

HIGH COURT OF MADHYA PRADESH, JABALPUR

Criminal Appeal No.1748/2005

Jafar Khan S/o Mahabub Khan

Vs.

State of Madhya Pradesh

Present : **Hon. Shri Justice S.K. Gangele,**
Hon. Shri Justice Anurag Shrivastava

Shri V.P. Singh, Advocate for the appellant.

Shri Prakash Gupta, Panel Lawyer for the respondent/State.

Whether approved for reporting: Yes/No

J U D G M E N T
(25.07.2017)

Per Anurag Shrivastava, J

This appeal under Section 374 (2) of Cr.P.C. has been filed by the appellant/accused against the judgment dated 09.08.2005, passed by learned 2nd Additional Special Sessions Judge, Chhindwara (MP), in S.T. No.93/2004, whereby the appellant/accused has been convicted for commission of offence punishable under Section 302 of IPC and sentenced to undergo RI for life with fine of Rs.300/- with default stipulation.

2. The case of prosecution in brief is that the deceased Durgawati aged about 13 years was a young girl, living with her parents Malkhan Gond (PW-1) and Smt.Maneshi Bai (PW-2), in village Sarra. The appellant/accused Jafar was

also living in her neighborhood. Two days before the incident, there was a quarrel between deceased and young daughter of the appellant. The appellant got annoyed during quarrel and he had threatened the deceased to kill. On 11.09.2004 about 11:00 am, the deceased was sitting at the door of her house, her parents had gone for work. Meanwhile, the appellant came there with a bottle of kerosine oil, he poured the oil on the deceased and set her ablaze. The deceased ran into the house of her neighbor Nandu (PW-5) to save herself in burning condition, but Nandu turned her out, then deceased came under a tree where other witnesses doused the fire by covering her with a cotton sheet. The information of the incident was given to the parents of the deceased and she was brought to District Hospital Chhindwara for treatment. She was admitted in the hospital. An information of burn case was sent to police station City Kotwali Chhindwara from the hospital. Head Constable M.Chand (PW-8) visited the hospital and after seeing condition of deceased, sent a letter to Executive Magistrate Ramcharan Shivhare (PW-11) for recording the dying declaration of the deceased. Subsequently Ramcharan Shivhare recorded the dying declaration Ex.P-12 of deceased. The police registered an offence under Section 307 of IPC against the appellant. During investigation, spot map Ex.P-3 was prepared. One bottle having smell of kerosine oil was seized near the door of house of the deceased. One Perpatti (Payal) of silver was seized from the accused and statement of witnesses were recorded. The deceased was died on 18.09.2004 at about 8:10 am in the hospital. Receiving the information of death, the police registered offence under Section 302 of IPC. An inquest was conducted, panchnama of dead body was

prepared and body was sent for postmortem and after usual investigation, the charge sheet has been filed.

3. The trial Court has framed the charge of offence punishable under Section 302 of IPC and Section 3(2)(5) of SC/ST (Prevention of Atrocities) Act. The appellant abjured guilt and pleaded innocence. The prosecution has examined 13 witnesses in its support whereas the appellant has examined four witnesses in his defence.

4. Learned trial Court on appreciation of evidence adduced by the parties arrived at the conclusion that the appellant has killed the deceased by setting her ablaze, and held the appellant guilty for commission of offence punishable under Section 302 of IPC and sentenced him as mentioned hereinabove.

5. In the appeal, it is argued by learned counsel for appellant that all the eye witnesses, who were present on the spot and who had seen the deceased in flame, have stated that the deceased did not tell them how she caught fire or who had set her ablaze. The parents of deceased were not present on the spot at the time of incident. The dying declaration of deceased is not reliable, because there was enmity between the appellant and parents of deceased and deceased was tutored by her parents before recording of DD. It is not proved that when dying declaration was recorded, the deceased was in fit state of mind. The trial Court had wrongly relied upon the dying declaration and convicted the appellant.

