IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

JUSTICE SUJOY PAUL

&

JUSTICE BINOD KUMAR DWIVEDI

CRIMINAL APPEAL No. 3599 OF 2014

BETWEEN :-

RAJESHWAR ALIAS PAPPU TIWARI, S/O RAMLATRANARESH TIWARI, AGED ABOUT 30 YEARS, OCCUPATION PRIVATE SERVICE, R/O VILLAGE NIPNIA, POLICE STATION AND TAHSIL BEOHARI, DISTRICT SHAHDOL (MADHYA PRADESH).

…....APPELLANT

(*BY SHRI ABHINAV DUBEY - ADVOCATE*)

AND

STATE OF MADHYA PRADESH THROUGH POLICE STATION BEOHARI, DISTRICT SHAHDOL (MADHYA PRADESH)

…...RESPONDENT

(*BY SHRI A. N. GUPTA - GOVERNMENT ADVOCATE*)

Reserved on	:	05/12/2023
Pronounced on	:	11/12/2023

This Criminal Appeal having been heard and reserved for judgment, coming on for pronouncement this day, ***Justice Sujoy Paul*** *pronounced the following :*

J U D G M E N T

This criminal appeal is filed under section 374(2) of Cr.P.C. assailing the judgment passed in Sessions Case No.143/11 dated 04.12.2014 whereby the appellant was held guilty for committing

offence under Section 302 of IPC and directed to undergo sentence of life imprisonment with fine of Rs.50,000/- with default stipulation.

2. In short, the case of the prosecution is that the appellant is the husband of deceased Shashi Tiwari. Shashi Tiwari at the advance stage of pregnancy was staying with her parents. The appellant in the morning of 02.5.2011 at around 7:30 reached the house of his in-laws. He insisted that his wife should accompany him. As per prosecution story, she agreed to accompany the appellant. However, appellant quarrelled with the deceased and thereafter came out of the house, took a bottle full of petrol from his motorcycle, entered the room where his wife was sitting, poured petrol on her and set her ablaze. However, appellant's mother-in-law tried to save her daughter but her efforts went in vain. Father of Shashi also reached to the scene of crime and made an unsuccessful attempt to save her daughter. In that effort, his hands were also burnt.

3. Shashi Tiwari was taken to hospital. Dr. Piyush Nigam (PW-12) has recorded her dying declaration (Ex.P/6). On the same day, Shashi died. Dr. Sunil Sthapak (P.W.15) conducted the post mortem and prepared the report Ex.P/18. The appellant was tried for committing offence under Sections 498-A, 304-B and in alternative Section 302 of IPC. Appellant was held guilty under Section 302 of IPC but was acquitted from other sections mentioned hereinabove.

<u>Contention of appellant's counsel</u> :

4. Learned counsel for the appellant submits that whole conviction of appellant is founded upon the dying declaration recorded by Dr.

Piyush Nigam (P.W.12) and eye-witness account of Kunti Mishra (P.W.1) mother of the deceased and Brajbhushan Mishra (P.W.2) father of the deceased.

5. Criticizing the manner in which dying declaration was recorded, learned counsel for the appellant submits that after recording the dying declaration, it was not read over to the appellant. In absence thereof, the dying declaration becomes untrustworthy in the light of judgment of Supreme Court in **Shaikh Bakshu and others vs. State of Maharashtra (2007) 11 SCC 269** which was followed by the Division Bench of this Court in **Garibdas alias Pappu Choudhari vs. State of Madhya Pradesh 2014 Cr.L.J. 3538**.

6. The next attack on the dying declaration is on the ground that as per the statement of Dr. Piyush Nigam (P.W.12) and the dying declaration, the deceased after giving the statement put her thumb impression on the dying declaration. However, in the post mortem, there existed no mention of any thumb impression or ink or mark of ink available on the thumb of deceased. Dr. Sunil Sthapak P.W.15's statement is relied upon to show that there existed no ink impression on the thumb of the deceased. By placing reliance on para-15 of the judgment of this Court in **Garibdas alias Pappu Choudhari (supra),** Shri Dubey, learned counsel submits that it was incumbent upon the prosecution to prove that mark of ink was vanished on account of applying medicine / ointment and in this case the prosecution has failed to discharge the said burden. The prosecution is lacking on this material aspect as well and hence dying declaration does not inspire confidence. So far ocular evidence is concerned, learned counsel for

