

HIGH COURT OF MADHYA PRADESH AT JABALPUR**CRIMINAL APPEAL NO. 522/2009**

Nafees Khan and another..... Appellants

Versus

The State of Madhya Pradesh..... Respondent

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For the appellants : Shri Nagendra Singh
Solanki, Advocate

For the respondent/State : Mr. Manhar Dixit, Panel
Lawyer

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Present:

HON'BLE MR. JUSTICE ATUL SREEDHARAN
HON'BLE MRS. JUSTICE SUNITA YADAV

J U D G M E N T
(07-12-2021)

Per : Sunita Yadav, J.

This appeal has been preferred by the appellants being aggrieved by the judgment and order dated 13.02.2009 passed in Sessions Trial No.69/2008 by the learned Ist Additional Sessions Judge, Seoni; convicting the appellants herein for the offence under Section 498-A of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for a period of one year and fine of Rs.1000/-

with default stipulation of additional rigorous imprisonment of 3 months in addition thereto, the appellants have also been convicted for the offence under Section 302 read with Section 34 of the Indian Penal Code sentencing them to undergo rigorous imprisonment for life and fine of Rs.1000/- with default stipulation of additional rigorous imprisonment of 3 months.

2. The facts necessary to be stated for disposal of the instant appeal are that the deceased Yashmin was married to appellant no.1 Nafees Khan in the year 2006. The appellant no.2 Quresha Bi is the mother-in-law of the deceased Yashmin. The appellants started harassing Yashmin for demand of dowry just after the marriage. On 19.04.2008 Yashmin was brought to the District Hospital Seoni with severe burns. On the same day itself her dying declaration was recorded. In her dying declaration she stated that her marriage was solemnized two years back with the accused Nafees. Her husband and mother-in-law used to subject her with mental and physical cruelty on trivial things. On 19.04.2008 in the afternoon, at about 3 'O clock, accused persons poured kerosene oil upon her and set her ablaze. After some treatment at Seoni, Yashmeen Bi was referred to Medical College, Nagpur.

When the complainant Nazim Khan (PW-1) who is the brother of deceased was taking her to Nagpur, on the way near Kurai Ghati, she died. Thereafter, on the report of complainant Nazim Khan, Merg intimation Ex.P/1 was registered. After the inquiry of merg, offences under Sections 498-A, 302, 304-B read with Section 34 of the Indian Penal Code were registered at Police Station, Kurai, District Seoni against the accused persons.

3. After due investigation, charge sheet was filed and the case was committed to the Court of Sessions (Trial Court). During the course of trial, the prosecution examined as many as 14 witnesses to prove its case. In defence, the accused persons examined five witnesses. Learned trial Court after relying upon the circumstances and appreciating the evidence on record, convicted and sentenced the appellants for the offences punishable under Sections 498-A and 302 of the Indian Penal Code, as aforementioned.

4. Learned counsel for the appellants argued that conviction and sentence of the appellants is bad, improper and incorrect. Learned trial Judge has erred in holding the appellants guilty for the offence because there is no evidence on record so as to indicate the specific type

of cruelty which was alleged to have been meted upon the deceased by the accused persons. He has further argued that learned trial Judge has erred in placing reliance upon the testimony of the prosecution witnesses, who are related to the deceased. Independent witnesses though present have not been examined. He has further submitted that so called dying declaration of the deceased ought not to have been relied upon by the learned trial Judge, as it was recorded after the death of Yashmin Bi to falsely implicate the appellants.

5. On the other hand, learned counsel for the respondent/State has argued that the impugned judgment and order is in accordance with the facts and law and need not be interfered with. He has further argued that the dying declaration given by the deceased is corroborated by the statements given by the other witnesses. He has further submitted that there is ample evidence to show that the deceased was subjected to mental and physical cruelty. Therefore, there is no need to interfere with the impugned judgment and order.

6. PW-9 Dr. Kirti Nandulkar is the author of postmortem report of deceased Yashmin which has been marked as Ex.P-9. According to this witness the cause of death of

deceased was cardiorespiratory arrest on account of burn wound injury which resulted in septicemia. Now, the question arises whether the appellants caused the death of Yashmin by setting her ablaze?