6. Learned Panel Lawyer for the State has supported the findings recorded by the trial Court and submitted that the dying declaration of deceased is fully reliable and merely on the basis of this, the appellant can be convicted. The trial Court had rightly relied upon the dying declaration. Therefore, there is no infirmity or illegality in the findings recorded by the trial Court.

7. Considering the rival contentions of the learned counsel for the parties and on perusal of record, it appears that it is not disputed that on 11.09.2004 the deceased was burnt and brought to the District hospital Chhindwara. She was hospitalized there till 18.09.2004 and during treatment at about 8:10 am on 18.09.2004, she was expired. Dr. Subhash (PW-9) deposed that on 18.09.2004 at District hospital Chhindwara, he had conducted the postmortems of body of deceased and found multiple burn injuries on her body. Burn were about 60% and the deceased was died of burn injuries. The statement of doctor is duly corroborated by PM report Ex.P-10. The defence has not challenged the above facts in cross examination of the doctor. Therefore, the trial Court has rightly recorded the finding that the deceased was died due to burn injuries.

8. It is also not disputed that on 11.09.2004 the deceased has received burn injuries and she was hospitalized, in district hospital Chhindwara where she had expired on 18.09.2004 during treatment. At the time of incident, the deceased was alone in her house. Her parents Malkhan Gond (PW-1) and Smt. Maneshi Bai (PW-2) had gone for work. Her younger sister Babita aged about 11 years (PW-3) was watching television in the house of neighbor. One of the

neighbor of deceased Nandu Pateria (PW-5) deposed that on the date of incident at about 12:30 noon, he was in his house, the deceased Durgawati, crying for help, came to her house she was in flame. Seeing her, the witness became frightened and he turned her out. Then the deceased went towards the house of Dewraj. Another witness Dewraj (PW4) corroborates this statement and deposed that he saw the deceased in flame coming from the house of Nandu. When she reached near the house some of the witnesses had doused the fire. Thereafter, the parents of deceased were informed. Babita (PW-3) also deposed that after hearing noise, she came out and saw her sister was burning and the neighbors were trying to douse fire. The deceased was brought to hospital in the auto rickshaw of Vinod (PW-7). From the statement of Vinod, it is found that when he was taking the deceased to hospital, the mother of deceased Smt.Maneshi met them on way and she also accompanied them to hospital with the deceased.

9. The witnesses Dewraj (PW-4), Nandu (PW-5) and Vinod (PW-7) deposed that after the incident, the deceased had not told them how she caught fire or who had set her ablaze?

10. Doctor Satish Nema (PW-12) deposed that on 11.09.2004 in District hospital Chhindwara, Durgawati was brought in the hospital. She was about 60% burnt. He has admitted the girl in burn ward and informed the police. Thereafter, he had recorded the dying declaration of deceased Ex.P-14 at about 7:20 pm. When he has recorded the statement, the deceased was alone and she was in fit state of mind. In the dying Declaration Ex.P-14 it was stated

by the deceased that "the appellant set her ablaze by pouring Kerosine oil when she was sitting in backside of her house."

11. Head Constable, M.Chand (PW-8) deposed that on receiving the information from the hospital, he went to the hospital and informed Executive Magistrate for the recorded the dying declaration and obtained MLC of deceased. Ramcharan Shivhare, Executive Magistrate (Naib Tahsildar) (PW-11) deposed that on 11.09.2004, he went to district hospital Chhindwara and after seeing the condition of deceased, got her examined by the doctor. When doctor certified that she was competent to make statement then he had recorded the dying declaration Ex.P-12 of Durgawati.

12. It is further deposed by Ramcharan Shivhare (PW-11) that in her dying declaration, the deceased had stated that "at the time of incident, she was sitting at back side of her house. The appellant came there with a bottle, he poured kerosine oil on her head and lit a match and set her on fire. She cried and ran towards her neighbour Nandu's house, but he turned her out, thereafter in burning condition she came near a tree where an old man came and doused the fire by covering her with cotton sheet. Thereafter, she was brought to the hospital in the auto rickshaw".

