raipur Chhattisgarh

----Appellant**Versus**

State Of Chhattisgarh, Through PS Mainpur, Distt. Raipur Chhattisgarh

---- Respondent

For Appellant	:	Mr. Vishwanath Goswami, Advocate
For State	:	Mr. Subhash Yadav, Dy. G.A.

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Order On Board****24/06/2019**

Heard.

1. This appeal is directed against impugned judgment of conviction and order of sentence dated 28.08.2012 passed by Special Judge, Scheduled Caste and Scheduled Tribe (Prevention of Atrocity) Act, Raipur, District Raipur (CG) in Sessions Trial No.37/2011, whereby and whereunder, the appellant has been held guilty of commission of offence and sentenced as described below :

Conviction	Sentence
Under Section 302 of IPC	Imprisonment for life and fine of Rs.5000/-, in default of which, additional R.I. for one year.

2. The conviction of the appellant is based on prosecution case of he having set on fire, Pramila with whom, it is alleged, he had an affair.

3. The records and the judgment impugned reveal that Pramila had sustained burn injury and was brought to the hospital at Gariyaband where she was given primary treatment. The Sub-Divisional Magistrate was informed who came to the hospital and it is said that he recorded dying declaration in Ex.P/5.

The injured Pramila was thereafter, referred to higher centers of treatment but she finally succumbed to death and died on 24th March, 2011. The appellant was prosecuted for having committed offence of murder of Pramila. Learned Trial Court relied upon dying declaration proved by Sub-Divisional Magistrate, K.R. Ogare (PW3), oral dying declarations and medical evidence to come to the conclusion that the appellant having set the deceased on fire, was guilty of commission of offence of murder.

4. Assailing legality and correctness of judgment of conviction, learned counsel for the appellant would argue that present is a case of false implication because evidence has come on record that on her allegation made by the deceased against the appellant, the appellant was tried for commission of offence under Section 376 IPC but later on, he was acquitted. The deceased having found that the appellant was not convicted but could succeed in getting an acquittal, set herself on fire and laid the blame on the appellant. Next submission of learned counsel for the appellant is that the dying declaration said to be recorded by K.R. Ogare (PW3) is doubtful because the course of events narrated in the dying declaration are not probable. Further contention is that the contents of dying declaration are contradictory to what has been stated by uncle Sukhchand Barle (PW1) before whom, she has stated to have given dying declaration that it was due to her provocation that the appellant poured kerosene and set her ablaze. It is argued that this only shows that it was only on the provocation of the deceased, herself, without there being any intention on the part of the appellant, that unfortunate incident of burning took place. Last submission of learned counsel for the appellant is that from the evidence of Dr. H.K. Chouhan (PW7), it is doubtful whether the injury was sufficient in ordinary course of nature, to cause death. Contradictory evidence given by the doctor raises serious doubt and benefit of this should go to the appellant, particularly when the deceased was found having sustained only 40% burn injury and she remained alive for about 6 days after the incident of burning.

5. On the other hand, learned State counsel opposes the submission and submits that the prosecution case is proved from the evidence of dying declaration which has been clearly stated by reliable evidence of Sub-Divisional Magistrate, K.R. Ogare (PW3). He would submit that the doctor, who conducted MLC, Dr. H.K. Chouhan (PW7) has stated that he had examined the injured and she was found in fit state of mind and has also proved his endorsement on dying declaration. Next submission of learned State counsel is that once the dying

declaration is found to be reliable, it is not the requirement of law that it should seek further corroboration, though, there are corroboration from the evidence of oral dying declaration given by Sukhchand Barle (PW1) & Rajesh Banjare (PW2), the uncle and the brother respectively.

6. Learned State counsel further argues that the appellant set the deceased on fire and she was admitted to hospital and there is nothing to show that because of reasons other than those attributable to the burning, that the deceased succumbed to death. In his cross-examination, Dr. H.K. Chouhan (PW7) has clearly deposed that the injury, in ordinary course of nature was sufficient to cause death.

