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**HIGH COURT OF CHHATTISGARH AT BILASPUR****Criminal Appeal No. 755 of 2016**

Virendra Kumar Sahu, S/o. Pancham Sahu, Aged About 27 Years, R/o. Village Devkatta, Dongargarh, Police Station- Dongargarh, Distt. Rajnandgaon, Chhattisgarh.

**---Appellant****Versus**

State Of Chhattisgarh, Through the Station House Officer, Police Station- Dongargarh, Distt. Rajnandgaon, Chhattisgarh.

**---Respondent**

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For Appellant : Mr. Goutam Khetrapal, Advocate

For Respondent : Mr. Sameer Oraon, Govt. Advocate

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**(Division Bench)****Hon'ble Shri Justice Sanjay K. Agrawal****Hon'ble Shri Justice Sanjay Agrawal****Judgment On Board****(08.12.2023)****Sanjay K. Agrawal, J.**

1. This criminal appeal preferred by the appellant under Section 374(2) of Cr.P.C. is directed against the impugned judgment dated 08.03.2016, passed by the Additional Sessions Judge, Dongargarh, District Rajnandgaon, in Sessions Trial No.10/2014, by which, the appellant herein has been convicted for the offence under Section 302 of Indian Penal Code and sentenced

to undergo life imprisonment and fine of Rs.500/-, in default of payment of fine, 15 days additional rigorous imprisonment.

2. Case of the prosecution, in brief, is that on 15.05.2014 at 2:00 A.M. at village Devkatta, Police Station Dongargarh, the appellant herein poured petrol on the body of his younger brother Nagesh (now deceased) and ignited match-stick, by which, he suffered severe burn injuries and while undergoing treatment at District Hospital Rajnandgaon, he died on 23.05.2014. During the course of treatment of deceased Nagesh, his dying declaration was recorded vide Ex.P-12 and concerned Doctor at Rajnandgaon Hospital has also certified on 15.05.2014 vide Ex.P-13 that he was in fit physical and mental state of mind to record the dying declaration. Since deceased Nagesh died, merg intimation was registered vide Ex.P-6, FIR was registered vide Ex.P-1, inquest was conducted vide Ex.P-3 and dead body of deceased Nagesh was subjected to post-mortem, which was conducted by Dr. V.P. Maheshwar (PW-11), who proved the post-mortem report Ex.P-7, according to which, cause of death was shock due to extensive burn injuries and septicemia. After due investigation, appellant was charge-sheeted for the aforesaid offence

under Section 302 of I.P.C. before the jurisdictional criminal court, which was ultimately committed to the Court of Sessions for hearing and disposal in accordance with law, in which the appellant abjured his guilt and entered into defence stating that he has not committed any offence and he has been falsely implicated.

3. In order to bring home the offence, prosecution examined as many as 13 witnesses and exhibited 13 documents and the appellant-accused in support of his defence has neither examined any witness nor has exhibited any document.
4. The trial Court, after appreciation of oral and documentary evidence on record, convicted the appellant herein for the offence under Section 302 of Indian Penal Code and sentenced him as mentioned in the opening paragraph of this judgment, against which the present appeal has been preferred.
5. Mr. Goutam Khetrapal, learned counsel for the appellant, would submit that the Doctor, who was certified deceased Nagesh to be fit physical and mental state of mind has not been examined for the reasons best known to the prosecution and furthermore, the declarant Nagesh did not clearly name the appellant herein to be the author of the crime and in that view of

the matter in absence of corroboration, the appellant cannot be convicted for the offence under Section 302 of I.P.C. and as such the appeal deserves to be allowed on the ground of benefit of doubt.

6. Mr. Sameer Oraon, learned State counsel, would support the impugned judgment and submit that the prosecution has been able to bring home the offence beyond reasonable doubt and the trial Court has rightly convicted the appellant herein for the aforesaid offence and, as such, the appeal deserves to be dismissed.
7. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
8. The question as to whether death of the deceased was homicidal in nature and appellant is the author of the crime both will be considered together considering the facts and circumstances of the case and the evidence available on record.
9. The case of the prosecution is based on the dying declaration Ex.P-12, recorded by the Naib Tahsildar, namely, Avinash Thakur (PW-13), therefore, it would be appropriate to notice the principles governing the dying

declaration and examination of the doctor while recording the dying declaration.