13. It is further deposed by Ramcharan Shivhare that after recording of dying declaration, it was read over to deceased and then he got the thump impression of her on Ex.P-12. In cross examination, this witness PW-11 has clearly stated that at the time of recording of dying declaration, the deceased was in fit mental condition. The DD was recorded as per

statement of deceased and also in absence of her relatives or family members. Dr. C.L. Gedam(PW-10) has also corroborated the dying declaration and deposed that before recording of dying declaration, he had examined the deceased and given certificate A to A and B to B on Ex.P-12 stating that the deceased was fit and fully conscious to give statement. Thus, from the statements of Ramcharan Shivhare, Executive Magistrate (PW-11) and Dr. C.L.Gedam (PW-10) this fact is fully proved that the deceased had given a dying declaration on 11.09.2004 to Executive Magistrate wherein she had stated that she had been set on fire by the appellant.

14. This fact is also corroborated by parents of deceased Malkhan Gond (PW-1) and Smt. Maneshi (PW-2) who deposed that in hospital the deceased had told them that the appellant had set her ablaze. This is oral dying declaration made by deceased to her parents in the hospital.

15. Thus, there are two dying declarations Ex.P-14 recorded by Dr. Satish Nema (PW-12) and another one is Ex.P-12 recorded by Executive Magistrate, Ramcharan Shivhare (PW-11). Both the dying declarations are almost same and consistent. These are also corroborated by the statements of parents of deceased to whom she had narrated about the incident. Since, deceased was alive for further 7 days, therefore, it cannot be said that due to her serious condition she was not able to give statement.

16. The deceased was a thirteen years old girl. It is quit possible that soon after the incident, when her fire was doused she was in state of panic, shock and pain.

Therefore, under these conditions she might have not stated anybody who arrived on the spot, about the incident. Therefore, only on this ground that the deceased had not informed the witnesses Dewraj, Nandu or Vinod against the appellant, we cannot doubt the dying declaration of deceased. It is quite possible that in hospital after getting initial treatment the deceased's condition was improved and then she was able to give statement. **Hon'ble Apex Court in Nanhau Ram Vs. State of M.P. (1988 Supp. SCC 152)** observed that:-

"normally, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail."

In present case, Dr. Satish Nema recorded first dying declaration Ex.P-14 at 7:20 pm and thereafter, Executive Magistrate recorded second dying declaration Ex.P-12 during 8:05 to 8:15 pm. In both statements, the doctors were of the opinion that the deceased was in fit state of mind and mental condition to make statement. The parents of deceased had also deposed that in hospital the deceased was fully conscious and she has informed them about the incident. Therefore, the trial Court has rightly concluded that the deceased was in fit state of mind to make statement.

17. Hon'ble Apex court in case law Bhajju @ Karan Singh Vs. State of MP in paras 22, 23 and 24 reiterated the principles governing dying declaration as under:-

"22. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the court

and could form the sole piece of evidence resulting in the conviction of the accused. This court has clearly stated the principle that Section 32 of the Evidence Act, 1872 (for short the Act) is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a "dying declaration".

23.The "dying declaration" essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that of a conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

24.Once the court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring 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 by other evidence."

18. In the present case the incident occurred in broad day light. The deceased had ample opportunity to see the appellant. It would take time to pour kerosine oil and lit the match. Why the deceased or her parents will imp led an innocent person leaving apart the real culprit. There are no substantial infirmities or discrepancies found in the statements of parents of deceased, Executive magistrate and doctor Satish Nema. The Dying Declaration of deceased Ex.P-12 and Ex.P-14 are filly reliable. The trial Court on right appreciation of evidence recorded the finding that appellant had set the deceased ablaze by pouring kerosine oil on her and killed her.

19. In view of aforesaid discussions, we are of considered opinion that the appellant had killed the deceased . The Trial Court had rightly held the appellant guilty under section 302 of Penal Code. The sentence inflicted on appellant is also proper. Therefore this appeal is devoid of substance and hereby **dismissed**.

(S.K. Gangele)
Judge

(Anurag Shrivastava)
Judge

Rashid*