

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1230 of 2014**

Shani Kumar, S/o Jalsai Ajar, aged about 26 Years, R/o Budhudongar, P.S. Saraipali, Civil & Revenue District- Mahasamund (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through Police Station- Saraipali, District- Mahasamund (C.G.)

---- Respondent

For Appellant : Mr. C.Jayant K. Rao, Advocate.

For State/ respondent : Mr. Subhash Yadav, Dy.G.A.

Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Shri Justice Ram Prasanna Sharma

Judgment On Board

21/02/2019

Per Manindra Mohan Shrivastava, J.-

1. This appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against judgment of conviction and order of sentence dated 30.09.2014 passed by Sessions Judge, Mahasamund (C.G.) in Session Trial No. 35/2013, wherein the said court convicted the appellant for commission of offence under Section 302 of IPC, 1860 and sentenced to life imprisonment and fine of Rs. 1000/- with further default stipulations.
2. The prosecution story, as unfolded from the impugned judgment and the records of the case is that Belmoti, wife of appellant, suffered burn injuries in the intervening night of 19th – 20th December, 2012 in her house and she was brought to

the Community Health Centre, Saraipali where she was given primary treatment. According to the prosecution, the treating doctor- Bhageshwar Patel (PW-12) recorded her dying declaration and thereafter, she was referred to higher centre for treatment at Raipur, where, she was treated but, she finally succumbed to death on 24th December, 2012. When the deceased was brought to the hospital, as alleged by the prosecution, the Investigating Officer-Assistant Sub-Inspector- Lal Bahadur Singh (PW-9) had also reached and on the basis of disclosure given to him, he recorded Dehati Nalishi (Spot FIR) in Ex.P/10 which also contained similar details relating to cause of death as contained in the written dying declaration recorded by the treating doctor- Bhageshwar Patel (PW-12), in Ex.P/15. Primarily, based on the dying declaration and what was contained in the Dehati Nalishi, the police filed charge-sheet against the appellant alleging commission of offence of murder of deceased by burning. Upon charges framed by the trial court, alleging that the appellant killed his own wife by setting her ablaze, the appellant abjured guilt. He was put to trial. The prosecution came out with the evidence of doctor-Bhageshwar Patel (PW-12) who recorded dying declaration (Ex.P/15) in which, it was recorded that when the deceased refused to cohabit with her husband in night, the appellant set her ablaze. The appellant was convicted under Section 302 of IPC.

3. Assailing correctness and legality of the judgment of conviction, learned counsel for the appellant would submit that the dying declaration was not recoded by any Executive Magistrate, even though evidence has come that at Saraipali, two Executive Magistrates are posted.
4. Further argument is that Dr. Bhageshwar Patel (PW-12) though, states that at the time of recording dying declaration, patient was in fit condition, no such written endorsement was made in the dying declaration. It is further argued that the doctor's evidence that when Executive Magistrate was called he expressed his inability and instructed the doctor to record dying declaration, is not reduced in writing nor mentioned in the dying declaration. He would further argue that it has been elicited in the cross-examination of the doctor that no memo was given to him by the police officer to record dying declaration. It is also submitted that, even though, the parents of the deceased are said to have arrived in the hospital, upon coming to know about the incident of burning, no oral dying declaration was given to them by their daughter, which also renders prosecution case improbable that the deceased would prefer to give dying declaration to the doctor but would not disclose the incident and the cause of death to her own parents who were present. All these suspicious circumstances, taken cumulatively, render entire case of the prosecution highly doubtful and without any independent corroboration to the said dying declaration (Ex.P/15),

particularly when it was not recorded by any Executive Magistrate, coupled with the conduct of the appellant that he had informed neighbours regarding the incident, the appellant ought to be acquitted by giving him benefit of doubt.

5. On the other hand, learned State counsel, supporting the judgment of conviction, would submit that the judgment of conviction and order of sentence by the trial court does not warrant interference because there is no legal requirement of mandatory nature that dying declaration should necessarily be recorded only by Executive Magistrate. He submits that ordinarily, in order to lay credence and authenticity to dying declaration, Executive Magistrate record dying declaration but only on this ground, dying declaration recorded by the doctor, cannot be disbelieved. His further submission is that the doctor has clearly stated in his evidence that at the time of recording dying declaration, the appellant's wife though in burnt condition, was conscious and fit to give statement.
6. He would further argue that even though, the evidence of the doctor does not create any doubt, doctor being an independent person, corroboration if any needed, is found in Dehati Nalishi (Ex.P/10) proved by Investigating Officer-Lal Bahadur Singh (PW-9) who reached the hospital soon after recording of dying declaration (Ex.P/15) and on the basis of disclosure given by the deceased, he prepared in writing, spot FIR (Ex.P/10) in which it has been recorded that it is the appellant who set the deceased on fire.

