HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

D.B. : Hon'ble Shri Subodh Abhyankar and Hon'ble Shri Satyendra Kumar Singh, J.J.

Criminal Appeal No.1015/2012

1	Case No.	Cr.A. No.1015/2012
2	Parties Name	Mohan S/o Chhituji Vs. State of M.P.
3	Date of Order	23/04/2022
4	Bench constituted of Hon'ble Justice	Division Bench Hon'ble Shri Justice Subodh Abhyankar and Hon’ble Shri Justice Satyendra Kumar Singh
5	Order passed by	Hon'ble Shri Justice Subodh Abhyankar
6	Whether approved for reporting	**Yes**
7	Name of counsel for the parties	Shri Shiv Kumar Golwalkar, for the appellant. Shri Bhaskar Agrawal, G.A. for the State.
8	Law laid down	15] So far as the non-mentioning of the name of the deceased just below the dying declaration is concerned, in the considered opinion of this Court, it is hardly relevant as the dying declaration was recorded by a Gazetted Officer of the State on the post of Sub Divisional Officer and the condition of the patient was also verified by the duty doctor. [Please see ***Narender Kumar (supra)].*** 16] So far as the reading over of the dying declaration to the deceased is concerned, the aforesaid objection is also liable to be rejected as it is not the case of the prosecution or the

		defence that the deceased had given dying declaration in one language whereas it was recorded in the other, which may necessitate the reading over of the dying declaration to the deceased and informing him the contents of the same. [Please see ***Jai Karan (supra) and Kashi Vishwanath (supra)]*** Judgement relied upon:- ***Narender Kumar v. State (NCT of Delhi), reported as (2015) 17 SCC 451 : (2018) 1 SCC (Cri) 784***
9	Significant paragraph	15 and 16

(Subodh Abhyankar)
Judge

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Criminal Appeal No.1015/2012

Mohan S/o Chhituji

Age:50 years, Occupation: Labour

R/o: Village Kherada, Thana Bhikangaon

District Khargone (M.P.)

Versus

The State of Madhya Pradesh

Through PS Bhikangaon, District Khargone (M.P.)

****

Shri Shiv Kumar Golwalkar, learned counsel for the appellant.

Shri Bhaskar Agrawal, learned counsel for the respondent/State.

* * * * *

J U D G E M E N T
(Delivered on 23/04/2022)

Per:- Subodh Abhyankar, J.

1] This criminal appeal has been filed by the appellant Mohan under Section 374(1) of Cr.P.C. against the judgment dated 14/06/2012 passed in Sessions Trial No.114.2011 by the Second Additional Sessions Judge, Khargone, District – Khargone whereby finding the appellant guilty, the

learned Judge of the trial Court has convicted him as under:-

Conviction		Sentence		
Section	Act	Imprisonment	Fine	Imprisonment in lieu of Fine
302	IPC	Life Imprisonment	Rs.25,000/- each	1 Year R.I.
498-A	IPC	1 Year RI	-	-

2] In brief, the facts giving rise to the present appeal are that on 15/09/2008 when the appellant and his wife Dhapai Bai were at their home, at that time, the appellant poured kerosene over her and set her ablaze who died in the hospital while being treated. Her MLC was prepared and intimation was also sent to the police and her dying declaration (Ex. P/17) was also recorded by the Executive Magistrate (PW/14) Shankarlal Singade. Thus the entire case of the prosecution revolves around the said dying declaration.

3] The case was committed to the Court of Sessions and subsequently learned Judge of the Trial Court, after recording the evidence, has convicted the appellant as aforesaid hence this appeal.

4] Learned counsel for the appellant has vehemently argued before this Court to submit that the veracity of dying declaration is highly doubtful and thus it cannot be relied upon for the purposes of convicting the present appellant. Firstly it is submitted that although it bears a thumb impression but there is no mention as to whose thumb impression

it is and secondly in the postmortem report, there is no mention of the fact that the thumb of the deceased was having some ink on it. Thirdly; it is submitted that the aforesaid dying declaration was not read over to the deceased by the Executive Magistrate. Thus, it cannot be said that the Executive Magistrate recorded the same dying declaration which was dictated by the deceased. Counsel has also submitted that the deceased was suffering from mental disease which is also admitted by PW/1 Pinky who is her daughter-in-law as also PW/2 Rakesh who happens to be the son of the deceased and the present appellant and stated that the behavior of his father towards his mother was cordial. In support of his contention, learned counsel for the appellant has also relied upon the decision of the Supreme Court in the case of ***Sham Shankar Kankaria vs. State of Maharashtra*** reported as ***(2006)13SCC 165***, in the case ***Jaswinder Singh vs. State of Panjab*** reported as 2010 CRI.L.J.(NOC) 40 (P.&H.)***.,*** in the case of ***Bablu @ Babla @ Shoaib vs. State of M.P.*** reported as 2012 (II) MPWN 17 and in the case of ***Pallavi vs. Sachin*** reported as 2012(II) MPWN 18.