7. The case of the prosecution is mainly based on the dying declaration of deceased Yashmin. The Apex Court, through its various pronouncements has laid down principles relating to dying declaration which may be summarized as under:

(1) there is no absolute rule of law that a dying declaration cannot be the sole basis of conviction unless it is corroborated, a true and voluntarily declaration needs no corroboration;

(2) a dying declaration is not a weaker kind of evidence than the other piece of evidence;

(3) each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(4) a dying declaration stands on the same footing as other pieces 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) 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.

(6) dying declarations cannot be disbelieved on the ground that the doctor has not been examined and the doctor has not made any endorsement on the dying declaration.

8. Bearing in mind the aforesaid principles, we have examined the case of the prosecution. PW-5 Budh Singh is the writer of dying declaration which is Exhibit- P/9 and PW-8 Suresh Kumar Nema is the doctor who has endorsed the mental condition and fitness of the deceased about her being able to give the statement. PW-5 Budh Singh has corroborated the fact that he has recorded the dying declaration of Yashmin on 19.04.2008. According to this witness, he was posted as Executive Magistrate at Seoni on 19.04.2008. That day, upon receiving the intimation from the concerned police, he went to the District Hospital, Seoni where Yashmin was admitted with burn injuries. This witness has further deposed that Dr. Suresh Kumar Nema (PW-8) has examined the mental condition and fitness of the deceased Yashmin before recording the dying declaration. After the endorsement of Dr. Suresh Kumar Nema he recorded the statement of

Yashmin in a question and answer form. PW-5 Budh Singh has further testified that Yashmin, in her dying declaration, told him that her husband and mother-in-law (the appellants herein) poured kerosene oil upon her and set her ablaze. This witness has further stated that since the hands of Yashmin had burn injury, he obtained impression of her right big toe thereon and again obtained a certificate of the doctor regarding the conscious state of mind of the patient, that was endorsed at the bottom of the dying declaration Ex.P-9.

9. PW-8 Dr. Suresh Kumar Nema has deposed in corroboration with PW-5 Budh Singh that on 19.04.2008, he had examined Mrs. Yashmin Bi, wife of Nafees Khan and found that she was in a fit mental condition to give the statement which was endorsed in Ex.P-9. He has further stated that after recording the dying declaration, he again examined the condition of Yashmin Bi and found that Yashmin Bi was in a fit mental condition throughout the recording of dying declaration, which was endorsed at the bottom of dying declaration Ex.P-9.

10. Learned counsel for the appellants has argued that the dying declaration is not reliable because the prosecution has not proved the letter allegedly sent to

PW-5 Budh Singh by the police requiring him to record the dying declaration. At this stage, learned counsel for the respondent/State pointed out that the said letter which was sent to PW-5 Budh Singh requiring him to record dying declaration, was produced by the prosecution but remained unexhibited. The said letter is there in the record of the trial Court which should be taken into consideration. But the above submission is not acceptable as it is well settled that only the defence is entitled to use a prosecution document although unproved and unexhibited. However, even if the said letter has not been proved by the prosecution, the evidence of PW-5 Budh Singh cannot be discredited because PW-8 Dr. Suresh Kumar Nema, who was posted at Seoni hospital at the relevant time, corroborated the statement of PW-5 Budh Singh that Yashmin was admitted in the hospital with burn injuries and this witness has examined the mental condition and fitness of Yashmin before and after the recording of dying declaration by PW-5 Budh Singh.

11. The learned counsel for the appellants placed reliance on the case of **Shaikh Bakshu and others vs. State of Maharashtra reported in (2007) 11 SCC 269.**

in which the dying declaration was not considered to be credible and cogent as the Naib Tehsildar did not produce the letter requiring him to record dying declaration. After going through the said case, it reveals that the factual aspects of that case are different from this case. In the case of **Shaikh Bakshu** (supra), there were two dying declarations and reason for recording the second dying declaration was not explained. In the said case, discrepancies regarding the place of occurrence were also there. Besides, burn marks were found corroding which made the credibility of dying declaration suspicious, so also in the dying declaration, it was stated that the deceased was brought to the hospital by a neighbour whereas hospital register revealed that she was brought by her sister-in-law. All the above anomalies are absent in instant case. Since, the facts and circumstances in **Shaikh Bakshu's** case (supra) are totally different; therefore, on the basis of the findings in that case, veracity of dying declaration in the present case cannot be disbelieved. Moreover, as discussed earlier Dr. Suresh Kumar Nema (PW-8) has also corroborated the fact that deceased Yashmin was admitted in District Hospital Seoni and PW-5 Budh Singh had recorded her dying declaration

after his certification about the mental condition of the deceased. There is no reason to disbelieve the statement of Dr. Suresh Kumar (PW-8) who was the duty doctor at the relevant time since nothing has been brought out by the appellants to discredit his testimony.