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

8. The main plank of prosecution case, to hold the appellant guilty of commission of offence, is the dying declaration Ex.P/5. It is this dying declaration which has been made the basis to hold that the appellant set the deceased on fire. We shall, therefore, examine the evidence on record to find out whether the prosecution has succeeded in proving, beyond reasonable doubt, that deceased, before dying had given dying declaration that it is the appellant, who set her on fire.

9. Before advertng to the oral and documentary evidence on record, we consider it apposite to refer to one of the celebrated decision of the Hon'ble Supreme Court wherein, their lordships have laid down the principle with regard to proof of dying declaration and the necessary approach by the Courts while dealing with such cases.

10. In the case of **Sudhakar v. State of Madhya Pradesh, (2012) 7 SCC 569**, it was observed :

“20. The ‘dying declaration’ is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More

so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.”

11. In another decision in the case of **Lakhan v. State of Madhya Pradesh, (2010) 8 SCC 514**, the law with regard to the dying declaration was discussed as below :

“In Lakhan, this Court provided clarity, not only to the law of dying declaration, but also to the question as to which of the dying declarations has to be preferably relied upon by the Court in deciding the question of guilt of the accused under the offence with which he is charged. The facts of that case were quite similar, if not identical to the facts of the present case. In that case also, the deceased was burnt by pouring kerosene oil and was brought to the hospital by the accused therein and his family members. The deceased had made two different dying declarations, which were mutually at variance. The Court held as under :

“9. The doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means “a man will not meet his Maker with a lie in his mouth”. The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as “the Evidence Act”) as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be crossexamined. Such statements themselves are relevant facts in certain cases.

10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable

for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (Vide *Khushal Rao v. State of Bombay*¹, *Rasheed Beg v. State of M.P.*, *K. Ramachandra Reddy v. Public Prosecutor, State of Maharashtra v. Krishnamurti Laxmipati Naidu*, *Uka Ram v. State of Rajasthan*, *Babulal v. State of M.P.*, *Muthu Kutty v. State of Rajasthan v. Wakteng and Sharda v. State of Rajasthan.*)”

12. In the case of **Sher Singh v. State of Punjab, (2008) 4 SCC 265**, the Supreme Court laid down necessity of cautious approach to ensure that the dying declaration 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 *Bhaju @ 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.”

13. Keeping in forefront the aforesaid legal position, when we look into the evidence on record, we find that the dying declaration, being a written one, has been proved by K.R. Ogare (PW3), who happens to be the Sub-Divisional Magistrate (PW3) at that point of time. He has deposed in his evidence that during the period when he remained posted as Sub-Divisional Magistrate at Gariyaband, he received letter on 19.03.2011 from the Police Station that the dying declaration of Pramila is to be recorded along with the application of certificate of the doctor that Pramila was competent and in a fit state to give declaration. He has further deposed that thereafter, he went to Government Hospital, Gariyaband and upon being asked, the doctor stated that the injured was in fit state to give statement and thereafter at about 10:00 p.m. in the night, he enquired from the injured Pramila and recorded her dying declaration in Ex.P/5. He has proved his signature thereon. He has also stated that doctor also made endorsement on the dying declaration. He further deposes that the dying declaration was written under his own handwriting. In order to impeach his credibility, it has been elicited that in the dying declaration, it has not been recorded that it was prepared in the presence of the doctor and that it was prepared in the hospital. Suggestion that Pramila was not in a fit condition to give dying declaration has been denied.

14. The evidence of the Executive Magistrate K.R. Ogare (PW3) inspires confidence. He reached hospital soon after Pramila was admitted in the hospital, upon being informed by the police. He has prepared dying declaration in his own handwriting. Not only this, he has deposed regarding he having arrived at his own satisfaction after meeting with the doctor that the injured was in a fit state to give a dying declaration. This is nothing in the evidence to show that at that time, any of the close relative of the deceased were also present.

