

1. Case No.	Criminal Appeal No.285/2009
2. Parties Name	Raghuram @ Raghoram S/o Chhogalal Balai vs. State of Madhya Pradesh
3. Date of Judgment	31/07/21
4. Bench Constituted of Hon'ble Justice	Division Bench Hon'ble Shri Justice Vivek Rusia and Hon'ble Shri Justice Shailendra Shukla
5. Judgment delivered by Hon. Justice	Hon'ble Shri Justice Shailendra Shukla
6. Whether approved for reporting	Yes
7. Name of Counsels for parties	Shri S.K. Vyas, learned Senior Counsel with Shri Harshvardhan Pathak, learned counsel for the Appellant. Shri Amit Singh Sisodiya, learned Government Advocate for respondent/State.
8. Law laid down	(1) Dying Declaration recorded by Doctor – The wife of appellant was burnt 100% and she was conscious and oriented but her condition was grim. It was natural for Doctor to undertake the task of recording dying declaration himself in view of precarious condition..... Para 26 Citation relied upon – Abdul Majid Abdul Rehman, AIR 1976 SC 1782. (2) Appellant's subsequent conduct relevant under Section 8 of Indian Evidence Act, 1872, Para 30.
9. Significant paragraph numbers	Paragraphs No.26 & 30

J U D G M E N T

(Delivered on 31st day of July, 2021)

Per, Shailendra Shukla, J :-

This appeal under Section 374 Cr.P.C. has been preferred against the judgment dated 3.3.2009 passed by the Addl. Sessions Judge, Badwah, West Nimar (M.P.) in S.T. No.144/2008, whereby the appellant has been convicted under Section 302 of IPC and sentenced to Life Imprisonment with fine of Rs.200/-. In lieu of payment of fine amount, the appellant has been directed to undergo one month's additional imprisonment.

2. Admitted facts are that deceased Subhadra Bai is the wife of appellant Raghuram and witnesses Kavita and Roshani are the children of appellant and the deceased.

3. The prosecution story in short is that on 4.6.2008 at about 10.20 P.M. Subhadra Bai, wife of the appellant, was brought to Government Hospital at Sanawad in burnt condition. She was found to have suffered 100% burns, there was smell of kerosene coming from her body and clothes. The doctor on duty recorded her dying declaration, in which she levelled allegations against the appellant i.e. her husband as the one who had poured kerosene over her and burnt her. She was referred to M.Y. Hospital, Indore, where she succumbed to her injuries at 12.30 A.M. on 5.6.2008. The panchnama of the dead body was then executed and the body was sent for postmortem. The investigating officer Shri S.S. Udawat (PW-17) drew the spot map, seized incriminating articles from the house of the accused which had been sealed immediately after the incident. The seized articles were sent to FSL for scientific analysis and after investigation charge sheet was filed under Section 302 of IPC.

4. After committal, the ASJ, Barwaha framed the charge under Section 302 of IPC against the appellant, who abjured his guilt. The prosecution thereafter examined 17 witnesses in support. In his accused statement, the appellant has stated that while he was sitting outside his house, his wife rushed out enveloped in flames and in attempt to save her, the appellant himself received burn injuries on his hands and face. The appellant has examined three defence witnesses in his support.

5. In the appeal which has been preferred, it has been stated that dying declaration which has been recorded by Dr. R.S. Patidar (PW-7) is a highly unreliable document which is not corroborated in any material particulars by any independent source and no weightage can be attributed to it, that children of the deceased have not supported the prosecution story, that upper part of the head of deceased had received no burn injuries which demolishes the theory of kerosene being poured on her, that dying declaration contains thumb impression of the deceased which is against the postmortem report, as per which the doctor had certified 100% burns on the body of the deceased, that the dying declaration is said to have been recorded from 9.30 PM to

9.40 PM and in the meanwhile deceased has been referred to M.Y. Hospital, Indore at 9.35 PM, that the factum of appellant having himself got burnt has not been brought out by prosecution, that there is no pre MLC which is usually done when a patient is brought straight to the hospital, that condition of Subhadra Bai was so grave that she could not have made any dying declaration and, therefore, the conviction cannot be sustained under these circumstances.