5] Learned counsel for the respondent/State, on the other hand, has opposed the prayer and it is submitted that the dying declaration of the deceased Dhapai Bai is a valid piece of evidence which is also apparent from the face of it as prior to recording of the statement, the Doctor has given its opinion that the patient was fit to give her statement and after the dying declaration was recorded, the Doctor has also opined that the patient was fully conscious during the period when she gave her

statement. Counsel has also drawn the attention of this Court to the deposition of PW/14 Shankarlal Singade who is the Executive Magistrate to submit that no illegality can be found in recording the said dying declaration. Counsel has also drawn the attention of this Court to the deposition of PW/4 Pancham who happens to be brother of the deceased who has clearly stated that the appellant used to beat the deceased after consuming liquor. Thus, it is submitted that no illegality has been committed by the learned Judge of the Trial Court in appreciating the evidence and convicting the appellant as aforesaid. Thus, it is submitted that the appeal be dismissed.

6] Heard learned counsel for the parties and perused the record.

7] So far as the acceptability of a dying declaration is concerned, in the case of ***Sham Shankar Kankaria*** the Supreme Court has held as under:-

> "11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. *The court must be further satisfied that the deceased was in a fit state of mind* after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed

up as under as indicated in *Paniben* v. *State of Gujarat*: (SCC pp. 480-81, para 18):-

> (*i*) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja* v. *State of M.P.*)
>
> (*ii*) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P.* v. *Ram Sagar Yadav* and *Ramawati Devi* v. *State of Bihar*.)
>
> (*iii*) 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 had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy* v. *Public Prosecutor*.)
>
> (*iv*) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg* v. *State of M.P.*)
>
> (*v*) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh* v. *State of M.P.*)
>
> (*vi*) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath* v. *State of U.P.*)
>
> (*vii*) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra* v. *Krishnamurti Laxmipati Naidu*.)
>
> (*viii*) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha* v. *State of Bihar*.)
>
> (*ix*) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that

> the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram* v. *State of M.P.*)
>
> (*x*) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P.* v. *Madan Mohan*.)
>
> (*xi*) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani* v. *State of Maharashtra*.)

12. In the light of the above principles, the acceptability of alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it a basis of conviction, even if there is no corroboration. (See *Gangotri Singh* v. *State of U.P.*, *Goverdhan Raoji Ghyare* v. *State of Maharashtra*, *Meesala Ramakrishan* v. *State of A.P.* and *State of Rajasthan* v. *Kishore*.)."

(emphasis supplied)

8] Regarding the thumb impression or the signature of the deceased on the dying declaration, the Hon'ble Supreme Court in the case of ***Narender Kumar v. State (NCT of Delhi), reported as (2015) 17 SCC 451 : (2018) 1 SCC (Cri) 784***, has held as under:-

"**17.** Having regard to the said statement of PW 12, which was also corroborated in every respect by PW 7 who has made an endorsement in the dying declaration itself that the patient was fully conscious and capable of making his statement and the said witnesses are official witnesses one of whom, namely, PW 12 is an expert witness, we have

no reason to disbelieve their version and, therefore, the submission on that footing is also liable to be rejected.

18. It was then contended that the dying declaration did not contain either the signature or the thumb impression of the deceased which is in violation of the guidelines issued by the High Court of Delhi in regard to the recording of dying declaration.

19. When we consider the said submission, in the first place, it must be stated that it was only a guideline. The guidelines were issued by the High Court in order to ensure that any defect in regard to the identity of the deceased or the veracity of the contents of the dying declaration are not doubted on the ground that the patient concerned himself could not have made such a statement in order to implicate someone in the offence. The issuance of the guidelines is for the purpose of ensuring and for testing the genuineness of the dying declaration of person who is in the last moment of his life. Merely because there was a defect in following the said guideline, which, as is now pointed out, is of a trivial nature and if the dying declaration recorded is otherwise proved by ample evidence, both oral as well as documentary, on the ground of such trivial defects, the whole of the dying declaration cannot be thrown out.