15. The evidence of K.R. Ogare (PW3) is corroborated in all material particulars with regard to recording of dying declaration, from the evidence of Dr. H.K. Chouhan (PW7), who has deposed that Pramila was brought to the hospital for examination and he found that she was conscious and was able to answer correctly. He has further deposed that upon examination, he found burn injury on her body and smell of kerosene was also found. According to him, the injured had sustained 40% burn injury. He has further deposed that in his presence, the

Sub-Divisional Magistrate had examined Pramila and recorded her dying declaration and thereafter, he endorsed on the dying declaration that the injured was in a fit condition to give statement. What has been elicited in the cross-examination is that the purpose of seeking information was only for preparing MLC and not for recording dying declaration. However, that does not make any difference.

16. Even though, no further corroborative evidence is necessary before the trial Court could rely upon the evidence of Sub-Divisional Magistrate, K.R. Ogare (PW3), we find that the corroboration is available in the form of evidence of oral dying declaration. Sukhchand Barle (PW1), the uncle of the deceased has stated that he was informed by the injured that it is the appellant, who set her ablaze. Similar, is the evidence given by Rajesh Banjare (PW2), the brother of the deceased. This evidence is sought to be impeached on the ground that at the time when deceased sustained injury, her brother was at Jagdalpur and he claims to have come to the hospital on the day when the injured succumbed to death. But in our opinion, it does not make any difference insofar as our conclusion based on evidence of Sukhchand Barle (PW1), K.R. Ogare (PW3) & Dr. H.K. Chouhan (PW7) is concerned.

17. One of the arguments raised by learned counsel for the appellant is that the conviction of the appellant under Section 302 IPC is not sustainable in law because the alleged overt act, even if accepted, was not with any premeditation. Learned counsel for the appellant would argue that the evidence of Sukhchand Barle (PW1) proves that there was no overt act on the part of the appellant until he was provoked by the deceased herself to set her on fire. The argument of learned counsel for the appellant does not merit acceptance. According to the evidence of Sukhchand Barle (PW1), it is the appellant, who first declared that he will set Pramila on fire and then only Pramila challenged him, followed by the appellant pouring kerosene and setting Pramila on fire. It would thus be seen that even before Pramila challenged the appellant, the appellant had declared that he would set the deceased on fire. Otherwise, also what has been said by Pramila, in the facts and circumstances and the evidence on record, does not qualify to be sudden and grave provocation so as to hold that Exception 1 of Section 300 IPC is attracted.

18. Another argument has been raised that even according to the prosecution evidence, the injured victim had sustained only 40% burn injury and she died

after about 6 days, therefore, it cannot be said that the burn injury, in ordinary course of nature, was sufficient to cause death. Learned counsel for the appellant would argue that the probability of deceased having succumbed to death because of certain complications and not because of injuries cannot be ruled out. This argument does not hold water in view of the evidence of Dr. H.K. Chouhan (PW7), who treated Pramila. In para 5 of his cross-examination, he has stated that the injuries which were caused by burning, were sufficient to cause death. There is no circumstance emerging from the evidence of the doctor that burn injury followed by death was in ordinary course of nature, not sufficient to cause death. True, it is that this doctor has also stated in para 3 of his evidence that nature of injury was such that it was likely to recover in 10-12 days. It is apparent that as vital parts of the body including whole chest, abdomen and face were burnt, the victim succumbed to death. Even Dr. S.K. Bagh (PW6), who conducted postmortem has also deposed that nature of injury on the body was such that it was sufficient in ordinary course of nature to cause death. The opinion given by him is that cause of death was burn injury leading to obstruction in breathing and heart failure. Therefore, the argument of learned counsel for the appellant in this regard also does not merit acceptance.

19. In the result, we do not find any merit in this appeal and is therefore dismissed.

Sd/-

(Manindra Mohan Shrivastava)

Judge

Sd/-

(Rajani Dubey)

Judge