6. The question which arises for consideration is whether in view of the grounds taken in the appeal and the oral submissions by learned senior counsel appearing on behalf of the appellant, the appellant deserves to be acquitted?

7. Learned counsel for the appellant, at the outset, has pointed out that witnesses Kailash (PW-2), Kamla Bai (PW-3), Roshani (PW-4), Nandu (PW-5), Madan (PW-6) have all turned hostile and their evidence carries no evidentiary value.

8. Submissions were considered.

9. The principle of *falsus in uno, falsus in omnibus* is not applicable in India, meaning thereby that even a hostile witness who partly supports the prosecution story can be relied upon regarding that part which has not been contradicted and successfully challenged in cross-examination. The relevant citation is **Nisar Ali Vs. State of U.P. reported in AIR 1957 SC 366**. The evidence of hostile witnesses need to be considered in the aforesaid backdrop.

10. Nandram (PW-1) states that at about 8.00 PM in the night while he was in his house, the deceased had come out on the road in burnt condition. She was taken to Sanawad Police Station and the police sent her to the hospital and thereafter she was referred from hospital to Indore. He has been declared hostile. The witness has not been given any suggestion that the appellant had tried to save his wife. Witness Kailash (PW-2) has also made similar statements and has been asked no question in cross-examination. All other witnesses whose names have been referred to above, have not been given any suggestion on behalf of accused that the accused/appellant had tried to save his wife. It can also be seen that the statements of PW-1 Nandram that

deceased was first taken to the police station Sanawad, has not been challenged in cross-examination.

11. Regarding the cause of burns to the deceased, her two children namely Roshani (PW-4) and Kavita (PW-13) have mentioned different reasons. Roshani (PW-4) states that at the time of the incident her father (appellant) was having his dinner and her mother closed the door and window of the room and set herself ablaze and then opened the door and rushed out of the house. However, Kavita (PW-13) has stated that at the time of the incident her father and her other sisters were sitting outside the house and her mother (deceased) went inside the house to light chimney and suffered burn injuries from the chimney. The accused has also examined his another daughter Bharti (DW-3) who has made statements akin to Kavita (PW-13). Thus, the defence of the appellant is that the deceased suffered accidental burns due to fall of chimney.

12. Thus, there are three possibilities which arise in this case. First is that the deceased suffered accidental burns due to chimney, or that she committed suicide by pouring kerosene over herself or that it was accused who had set his wife ablaze. The third possibility obtains its strength from the dying declaration purportedly made by the deceased before the doctor. First it would be appropriate to consider the condition of the deceased Subhadra Bai when she was brought to the hospital.

13. Dr. R.S. Patidar (PW-7) states that while he was posted as Medical Officer in District Civil Hospital at Sanawad, Subhadra Bai W/o Raghuram was brought in burnt condition. He states that the general condition of the patient was poor but she was conscious and talking continuously, that due to burn injuries her blood pressure could not be taken. She had suffered burn injuries on her face, neck, chest, abdomen and posterior part, both hands, fingers, legs including soles and he had drawn report which is Ex.P/8. A perusal of this report shows that the hair on the head were also singed and no place was left unburnt. Similarly Dr. Prashant (PW-16) who has conducted the postmortem, has also found burn marks over whole body. Some part of the body such as the upper part of the head, inner parts of thighs and

some parts in both hands had escaped burns. In Ex.P/8 it has been stated that there was 100% epidermal burn injuries.

14. Had it been an accidental case, then the deceased would not have suffered such extensive burns which involve her whole body. The chimney contains very little amount of kerosene, which would not have propensity to cause such severe burns. Although investigating officer Shri S.S. Udawat (PW-17) has seized chimney as per seizure memo Ex.P/11 along with a five litre kerosene Can but the spot map which is Ex.P/19 which has been prepared by the witness, does not depict any chimney, although it shows presence of kerosene Can and other items. Further, the items which have been sent for FSL examination and which have been mentioned in the draught (Ex.P/21) also contains no mention of chimney. Vide Ex.P/21 pieces of Saari, kerosene Can, burnt mattress (गोदड़ी), burnt blouse, burnt निवार of the bed, the singed hair of deceased have been mentioned but the chimney has not been mentioned therein. Kavita (PW-13) and Bharti (DW-3) both have not seen their mother getting accidentally burnt due to falling of chimney over her. As already stated, extensive 100% burn injuries could not have been caused by fall of chimney. No suggestion has also been given to the treating doctor R.S. Patidar (PW-7) in this regard. Hence, the possibility of accidental burns due to fall of chimney is ruled out.