20. In the case on hand, we have noted that the dying declaration was recorded by PW 7 who was summoned by PW 12 the doctor who noted the condition of the patient and PW 7 was brought to the hospital by PW 2, the ASI and before recording the dying declaration PW 12 endorsed the capability of the deceased to make the statement apart from PW 7 himself ensuring that the deceased was in a fit condition to make the statement and thereafter the said statement was recorded by PW 7, a responsible judicial officer. It cannot be held that simply because PW 7 omitted to get the thumb impression or signature of the deceased the dying declaration should be rejected. As has been noted by the High Court in its judgment where it has reached a conclusion that the recording of the dying declaration was established and found to be truthful and the statement contained therein was made voluntarily and recorded correctly, there is no reason to doubt the said document, Ext. PW-7/C for the reason that the signature or the thumb impression was not obtained on the said document. Therefore, we hold that the dying declaration was proved in the manner known to law and, therefore, there is no scope to reject the same."

(emphasis supplied)

9] Regarding the contention of the appellant that the dying declaration was not read over to the deceased, reference may be had to the decision of the Hon'ble Supreme Court in the case of ***Jai Karan v. State of Delhi (NCT), (1999) reported as 8 SCC 161 : 1999 SCC (Cri) 1385***, has held as under:-

> " **9.** The short question that arises is whether the dying declaration said to have been made by the deceased (Exh. 11/A) is believable and acceptable and conviction can be based on the same.
> **10.** A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premiss that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premiss which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross-examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence — neither extra strong nor weak — and can be acted upon without corroboration if it is found to be otherwise true and reliable. [*Padmaben Shamalbhai Patel* v. *State of Gujarat*[1] (para 8).]
> **Xxxxxxxxxxxxxxxxxxxxxxxxxxxxx**
> **15.** Dr Gaurav Nijhara (PW 11) in his testimony has stated that he was posted as Medical Officer in LNJPN Hospital on 26-9-1990 and on that day the injured Wanti Devi, wife of Jai Karan was brought to the hospital by her husband. It is also in his evidence that the injured told the witness that after a fight with her husband, he (husband) poured kerosene on her and lit fire; that on examining the injured he found

> her having 90% burns; that she was conscious, cooperative and oriented regarding time, place and person. The witness claims that he admitted her in the Burns Ward, prepared her MLC No. 89766 and signed the document Ex. PW 11/A. The witness also examined the accused when he brought his wife and gave the history of burning both his hands while "burning his wife with kerosene". This history was also written by the witness (Ex. PW 11/B). **The witness had also stated that the injured persons (deceased and accused) made the statement in Hindi while he recorded it in English, that he had not read over and explained the contents of the document to the injured**. He had also not taken her signature or thumb impression on the document. No other person had attested the statement alleged to have been made by the injured Wanti Devi before the witness."
>
> (emphasis supplied)

10] Similar observations have also been made by the Hon'ble Supreme Court in the case of ***Kashi Vishwanath v. State of Karnataka, reported as (2013) 7 SCC 162 : (2013) 3 SCC (Cri) 257***, has held as under:-

> "**29.** Apart from the contradictions, the credibility of the three dying declarations (Ext. P-12, Ext. P-22 and Ext. P-29) is to be doubted. In the first dying declaration (Ext. P-12) dated 14-1-2000 the thumb impression of the victim has been shown. Whereas in the second dying declaration (Ext. P-22) taken on the same day i.e. 14-1-2000 and the third dying declaration (Ext. P-29) given on the next day i.e. 15-1-2000, the victim had stated that she had not given her signatures since her hand was completely burnt. Dr Bhimappa (PW 22), who signed Ext. P-22, in his cross-examination stated that he was not aware whether Neelamma (the deceased) was talking in Telugu. Dr Dhanjaya Kumar (PW 20), who signed Ext. P-12, in his cross-examination specifically stated that he can understand Kannada but does not know Telugu language and that Neelamma was talking in Telugu language. Padmavathi (PW 8), mother of the deceased, in her cross-examination stated that Neelamma (the deceased) was not knowing the correct writing in Telugu. But she was writing some Telugu.

> 30. The prosecution has failed to state as to why three dying declarations were recorded in Kannada, if the deceased Neelamma was talking in Telugu. It has also not been made clear as to who amongst the Tahsildar, PSI or SI or the doctors who had signed Ext. P-12, Ext. P-22 and Ext. P-29 had knowledge of Telugu and translated the same in Kannada for writing dying declarations in those **exhibits and that at the bottom of three dying declarations it has not been mentioned that they were read over in Kannada and explained in Telugu and that the deceased understood the contents of the same.** The abovementioned facts create doubt in our mind as to the truthfulness of the contents of the dying declarations as the possibility of the deceased being influenced by somebody in making the dying declarations cannot be ruled out."

11] In the aforesaid case, the dying declaration was not relied upon by the Supreme Court and the appellant was acquitted.