7. Heard learned counsel for the parties and perused the records.
8. Before undertaking the assessment of evidence on record, we consider it appropriate to deal with settled judicially evolved principles with regard to proof of dying declaration and the caution which the Courts are required to take, before placing reliance upon a dying declaration and making it a basis to convict the accused.
9. A dying declaration is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. It is, therefore, expected that the person will speak the truth and only the truth. Normally in such situations, the courts attach the intrinsic value of truthfulness to such statement and once it is found to have been voluntarily made, it could be relied upon if it is found that it is not an attempt by the deceased to cover up the truth or to falsely implicate a person. Further more, where version given by the deceased is supported and corroborated by other prosecution evidence, the courts can safely rely upon such dying declaration.
10. In the case of **Sher Singh Vs. 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.”

11. In an another decision, in the case of **Raju Devade Vs. State of Maharashtra, (2016) 11 SCC 673**, the judicial approach required to be followed while examining dying declaration is as below:-

“23. It is also relevant to refer to judgment of this court in Ranjit Singh and others versus State of Punjab, 2006 (13) SCC 130 wherein this court has clearly laid down that the conviction can be recorded on the basis of the dying declaration alone if the same is wholly reliable. In the event, if there are suspicions as regards to the said dying declaration, the court should look for some corroborating evidences. Court has further observed that in the event of inconsistencies in the dying declarations the court should lean towards the first dying declaration. Following was observed in para 13:

“13. It is now well settled that conviction can be recorded on the basis of a dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the courts in arriving at the judgment of conviction shall look for some corroborating evidence. It is also well known that in a case where inconsistencies in the dying declarations, in relation to the active role played by one or the other

accused persons, exist, the court shall lean more towards the first dying declaration than the second one.”

12. Keeping in forefront the aforesaid judicial principles with regard to legal requirement of proof of dying declaration, we shall now deal with the material on record.
13. Lal Bihari (PW-1) & Mani Miri (PW-2) who are the neighbours of the deceased and the appellant have stated regarding the incident of deceased having caught fire in the night. According to Lal Bihari (PW-1), the incident took place around 12 to 1 a.m. in the night whereas, according to Mani Miri (PW-2), the incident took place around 12 in the night. It would thus be seen that the time of incident was late in the night and not during day time.
14. Death of Belmoti, on account of burn injuries, has been proved from reliable evidence of the doctor-Kailash Verma (PW-6) who has proved postmortem report (Ex.P/8) prepared by him. He has stated in his evidence that after examining the dead body, he found that Belmoti had sustained burn injuries upto third degree, though, no injuries except burn injuries were found, the cause of death according to him was burning and complications arising therefrom. In the cross-examination, he admits that it could be homicidal, suicidal or accidental.
15. The prosecution case mainly rests upon the testimony of treating doctor - Bhageshwar Patel (PW-12) who claims to have recorded dying declaration in Ex.P/15. He has deposed that Belmoti was brought to the hospital early in the morning

at about 3:35 a.m. on 20th December, 2012 in burnt condition by one of the constable of Police Station- Saraipali namely Mr. Kavi Gwal, No. 45, along with application for conducting MLC. He found that Belmoti had sustained burn injuries on her face, neck, breast, both hands, shoulders, fingers as also on her legs, abdomen, back on both sides and according to him, smell of kerosene was coming out. He further deposes that he found Belmoti having sustained burn injuries upto 60-70% and she was referred to medical hospital, Raipur. This doctor further deposes that looking to the serious condition of the patient, the concerned policeman got him connected to Executive Magistrate on phone, but the Executive Magistrate expressed his inability and advised the doctor that he himself may record dying declaration, thereafter he recorded her dying declaration. The doctor deposes that at the time of recording dying declaration, Belmoti was fully conscious and was in condition to properly speak also. He further deposes that when he asked Belmoti as to how the incident happened, the facts which were disclosed by her were reduced in writing. He deposes that Belmoti disclosed that in the night, when her husband insisted for cohabitation, she refused because she was extremely tired, thereafter, her husband assaulted her and then sprinkled kerosene on her and set her ablaze. She sought to save her by wrapping blanket.