15. Regarding the other two possibilities which are suicidal burn injuries or accused himself setting his wife ablaze, shall now be considered. Regarding suicidal burn injuries, the only witness is Roshani (PW-4) but this witness herself states in cross-examination that at the time of incident she was sitting outside her house, meaning thereby that the witness had not seen her mother pouring kerosene over herself. In examination-in-chief she states that her father was having his food at the time of the incident and in cross-examination she states that her father (appellant) was sitting outside the house at the time of the incident. Thus, there is no eyewitness showing burns due to suicidal attempt by the deceased. The only evidence which is available is the dying declaration of the deceased, which shall now be considered.

16. Dr. R.S. Patidar (PW/7) has stated that when the deceased Subhadra Bai was brought for examination by Anil, he had prepared MLC report which is Ex.P/8. The general condition and extent of burn injuries of patient have already been described earlier. A perusal of Ex.P/8 shows the following remarks have been noted down at 9:30 pm.

As per patient – 'पति ने घासलेट डालकर आग लगाई'.

17. Below this remark, it has been mentioned that patient is conscious, oriented, anxious and talkative, but her general condition is poor.

18. The witness Dr. R.S. Patidar (PW/7) states that he recorded the dying declaration of the injured in front of witnesses namely; Kailash and Nandram. He has made a mention of the various questions which were asked and the answers which were given by the injured patient. The witness states that the injured had appended her thumb impression below the dying declaration which is Ex.P/10. It would be appropriate to reproduce the contents of dying declaration i.e. Ex.P/10.

कथन

प्र. नाम क्या है।

उ. सुभद्रा पति राघुराम

प्र. कहा रहती है।

उ. बडूद

प्र. कैसे जली है।

उ. पती ने घासलेट डाला और आग लगाई।

प्र. क्यों जलाया

उ. दारू पीकर झगड़ा करता है।

प्र. और कुछ कहना है।

उ. मेरी तो जान गई, पर राघुराम को मत छोड़ना मेरा 1 छोरा 3 छोरी है, मौसी के पास रखना।

Remained conscious during her statements.

19. In cross-examination, the witness Dr. R.S. Patidar (PW/7) has admitted that while the dying declaration was being recorded, simultaneously her treatment had also been initiated. He states that pain relieving injection was also administered but denies the suggestion that due to such injection the patients loose their consciousness.

20. Learned senior counsel for the appellant in his oral submission has stated that the respiration rate has been shown to be 12% per minute which means that the patient must have been gasping and it was not possible for such patient to make any statement. However, no such suggestion has been given in cross-examination to Dr. Patidar (PW/7). The respiration rate is in fact the number of breathes the person takes per minute and a casual browsing of a internet shows that a normal respiration rate is anywhere between 12 to 16 breathes per minute. Hence, there is no reason to believe that patient was gasping for breathe at the time she was admitted. The dying declaration has been recorded by medical specialist who has made a remark about the patient being conscious and oriented when she was initially brought inside the hospital. Even after recording the statements, similar remarks about her being conscious have been made. There is no reason to disbelieve this witness who has otherwise no interest to implicate the accused falsely. The statements and answers do not appear to be fabricated and the evidence of Dr. Patidar (PW/7) has not been found to be discordant, infirm and unreliable.

21. The learned senior counsel has further submitted that Doctor had committed irregularity by directly recording the MLC, that the Doctor should have prepared a pre MLC report since the patient was brought directly to the hospital by her son and on request by police, MLC report should have been drawn. Learned senior counsel has further drawn the Court's attention to the fact that the MLC Ex.P/8 has been written at 9:30 pm, that dying declaration had been made at 9:40 pm and MLC Ex.P/10 has been drawn at 9:35 pm, thus, timings are intermingled and do not match appropriately.

