NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1305 of 2016

- Gajendra Markandey S/o Ramdayal Markandey, aged about 50 years, Caste – Satnami, R/o Village Pachari, Police Station Patewa, District Mahasamund, Chhattisgarh.

---- Appellant

Versus

- State of Chhattisgarh through Police Station – Patewa, District Mahasamund, Chhattisgarh.

---- Respondent

For Appellant :- Ms. Indira Tripathi, Advocate.
For State :- Mr. Afroz Khan, Panel Lawyer.

Division Bench
Hon'ble Shri Justice Sanjay K. Agrawal &
Hon'ble Shri Justice Sanjay Kumar Jaiswal
Judgment On Board
(03.01.2024)

Sanjay K. Agrawal, J

1. This criminal appeal under Section 374(2) of the CrPC preferred by the appellant – accused herein is directed against the impugned judgment of conviction and order of sentence dated 03.09.2016 passed by the Sessions Judge, Mahasamund, District Mahasamund,

Chhattisgarh, in Sessions Trial No. 64/2015 by which appellant has been convicted for offence under Section 302 of the IPC and sentenced to undergo imprisonment for life with fine of ₹5,000/-, in default of payment of fine additional rigorous imprisonment for one month.

2. Case of the prosecution, in short, is that on 29.05.2015 at about 12:00 noon at village Pachari, Police Station Patewa, District Mahasamund, Chhattisgarh, appellant poured kerosene oil on his daughter-in-law Jhabla Bai (now deceased) and set her ablaze by which she suffered 100% burn injuries, she was admitted to the hospital at Dr. B.R. Ambedkar Smriti Chikitsalaya, Raipur, where during treatment she died on the same day i.e. 29.05.2015 at 6:45 pm and thereby committed the aforesaid offence. It is further case of the prosecution that on the date of offence, when Jhabla Bai (deceased) was alone at home, appellant poured kerosene oil on her body and set her ablaze by which she suffered grievous burn injuries. She (deceased) was escorted to the District Hospital, Mahasamund, from treatment and from where she was referred to Dr. B.R. Ambedkar Hospital, Raipur. In District Hospital, Mahasamund, she (deceased) had given the dying declaration (Ex.P/3) to Medical Officer

Dr. Onkeshwary Sahu (PW-5) in which she has implicated the appellant. Merg intimation and FIR were registered vide Article-A/2 & Ex.P/9, respectively. Inquest proceedings (Article – A/3) were conducted and the dead body of the deceased was sent for postmortem. As per postmortem report (Ex.P/19), proved by Dr. M. Nirala (PW-16), cause of death was due to cardio-respiratory failure as a result of burn injuries and its complications.

3. After due investigation, appellant herein was charge-sheeted for the aforesaid offence and the case was committed to the Court of Sessions for trial in accordance with law. The appellant / accused abjured his guilt and entered into defence.

4. In order to bring home the offence, prosecution has examined as many as 17 witnesses and exhibited 19 documents and defence in support of its case has examined four witnesses (DW-1 to DW-4), but not exhibited any document.

5. The learned trial Court after appreciating the oral and documentary evidence available on record, convicted the

appellant / accused for the offence as mentioned in the opening paragraph of the judgment, against which this appeal has been preferred by the appellant herein questioning the impugned judgment of conviction and order of sentence.

6. Ms. Indira Tripathi, learned counsel for the appellant, submits that appellant has falsely been implicated in crime in question and he has been convicted by recording a finding which is perverse to the record. She also submits that the conviction of the appellant is solely based on the dying declaration, but the prosecution has failed to establish that deceased was in fit physical and mental state of mind to record the dying declaration. As, such, the conviction of the appellant for offence punishable under Section 302 of the IPC is liable to be set aside and he is entitled for acquittal on the basis of benefit of doubt and the appeal deserves to be allowed. She further relied upon the decision rendered by the Supreme Court in the matter of **Irfan @ Naka v. State of Uttar Pradesh**[1] to buttress her submission.

1 2023 SCC OnLine SC 1060

7. On the other hand, Mr. Afroz Khan, learned State counsel, supports the impugned judgment and submits that prosecution has been able to prove the offence beyond reasonable doubt and there is sufficient evidence adduced by the prosecution showing involvement of the appellant in crime in question. He further submits that there is no reason to disbelieve the dying declaration (Ex.P/3) made by Jhabla Bai (deceased) and it has been proved in accordance with law, therefore, the trial Court has rightly convicted the appellant herein for the aforesaid offence and the instant appeal deserves to be dismissed.