16. He also states that according to Belmoti, in the past, dowry was also demanded. He has proved his signature and has also stated that Belmoti also signed.

This doctor has been subjected to cross-examination and what has been mainly elicited is that he has not recorded any note regarding non-availability of Executive Magistrate and further that he did not ask from the parents of Belmoti. It has also been elicited that he has not made any endorsement in writing that Belmoti was in fit a condition to give statement. He states that the patient informed that kerosene was poured and she herself was talking, therefore, he did not mention these facts. He has denied suggestion that injured was not in a condition to speak. The suggestion that as he had not recorded any dying declaration, therefore, he did not obtain signature of relatives, has been denied.

17. There is no requirement of law that dying declaration should necessarily be recorded only by Executive Magistrate, though, ordinarily such procedure is preferred. What is important is that the person who is recording dying declaration must be satisfied that the declaration is being made voluntarily and truthful and that the person is in fit state to give dying declaration.
18. Present is not a case where the dying declaration was recorded by any person other than the doctor. Present is a case where the treating doctor himself recorded dying declaration. The satisfaction of the person recording dying

declaration is important. Where the person recording dying declaration happens to be the doctor, his satisfaction that the patient was fully conscious and was in state to speak, cannot be doubted unless there is strong reason to hold otherwise. Merely because the doctor did not put it in writing, the dying declaration which is otherwise truthful cannot be discarded.

Moreover, the doubt caused on the dying declaration on the basis that non-availability of Executive Magistrate was not reduced in writing, does not impress us. This again, is not a requirement of law, but in any case, where there is doubt on the dying declaration, this may assume importance. The doctor has stated that even though, Executive Magistrate was contacted, he expressed his inability and advised to record dying declaration, appears to be quite natural and there is no reason for us to disbelieve the testimony of the doctor. After all he is an independent person and unless there is material to show that condition of the patient was so bad that it was wholly improbable that she could give dying declaration or that doctor was acting under any influence, such an evidence normally would be acted upon. Present is not a case where there is any other oral or dying declaration to the contrary, recorded by any other authority, much less any Executive Magistrate, carrying more weight than the dying declaration recorded by the doctor.

19. Even though, in our opinion, the evidence of the doctor is reliable, by way of abundant caution to doubly satisfy

ourselves, we have looked into the contents of spot FIR (Ex.P/10) recorded by the Investigating Officer - Lal Bahadur Singh (PW-9). This police officer has stated that on petrolling duty, having come to know about admission of a burnt woman in the hospital, when he reached the hospital, he found that a dying declaration was already recorded and then on the disclosure of the victim, he recorded a spot FIR at the spot itself. If we compare the contents of the dying declaration (Ex. P/15) and Dehati Nalishi (Ex. P/10), dying declaration recorded by doctor find sufficient corroboration that when deceased refused to cohabit with her husband in the night, the appellant was enraged and then he firstly assaulted her and then set her on fire. Even in the MLC documents (Ex.P14) prepared by the doctor himself, it has been recorded that the patient sustained burn injuries having been set ablaze by her husband. We do not find any reason why the doctor would falsely implicate the appellant by preparing a concocted document of dying declaration.

20. The appellant's wife had suffered burn injuries and she was brought to the hospital and when Executive Magistrate did not come, the doctor, treating it to be his duty to ask the patient recorded what was stated by her and also obtained her signature. He is not a police officer or a person belonging to the family of the deceased that we should look at his evidence with suspicion only because the dying declaration has not been recorded by an Executive Magistrate. Therefore, we are

inclined to believe the dying declaration on the basis of reliable testimony of the doctor-Bhageshwar Patel (PW-12).

21. The submission of learned counsel for the appellant that in the background of the incident that the appellant's wife refused to cohabit and therefore, in the heat of moment, the appellant set his wife ablaze, therefore, the conviction may be altered to that under Section 304 of IPC as culpable homicide not amounting to murder, does not appeal to us because the fourth exception to Section 300 of IPC will not apply in a case where the accused has otherwise acted in an unusual and cruel manner. What could be more cruel for a husband than to assault and then set his wife ablaze merely because she refused at that moment to cohabit with the husband. The kind of mental depravity exhibited by the appellant does not allow us to hold that it was not a case of unusual or cruel manner.
22. Therefore, in our opinion, no interference is called for with the impugned judgment and order of sentence.
23. The appeal is therefore dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Ram Prasanna Sharma)
Judge