12] On the anvil of the aforesaid dictum of the Supreme Court, this court is required to see the admissibility of the dying declaration. On due consideration of submissions and on perusal of the record, it is found that the FIR in the present case Ex.P/22 was lodged on 17.09.2008 under Section 307 of IPC against the present appellant only after receiving the inquiry report alleging that Dhapai Bai the deceased was set ablaze by her husband the present appellant, which has been disclosed by her in her dying declaration. It is also found that Dhapai Bai was initially brought to the Hospital on 15.09.2008 and duty doctor, PW-11 Dr. S. Dixit sent an intimation to the concerned police station vide Ex.P/14 wherein also it is mentioned that as per the injured her husband had set her on fire after pouring kerosene over her. In the MLC Ex.P15 through which the injured was asked to be examined by the concerned medical officer, it is again mentioned that she has informed that she has been set on fire by

her husband after pouring kerosene.

13] On 15.09.2008 itself, the concerned police officer of *Police Sahayta Kendra, Mukhya Chikitshalay,* Khandwa sought an information if the injured was in a fit mental condition to give her statement to which the doctor has also opined that she is fit to give the statement. Her dying declaration Ex.P/17 was recorded by PW-14 Shankarlal Singade, Sub-Divisional Officer and S.D.M., Sohagpur, District – Hoshangabad and has affirmed that the deceased had given her dying declaration prior to her death wherein he had also obtained the opinion of doctor regarding the fitness of the injured to give the statement and the doctor has also endorsed on the said dying declaration Ex./P17 that the patient was fit to give statement and after her statement was recorded, the doctor has also opined that during the course of recording of the statement the patient was fully conscious. This witness has affirmed in the aforesaid dying declaration that the deceased Dhapai Bai has stated that at around 5 O' clock in the evening the appellant poured kerosene over her from a chimney as he consumes liquor excessively and quarrel with her and also beat her every now and then and today after burning her, he has run away and earlier also he had tried to burn her, but as the kerosene was not enough, she could not be burnt. The aforesaid dying declaration has been assailed by counsel for the appellant on the ground that firstly, there is no mention of the name of the person giving the dying declaration below the thumb impression which is appended on the dying declaration, that it was given by the deceased Dhapai Bail; secondly, this dying

declaration also was not read over to the deceased when it was recorded; and thirdly the thumb impression on the dying declaration itself gives rise to the suspicion about its veracity as the deceased had 90 to 95% injury and her hands were also burnt.

14] On perusal of the record, it is found that regarding the thumb impression of the deceased on the dying declaration is concerned, PW-11 doctor Dixit has also been cross-examined on this point, who has clearly stated that he has given an opinion that the deceased had suffered superficial to deep burns, although it is not mentioned that on which part of the body, which type of burn she has suffered and has also stated that if the patient has suffered superficial burns, his or her fingerprint would be prominent.

15] So far as the non-mentioning of the name of the deceased just below the dying declaration is concerned, in the considered opinion of this Court, it is hardly relevant as the dying declaration was recorded by a Gazetted Officer of the State on the post of Sub Divisional Officer and the condition of the patient was also verified by the duty doctor. [Please see ***Narender Kumar (supra)].***

16] So far as the reading over of the dying declaration to the deceased is concerned, the aforesaid objection is also liable to be rejected as it is not the case of the prosecution or the defence that the deceased had given dying declaration in one language whereas it was recorded in the other, which may necessitate the reading over of the dying declaration to the deceased and informing him the contents of the same. [Please see ***Jai***

Karan (supra) and Kashi Vishwanath (supra)]

17] In view of the aforesaid discussion, the judgements relied upon by the counsel for the appellant are distinguishable and are of no avail to him.

18] Thus, in the considered opinion of this Court, the dying declaration itself is sufficient to convict the appellant coupled with the other documents which are also placed on record. It is also found that that the sons of the deceased have not supported the case of the prosecution and her daughter-in-law whose statement was also recorded under Section 164 of Cr.P.C. has also not supported the case of the prosecution and have been declared hostile. However, PW-4 Pancham, who is the brother of the deceased has also affirmed that his brother-in-law the appellant, used to consume liquor a lot and also used to quarrel with the deceased after such drinking. He has also stated that most of the lower limb of the deceased was burnt and upper limb had lesser burn injuries. PW-6 Bhairam, who is also the resident of the same area has admitted that the appellant was in the habit of heavy drinking, although on other particulars, he has not supported the case of the prosecution. In such facts and circumstances of the case, this Court has no hesitation to come to a conclusion that it was the present appellant only, who had burnt the deceased alive after pouring kerosene over her and thus, the conviction recorded by the learned Judge of the trial Court does not call for any interference.

19] Resultantly, the appeal being devoid of merits, is hereby

dismissed.

(Subodh Abhyankar)
Judge

(Satyendra Kumar Singh)
Judge

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