10. At this stage, it is relevant to notice Section 32(1) of the Indian Evidence Act, 1872, which reads thus:

**“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.**—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

**(1) when it relates to cause of death.**—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

xxx

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xxx”

11. The general ground of admissibility of the evidence mentioned in Section 32(1) is that in the matter in question, no better evidence is to be had. The provisions in Section 32(1) constitute further exceptions to the rule which exclude hearsay. As a general rule, oral evidence must be direct (Section 60). The eight clauses of Section 32 may be regarded as exceptions to it, which are mainly

based on two conditions: a necessity for the evidence and a circumstantial guarantee of trustworthiness. Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which gives a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source. The Supreme Court emphasized on the principle enumerated in the famous legal maxim of the Law of Evidence, i.e., *nemo moriturus praesumitur mentire* which means a man will not meet his Maker with a lie in his mouth. Our Indian Law also recognizes this fact that “a dying man seldom lies” or in other words “truth sits upon the lips of a dying man”. The relevance of this very fact, is an exception to the rule of hearsay evidence.

12. Section 32(1) of the Evidence Act is famously referred to as the “dying declaration” section, although the said phrase itself does not find mention under the Evidence Act. Their Lordships of the Supreme Court have considered the scope and ambit of Section 32 of the Evidence Act, particularly, Section 32(1) on various occasions including in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**<sup>1</sup> in which their Lordships have summarised the principles

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<sup>1</sup>(1984) 4 SCC 116

enumerated in Section 32(1) of the Evidence Act, including relating to “circumstances of the transaction”:

“21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:-

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.”

13. Thereafter, in the matter of **Devinder alias Kala Ram and others v. State of Haryana**<sup>2</sup>, wherein the deceased, who sustained burn injuries while cooking meals on stove, had made a statement to the doctor, their Lordships of the Supreme Court held that statement of the deceased recorded by the doctor is relevant under Section 32 of the Evidence Act and observed as under: -

“14. In the facts of the present case, we find that PW 7, the Medical Officer of the Civil Hospital,

examined the case of the deceased on 6-8-1992 at 6.30 a.m. and he has clearly stated in his evidence that on examination she was conscious and that there were superficial to deep burns all over the body except some areas on feet, face and perineum and there was smell of kerosene on her body. He also stated in his evidence that the deceased was brought to the hospital by her husband Kala Ram (Appellant 1). He has proved the bed-head ticket pertaining to the deceased in the hospital (Ext. DD) as well as his endorsement at Point 'A' on Ext. DD, from which it is clear that he was told by the patient herself that she sustained burns while cooking meals on a stove. This statement of the deceased recorded by PW 7 is relevant under Section 32 of the Evidence Act, 1872 which provides that statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

14. In the matter of **Purshottam Chopra and another v. State (Government of NCT of Delhi)**<sup>3</sup>, principles relating to recording of dying declaration and its admissibility and reliability were summed up in paragraph 21 as under: -

"21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability could be usefully summed up as under:-

21.1. A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the court.

21.2. The court should be satisfied that the

declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

21.3. Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

21.4. When the eyewitnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

21.5. The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement.

21.6. Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.

21.7. As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

21.8. If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in

recording conviction on its basis even without corroboration.”

15. In addition to this, a Constitution Bench of the Supreme Court in the matter of **Laxman v. State of Maharashtra**<sup>4</sup> has clearly held that a certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. Their Lordships held in paragraph 5 of the report as under: -

“5. The Court also in the aforesaid case relied upon the decision of this Court in *Harjit Kaur v. State of Punjab*<sup>5</sup> wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in *Paparambaka Rosamma v. State of A.P.*<sup>6</sup> (at SCC p. 701, para 8) to the effect that

"in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration"

has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is

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4(2002) 6 SCC 710

5(1999) 6 SCC 545

6 (1999) 7 SCC 695

conscious and there was no certification that the patient was in a fit state of mind specially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this court in *Paparambaka Rosamma v. State of A.P.*<sup>8</sup> must be held to be not correctly decided and we affirm the law laid down by this Court in *Koli Chunilal Savji v. State of Gujarat*<sup>7</sup>.