22. The aforesaid submissions were considered.

23. Ex.P/8 which is a report prepared by Dr. Patidar (PW/7) carries the headline of MLC and below these words, report has been drawn. This report i.e. Ex.P/8 has been written from the middle of leaf of a paper behind which "*Mutzarar* form" has been drawn by the police of Police Station - Sanawad in which a request has been made to the Medical Officer, CHL Hospital, Sanawad, to provide the medical

treatment with a mention that the deceased Subhadra Bai has been brought in a burnt condition and she was having smell of kerosene. The writing of a concerned police employee extends to the second leaf of the paper, below which MLC has been drawn. Dr. Patidar (PW/7) has been asked as to whether the patient was brought directly to him or she was brought via police station. The witness claims ignorance about this fact. However, a perusal of Ex.P/8 prima-facie shows that before the patient was brought to Doctor, the police had drawn a request letter for examining the patient. The witness Nandram (PW/1) has already stated that the injured Subhadra Bai was first taken to Police Station - Sanawad and thereafter the police had sent her to hospital. These submissions have not been challenged in the cross-examination. Thus, it is proved that the injured patient was first taken to the Police Station and then to the Doctor and hence there was no need to execute the pre MLC report. The MLC Ex.P/10 which has been drawn, has been executed rather at 9:35 pm in order to show that the patient has been referred to MY Hospital, Indore. The tick-mark over the word 'refer' has been made in the aforesaid document. Thus, this document is in fact an information to the police mentioning about the referral of patient. This shows that on 9:30 pm the MLC was recorded and immediately a referral document was prepared i.e. Ex.P/10 and the dying declaration was also drawn at 9:40 pm. Thus, there is uniformity in the process of executing these documents and no irregularity can be seen therein.

24. Now reverting back to the dying declaration recorded by Dr. R.S. Patidar (PW/7), learned senior counsel for the appellant has cited Hon'ble Apex Court's judgment in the case of of **K. Ramchandra Reddy and Another vs. Public Prosecutor reported in AIR 1976 SC 1994** and the para 6 of judgment reads as under:

Para No.6. *“The accused pleaded innocence and averred that they had been falsely implicated due to enmity. Thus it would appear that the conviction of the accused depends entirely on the reliability of the dying declaration Ext. P-2. The dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the*

closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. The law on the subject has been clearly and explicitly enunciated 37-833 Sup CI/76 by this Court in [Khushal Rao v. State of Bombay\(I\)](#) where the Court observed as follows:

On a review of the relevant provisions of the [Evidence Act](#) and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, & agreement with the opinion of the Full Bench of the Madras IB High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated, (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence, (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night. whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control. that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination."

The above observations made by this Court were fully endorsed by a Bench of five Judges of this Court in Harbans Singh and Another v. State of Punjab [1962] Su. (1) S.C.R. 104. In a recent decision of this Court in Tapinder Singh v. State of Punjab MANU/SC/0203/1970 : 1970CriL J1415 relying upon the earlier decision referred to above, this Court observed as follows : It is true that a dying declaration is not a deposition in court and ii is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances."

In Lallubhai Devchand Shah and others v. State of Gujarat(1), this Court laid special stress on the fact that one of the important tests of the reliability of a dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind and observed as follows:

"The Court, therefore, blamed Dr. Pant for not questioning Trilok Singh with a view to test whether Trilok Singh was in a "fit state of mind" to make the statement. The "fit state of mind" referred to is in relation to the statement that the dying man was making. In other words, what the case suggests is that the person who records a dying declaration must be satisfied that the dying man was making a conscious and voluntary statement with normal understanding."

25. It has already been found that Dr. Patidar (PW/7) is not a partisan witness who has shown an inclination to implicate the appellant/accused. It is a well settled law that the Court is entitled to convict the accused on the sole basis of dying declaration if the same can be recorded as truthful (**Gopal Singh vs. State of Madhya Pradesh reported in AIR 72 SC 1557**). It is of-course true that the reliability of dying declaration should be subjected to close scrutiny and the Courts must satisfy that the dying declaration is truthful. (**Prem Kumar Gulati vs State of Haryana reported in 2014 Vol.-14 SCC 646**).