12. Learned counsel for the appellants has further argued that there is nothing to show that the dying declaration was read over to the declarant and the declarant admitted the same to have been correctly recorded; therefore, it can not be relied upon. On this aspect, he has placed reliance upon the case law of **Garibdas @ Pappu Choudhari vs. State of M.P. reported in I.L.R.[2014] M.P. 1923** to buttress his argument. However, we are not inclined to accept the arguments rendered by the learned counsel for the appellants, as the facts of the above case are totally different from this case. In the said case, hands of the deceased were totally burnt and in the dying declaration very clear thumb impression of deceased having ridges and curves was obtained, whereas, the autopsy surgeon in his cross-examination has deposed that no ink impression was found on the thumb of the deceased. It is in this background one of the factors considered was that the dying declaration did not

bear the endorsement that it was read over and explained to the deceased. However, in the present case, since there was injury in deceased's hand the impression of right big toe of deceased was duly obtained.

13. As discussed above the findings in the cases of **Garibdas @ Pappu Choudhari vs. State of M.P. reported in I.L.R.[2014] M.P. 1923** and **Shaikh Bakshu and others vs. State of Maharashtra reported in (2007) 11 SCC 269** are purely on the facts and circumstances of those cases and it is not on the question of law as to such requirement being mandatory and non-compliance of it, should make the declaration unacceptable. The decision on facts, howsoever similar, does not constitute a ratio or even an obiter. In this regard the decision of the Apex Court in case of **Regional Manager and another v. Pawan Kumar Dubey, reported in AIR 1976 SC 1766** is relevant wherein it is held in para 7 as under :

"7. ... Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

14. In the case of **Ganpat Bakaramji Lad vs The State Of Maharashtra, 2018 SCC Online Bom 321**, decided by the Full Bench of Bombay High Court, the aspect of dying declaration not being read over to the declarant has been discussed. The question before the Full Bench was "*Whether a dying declaration can be rejected merely because the same is not read over to the declarant and the declarant admitting the same to have been correctly recorded?*". The Full Bench has answered the same as below:

“A dying declaration cannot be rejected merely because the same is not read over to the declarant and the declarant admitting the same to have been correctly recorded. We hold and clarify that this can be one of the factors, if it assumes significance in the facts and circumstances of any case.”The relevant paras of the judgment of the full bench in that case are as below;

38 Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct.

We are, therefore, unable to hold such requirement as mandatory and that in the absence of it, the dying declaration would become unreliable or unsustainable. We, therefore, subscribe to such a view taken in the referring judgment in the case of Ganpat Lad.

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In view of the aforesaid law laid down, in our view, the observations in the cases of **Shaikh Bakshu and Kantilal**, are based on the facts and would not, therefore, constitute a precedent or a ratio decidendi or even an obiter dicta to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials.

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43. In the decision of the Apex Court in the case of **State of H.P. v. Lekh Raj, reported in (2000) 1 SCC 247**, it is observed that the legal trial is conducted to ascertain the guilt or innocence of the accused. In arriving at the truth, the Courts are required to adopt rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hyper technicalities or figment of imagination should not be allowed to divest the Court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstances keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The Courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hyper technical approach has to be replaced by rational, realistic and genuine

approach for administering justice in a criminal trial.

44.....We, therefore, having due regard, overrule the same and affirm the view taken by the Division Bench of this Court in the referral judgment in the case of Ganpat Lad's case, cited supra, which takes the view that it is neither the ratio nor an obiter in the decision of the Apex Court in Shaikh Bakshu's case, or for that matter even in Kanti Lals case, that the dying declaration must contain an endorsement that it was read over and explained to the declarant, who found it to be true and correct.

15. We agree with the observation of the Full Bench of Bombay High Court in the above case of **Ganpat Bakaramji Lad (supra)** that a dying declaration can be oral as well as written and in case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? Moreover, neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. Consequently, we do not find any force in the argument of the learned counsel of the appellant that the dying declaration Ex.P-9 is not believable because the same being not read over to the deceased and the deceased/declarant admitting the same to have been correctly recorded.