the appellant first placed reliance on the statement of Kunti Mishra (P.W.1) mother of the deceased. It is submitted that as per her statement, she first entered the room of her daughter Shashi wherein the appellant poured petrol on her and set her ablaze. When she cried, her husband came there and made efforts to extinguish the fire. In this course, her husband Brajbhushan (P.W.2) got injured. However, by placing reliance on the note of Court below in the statement of Brajbhushan (P.W.2), it is submitted that no MLC of Brajbhushan was placed on record to show that he sustained any burn injury in the course of saving his daughter.

7. Shri Abhinav Dubey, learned counsel for the appellant placed reliance on statement of Brajbhushan Prasad Mishra (PW-2)/father of deceased. It is submitted that as per this statement, appellant was quarreling with his daughter Shashi. Brajbhushan Prasad Mishra (PW-2) tried to stop him and during this period, Kunti Mishra (PW-1) reached to the scene of crime. Thereafter appellant went out of the house, took a plastic bottle containing petrol like substance, came to the room of deceased Shashi. Brajbhushan Prasad Mishra (PW-2) followed him to that room. The wife of Brajbhushan Prasad Mishra (PW-2) was already there. The appellant poured petrol on Shashi and set her ablaze. Brajbhushan Prasad Mishra (PW-2) unsuccessfully tried to caught hold of the appellant but could not succeed. The appellant after putting her on fire, fled away. Brajbhushan Mishra (PW-2) got burn injuries during his effort to extinguish the fire.

8. By comparing both the statements of mother and father, learned counsel for the appellant submits that there are contradictions in their

statements and therefore, neither dying declaration nor ocular evidence is sufficient to hold the appellant as guilty. Thus, first limb of argument is that appellant may be acquitted from committing offence under Section 302 of IPC.

9. *Alternatively*, learned counsel for the appellant by placing reliance on a judgment of Supreme Court reported in **AIR Online 2023 SC 596 (Nirmala Devi vs. State of Himachal Pradesh)** urged that in a case of this nature where out of anger and in sudden impulse, the appellant committed offence, the offence will be one under Section 304 Part-I of IPC and not an offence under Section 302 of IPC. The appellant is in custody since 06/05/2011. The conviction may be modified to the extent indicated above and appellant may be released by treating him to have undergone the desired sentence.

Stand of Government Advocate :

10. Shri A. N. Gupta, learned Government Advocate supported the impugned judgment and submits that the dying declaration is clear and unambiguous. There is no reason to disbelieve the dying declaration. By placing reliance on the statement of Dr. Piyush Nigam (PW-12) (Para-20), it is urged that this witness by using medical terminology stated that Shashi was in fit state of mind to depose statement. Thus, no doubt can be entertained on the validity of the dying declaration.

11. Shri Gupta, learned Government Advocate placed heavy reliance on post mortem report (Ex.P/18) and urged that the deceased Shashi was at the advance stage of pregnancy and a foetus of 7-8 months was detected in the report. Thus, offence is very grave and there is no question of modifying the conviction to Section 304 Part-I/II of IPC.

12. So far ocular evidence is concerned, learned Government Advocate for the State submits that a careful reading of statement of Kunti Mishra (PW-1) and Brajbhushan Prasad Mishra (PW-2) leaves no room for any doubt that they were present at the scene of crime and they have witnessed the incident. Minor discrepancies are liable to be ignored.

13. Learned counsel for the parties confined their arguments to the extent indicated above.

14. We have heard the parties at length and perused the record.

Findings :-

15. In the instant case, after completion of investigation, *chalan* was filed before the Court of learned Judicial Magistrate First Class and thereafter it was committed before the Court below. The appellant abjured the guilt and pleaded innocence. The Court below accordingly framed three questions for its determinations.

16. After recording statement of sixteen prosecution witnesses, examining the documents and hearing the parties, the Court below passed the impugned judgment holding the appellant as guilty for committing offence under Section 302 of IPC.

Ocular evidence :-

17. The Court below upon considering the statement of Dr. Piyush Nigam (PW-12) and Dr. Sunil Sthapak (PW-15) opined that death was homicidal in nature. The victim was pregnant and the age of the foetus was between 7-8 months. The cause of death was hypovolemic shock which is arising out of serious burn injuries. This finding about

'homicidal death' arrived at by the Court below is not criticized by learned counsel for the appellant during the course of argument.