16. The Supreme Court in the matter of **Jagbir Singh v. State (NCT of Delhi)**<sup>8</sup> following the principle of law laid down in **Laxman** (supra) has clearly held that even absence of the certificate by a doctor is not fatal to act upon a dying declaration, however, the requirement remains that the person who records dying declaration must ensure that the patient was in a fit condition, both mentally and physically, to give the declaration.
17. Recently, in the matter of **Irfan @ Naka v. State of Uttar Pradesh**<sup>9</sup> the Supreme Court has held that the dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind and observed in Para-63 as under:

“**63.** It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused.

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7 (1999) 9 SCC 562

8 (2019) 8 SCC 779

9 2023 SCC Online SC 1060

It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.”

18. Reverting to the facts of the case and in view of the principles of law laid down by the Supreme Court, it is quite vivid that the dying declaration Ex.P-12 was recorded by the Naib Tahsildar- Avinash Thakur (PW-13) at the request of Station House Officer, Police Station- Basantpur and the Assistant Surgeon, District Hospital Rajnandgaon certified the deceased to be fit physical and mental state of mind on 16.05.2014 vide Ex.P-13 to record the dying declaration, but surprisingly, the Doctor who has certified the deceased to be fit physical and mental state of mind to record the dying declaration has not been examined by the prosecution for the reasons best known to the prosecution. Furthermore, the Tahsildar (PW-13) who recorded the dying declaration vide Ex.P-12 has only said that vide Ex.P-13, comment has been recorded by Assistant Surgeon, District Hospital Rajnandgaon, but a careful perusal of Ex.P-13 would show that it is illegible and cannot be read and moresoever the person who has certified the

deceased to be fit physical and mental state of mind has not been examined by the prosecution, as stated earlier. However, Naib Tahsildar- Avinash Thakur (PW-13) also did not say that when he recorded the dying declaration, deceased Nagesh was in fit physical and mental state of mind to record the dying declaration and presumably for the reasons that vide Ex.P-13, the Assistant Surgeon has made some comments which is not legible. As such, there is no legal evidence on record to hold that deceased Nagesh was in a fit physical and mental state of mind to record the dying declaration and more particularly, he has suffered 80% burn injuries as per post-mortem report Ex.P-7 and not only this, the dying declaration only names that his brother has poured petrol on him and enlightened match stick and in para 5, in question No.5, he has only stated that his brother Virendra has poured petrol and full name and father's name of Virendra has also not been stated and it requires corroboration in light of the decision of the Supreme Court in the matter of **Gopal Singh & Another v. The State of Madhya Pradesh & Another**<sup>10</sup>, in which, their Lordships have held that a dying declaration which does not contain complete names and addresses of the persons charged with the offence, even

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10 AIR 1972 SC 1557

though may help to establish their identity, is not of such a nature on which conviction can be based. It cannot be accepted without corroboration.

19. In that view of the matter, the prosecution has failed to establish that Nagesh was in a fit physical and mental state of mind to record the dying declaration as before recording his dying declaration, the Doctor who has certified that he was in fit physical and mental state of mind to record the dying declaration has not been examined and the Executive Magistrate- Avinash Thakur (PW-13) who has recorded the dying declaration did not state before the Court that he was satisfied that deceased Nagesh was in fit physical and mental state of mind to record the dying declaration.
20. In view of the aforesaid principles of law laid down by the Supreme Court and in view of the discussion made herein above, we are of the considered opinion that the appellant is entitled for acquittal on the ground of benefit of doubt. Accordingly, the impugned judgment dated 08.03.2016 is hereby set aside. The appellant stands acquitted of the charge framed against him for the offence punishable under Section 302 of I.P.C. and he shall be forthwith set at liberty, unless he is required in connection with any other case.

21. The appeal is allowed.

22. Let a certified copy of this judgment along with the original record be transmitted to the trial Court concerned for necessary information and action, if any. A certified copy of the judgment may also be sent to the concerned Jail Superintendent forthwith wherein the appellant is suffering the jail sentence.

Sd/-  
**(Sanjay K. Agrawal)**  
**Judge**

Sd/-  
**(Sanjay Agrawal)**  
**Judge**

Ashok