26. The necessity for careful scrutiny of dying declaration is that it is not a statement made on oath and is not tested on the touchstone of cross-examination. A question certainly be raised as to why Doctor could not made any request for recording the dying declaration by

Executive Magistrate. In the case of **Abdul Majid Abdul Rehman vs. State of Gujarat reported in AIR 1976 SC 1782**, it has been held that when the Doctor had found that the life had been ebbing fast and there was no time to call the Police or Magistrate, he was justified in recording the dying declaration and indeed he was duty bound to do so and as the Doctor was disinterested and respectable witness, there was no reason to reject the witness. Para 11 of the aforesaid judgment is relevant which reads as under:

Para No.11. *“The High Court found, and we think rightly, that this reasoning was wholly puerile. There was absolutely no basis for doubting the integrity and veracity of Dr. Shah. We have examined the statement of Dr. Shah. We are in entire agreement with the High Court, that Dr. Shah's statement discloses "a picture of straight forwardness and forthrightness." There is absolutely nothing in that statement which could raise: a suspicion that the deponent was biased in favour of the prosecution or ill disposed towards the accused. The Doctor was the best person to opine about the fitness of the deceased to make the statement, he did, the Doctor found that life was ebbing fast in the patient. There was no time to call the police or a Magistrate. In such a situations the Doctor was justified, indeed, he was duty bound to record the dying declaration of the deceased. He was a disinterested, respectable witness. The Trial Judge was therefore wholly unjustified in rejecting the evidence of the Medical Officer”.*

27. As already seen, the patient was burnt 100% and she was conscious and oriented, but her condition was grim. As already found, she succumbed barely three hours later. Hence, it was natural for Doctor to take the task of recording the dying declaration himself in view of precarious condition of prosecutrix.

28. Learned senior counsel for the appellant submits that the presence of thumb impression on dying declaration is contrary to the evidence of Doctor who has stated that the fingers of victim had also got burnt. A perusal of thumb impression on Ex.P/9 shows that the thumb impression is not complete and there are irregular margins therein which itself points out some debility which is not expected in completely normal person.

29. The defence of accused/appellant is that he tried to save his wife which itself shows that he could have committed the offence. He has examined Dr. Rameshwar (DW/2) who has stated that the appellant was brought by a Constable on 05.06.2008 in a Civil Hospital,

Sanawad and had found one third of forearms of appellant having some burn injuries and also singeing of hair on head on the front side, face on left side and mouth. The burn injuries were dermoepidermal burns and the extent of burn was 10%. The relevant document is Ex.D/1. In cross-examination, he has admitted that if the hands of such a person already were smeared with kerosene oil then such injuries could be caused.

30. Thus, there is indeed an evidence that the appellant had also received burn injuries. However, his conduct again creates a dent on this defence. As already can be seen, the burn injuries were minimal i.e. only 10%. The natural conduct of a husband receiving such minimal injuries would be to escort gravely burnt wife to the hospital, which is not the case here. This conduct of appellant/husband is a relevant fact against him under Section 8 of Indian Evidence Act, 1872. It is the prosecution story itself that the appellant had fled from the spot after the incident. As already found, none of the witnesses have been given suggestion that the appellant tried to save his wife. This defence has been taken for the first time in the accused statements and developed subsequently. The accused has been medically examined at 3:30 am and not immediately after the patient was hauled to the hospital. The accused/appellant has not explained the lapse of time before he was medically examined. This fortifies the prosecution story that the accused/appellant had fled from the spot.

31. In view of the discussion gone into as above, we find that the death of Subhadra Bai was a result of culpable homicide and it was the appellant who had committed the offence. There are no circumstances available which would bring the act of appellant under any of the exception mentioned under Section 300 of IPC. The deceased Subhadra Bai has stated that the appellant/husband used to fight with her after consuming liquor and she does not even want her children to be allowed to stay with her husband. Such statements which have been made by dying person have been found to be reliable and clarify the motive on the part of appellant as well.

32. Consequently, we affirm the conviction of appellant under Section 302 IPC by the trial Court. The sentence which has been imposed on him by the trial Court is also appropriate and the same is affirmed as well. The appeal, thus, stands dismissed on the point of conviction and sentence.

33. Let a copy of this order along with original record be sent to the trial Court for compliance.

34. The disposal of the property shall be as per the order of trial Court.

(VIVEK RUSIA)
JUDGE

(SHAIENDRA SHUKLA)
JUDGE

Arun/-