16. Learned counsel for the appellants has further argued that the deceased had allegedly suffered almost 90% burns and was not able to speak during her treatment in the hospital; therefore, it was not possible for her to give dying declaration. But the said argument bears no weight because the witnesses DW-3 Najmun Bi and DW-4 Abdul Vasik examined by the accused persons/appellants herein have deposed contrary to the above defence taken by the appellants herein. DW-3 Najmun Bi and DW-4 Abdul Vasik at paragraph 6 of their court statements said that when Yashmin was admitted in the hospital, her brother had come to see her. During his visit when Yasmin's brother asked her the reason of burn injury she answered under oath of Quran that she had been suffering from stomach pain and the pain was so unbearable that she set herself on fire after pouring kerosene oil. The statements of above defence witnesses itself corroborates the story of the prosecution that Yashmin was able to talk when she was getting treatment in Seoni hospital.

17. Learned counsel for the appellants has further argued that the dying declaration Ex.P-9 seems to be forged as it has allegedly been recorded at 09:15 p.m.

while the Investigating Officer PW-14 Raghuvansh Singh Bhadoriya has deposed that he had received the telephonic information of death of Yashmin on 19.04.2008 around 8:00 p.m. We do not find much weight in this argument because on perusal of the record it is clear that the evidence of PW-14, R.S. Bhadoriya has been recorded only after a lapse of 4 months from the date of incident, i.e. on 17.10.2008. It is obvious that because of the time gap he was not able to state the exact time of receiving the information and has mentioned tentative time not the exact time of receiving the information.

18. Consequently, all the grounds raised by the learned counsel for the appellants to discredit the dying declaration Ex.P-9, are found to be baseless and the dying declaration Ex.P-9 is found to be credible and cogent.

19. In addition to dying declaration the prosecution has also examined PW-1 Nazim Khan, PW-4 Chand Bi and PW-7 Aziz Khan who are the brother, mother and father of the deceased, respectively to prove that the deceased was being subjected to physical and mental cruelty for demand of dowry before her death. All the above witnesses have deposed in the same line that Yashmin

was being ill-treated by the accused persons after her marriage. According to these witnesses the accused persons never provided medical aid to Yashmin whenever she became ill, instead they used to send Yashmin to her maternal home for treatment. The prosecution has examined PW-2 Jyoti to prove the fact of harassment by appellants. PW-2 Jyoti has deposed that Yashmin w/o Nafees Khan had filed a complaint against her husband in *Pariwar Paramarsh Kendra*. This witness PW-2 Jyoti has brought the register maintained in the *Kendra* and proved the entries regarding the complaint made by Yashmin in the said register which is Exhibit P-5. The evidence of this witness corroborates the statements of PW-1 Nazim Khan, PW-4 Chand Bi and PW-7 Aziz Khan as well as the dying declaration of deceased Yashmin about her being harassed by the appellants.

20. The appellants have examined five witnesses to prove their defence that the deceased was suffering from acute stomach pain on account of which she committed suicide when they were at their agricultural field. But the defence of the appellants is found to be afterthought just to save themselves because they have not produced any documents to prove that the deceased was suffering from

any ailment which caused her stomach pain. In the light of dying declaration Ex.P-9 appellants' parallel hypothesis found to be not reliable as well.

21. For the reasons as above, the case of the prosecution is found to be proved beyond reasonable doubt. Therefore, the impugned judgment and order by which the appellants are convicted for the offences under Sections is found to be in accordance with facts and law.

22. Consequently, the appeal is found to be without substance, hence, **dismissed** and appellants' conviction and sentence under Sections 498-A, 302 of the Indian Penal Code is affirmed.

23. The appellant No.2 Quresha Bi is on bail. Her bail bonds stand cancelled. She is directed to surrender forth with before the trial court and the trial Court shall send her to jail for serving out remaining part of her jail sentence, in accordance with law.

24. As per Jail report dated 29.03.2021, it appears that appellant No.1 Nafees Khan has completed 12 years 11 months and 5 days. Thus, the appellant has completed 12 years 11 months and 5 days of imprisonment as on 28.03.2021.

25. However, we make it clear that dismissal of this appeal shall not come in the way of State Government to exercise its discretion for granting remission to the appellants as and when the State feels it just and proper.

26. In view of above, the appeal stands **dismissed**.

(Atul Sreedharan)
Judge

(Sunita Yadav)
Judge

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