8. We have heard learned counsel for the parties, considered their rival submissions made herein-above and gone through the records with utmost circumspection.

9. So far as the nature of death of Jhabla Bai (deceased) is concerned, no definite opinion has been expressed by Dr. M. Nirala (PW-16) in postmortem report (Ex.P/19) and learned trial Court has also not answered this question specifically, therefore, it would be appropriate to consider the question of nature of death of deceased

as well as the question of author of crime in question conjointly considering the entire evidence available on record as the case mainly based on dying declaration (Ex.P/3) recorded by Dr. Onkeshwary Sahu (PW-5) in which Jhabla Bai (deceased) has implicated the appellant in crime in question and also on oral dying declaration made by Jhabla Bai (deceased) to Dr. Badal Shelke (PW-17). We shall consider both of the questions together.

10. At this stage, it is appropriate 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:—
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> **(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.
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> 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 xxx xxx"

11. The general ground of admissibility of the evidence mentioned in Section 32(1) of the Evidence Act 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 or 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**[2] in which their Lordships have summarised the principles enumerated in Section 32(1) of the Evidence Act, including relating to "circumstances of the transaction", which are as under: -

> "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

2 (1984) 4 SCC 116

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**[3], 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

3 (2012) 10 SCC 763

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)**[4], 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

4 (2020) 11 SCC 489

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. Recently, in the matter of **Irfan @ Naka** (supra) 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. 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."

16. Returning to the facts of the present case in the light of the principles of law laid down by their Lordships of the Supreme Court in the aforesaid judgments, it is quite vivid that dying declaration (Ex.P/3) has been recorded by Medical Officer Dr. Onkeshwary Sahu (PW-5) and in her (PW-5) statement before the Court she has clearly stated that Jhabla Bai (now deceased) had suffered 100% burn injuries; in paragraph No.11 she (PW-5) has stated that her (deceased) Blood Pressure and Pulse were not recorded as she was in semi-conscious state, her (deceased) eyes were burnt and she (deceased) was finding difficult to speak; further in paragraph No.15, she (PW-5) has stated that she was put on oxygen as she (deceased) was finding difficult to breath and she has also stated that she recorded the dying declaration without informing the Executive Magistrate. Further in paragraph No.23 of her (PW-5) statement, she reiterated that Jhabla Bai (deceased) was in semi-conscious state and before recording the dying declaration she did not certify that Jhabla Bai (deceased) was in fit physical and mental state of mind to give dying declaration. Staff nurse Smt. Madhu Minj (PW-10), in her statement before the Court, has stated that Jhabla Bai (deceased) was

finding difficult to speak and she was not speaking clearly and she was also finding difficult to breath. Furthermore, witness of the dying declaration Omkar Thakur (PW-12), ward boy, has not supported the case of the prosecution. As such, it is quite vivid that the prosecution has failed to prove that Jhabla Bai (deceased) was in fit physical and mental state of mind to give dying declaration which is a *sine qua non* to rely upon the dying declaration (Ex.P/3) as held by the Supreme Court in the matter of **Irfan @ Naka** (supra). Further, oral dying declaration, which is said to have been given to Dr. Badal Shelke (PW-17) is of no use to the prosecution as Jhabla Bai was in fit physical and mental state of mind to give dying declaration has not been proved. In that view of the matter, appellant is entitled for acquittal on the basis of benefit of doubt.

17. In view of the aforesaid discussion, we are of the considered opinion that the trial Court has erred in convicting the appellant for offence punishable under Section 302 of the IPC relying upon the dying declaration (Ex.P/3) recorded by Medical Officer Dr. Onkeshwary Sahu (PW-5) and oral dying declaration which is said to have been given by the deceased to Dr. Badal Shelke

(PW-17) without certifying that deceased was in fit physical and mental state of mind to give the dying declaration. As such, we hereby set aside the conviction of the appellant for offence under Section 302 of the IPC as well as sentence of imprisonment for life and he is entitled for acquittal on the basis of principles of benefit of doubt. Appellant is in jail since 05.10.2015, we direct that he be released from the jail forthwith, if not required in any other matter.

18. This criminal appeal is **allowed**.

19. Let a certified copy of this judgment along with the original records be transmitted to the concerned trial Court and to the Superintendent of Jail where he is lodged and suffering jail sentence, forthwith for necessary information and action, if any.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Sanjay Kumar Jaiswal)
Judge

Ankit