18. Kunti Mishra (PW-1)'s statement was considered by the Court below wherein she deposed that appellant quarreled with Shashi then went out of the house, brought a bottle filled with petrol, poured petrol on Shashi and set her ablaze. Brajbushan (PW-2), husband of Kunti Mishra (PW-1), reached to the place of incident and tried to extinguish the fire by putting a blanket on Shashi. He got burn injuries out of it.

19. The statement of Brajbhushan Mishra (PW-2) was also considered by Court below wherein he stated that incident was witnessed by him. As noticed above, learned counsel for the appellant pointed out certain discrepancies/contradictions in the statements of mother and father of deceased. However, a microscopic and conjoint reading of both the statements makes it clear that the little variation in their statements is not material in nature. The memory of human being cannot be photographic in nature. When statements are recorded after quite some time, such variations bound to take place. Such variation, in our judgment, will not cause any dent to the story of prosecution. The Apex Court in **Shankar v. State of Karnataka (2011) 6 SCC 279, State of Rajastahan v. Rajendra Singh (2009) 11 SCC 106, State v. Saravanan (2008) 17 SCC 587, Arunugam v. State (2008) 15 SCC 590, Mahendra Pratap Singh v. State of U.P. (2009) 11 SCC 334, Vijay v. State of M.P. (2010) 8 SCC 191, State of U.P.v. Naresh (2011) 4 SCC 324, Brahm Swaroop v. State of U.P. (2011) 6 SCC 288** and **Sunil Kumar Sambhudayal Gupta v. State of Maharashtra**

(2010) 13 SCC 657, held that if contradictions are not material in nature, it will not have any adverse impact on the prosecution case.

20. The Court below, in our considered opinion, has rightly relied upon the statement of Kunti Mishra (PW-1) and Brajbhushan Mishra (PW-2) who were eye witnesses and rightly came to hold that they have witnessed the incident and appellant indeed caused burn injuries to Shashi by pouring petrol on her and setting her ablaze.

21. The Court below also considered the statement of Vijendra Kumar Mishra (PW-4) and Ramshiromani (PW-5) who deposed that when they heard about the cry relating to burn injuries, they had seen Shashi who suffered burn injuries. The hands of Brajbhushan Mishra (PW-2) were also in the burnt condition and he informed them that he suffered these injuries while trying to extinguish the fire.

22. Ramkaran Mishra (PW-6) also deposed that in the morning of date of incident, he had seen the fumes coming out of the house of Brajbhushan Mishra (PW-2) and also witnessed the appellant fleeing away on his motorcycle towards Nipnia. He also stated that when he entered the house of Brajbhushan (PW-2), he found that Shashi was burning and her father was trying to extinguish the fire. Victim's father informed that her husband has set her ablaze.

23. Shyamvati (PW-9) in her statement stated that Shashi's husband came to the house of Shashi, stayed with her family members for some time and then came out of the house and brought a bottle along with him. When she heard the cry, she entered the house and found that

Shashi was covered with flames and her father was trying to extinguish the fire.

24. Rajendra Tiwari (PW-10) deposed that Brajbhushan Mishra (PW-2), is his father-in-law. On the date of incident, when he entered his in-law's house, he also found that Shashi was in a burnt condition and badly crying. Brajbhushan Mishra (PW-2) was trying to extinguish the fire and in this attempt, he himself got injured.

25. Ramrati (PW-7) entered the witness box and almost narrated the same story which is being narrated by Shyamvati (PW-9) and Rajendra Tiwari (PW-10).

26. Dukhilal Prajapati (PW-11) recorded the 'merg' intimation No.41/2011 (Ex.P/10) on the basis of information received from the doctor. N. S. Yadav, Head Constable (PW-13) prepared the spot map (Ex.P/3) and recovered burnt blanket, a plastic bottle and pieces of saree and petticoat from the spot. Shri N. S. Yadav, Head Constable (PW-13) and Dharmendra Kumar Mishra, Tehsildar (PW-14) are witnesses to dead body '*panchayatnama*'.

27. As noticed above, the Court below has considered the statement of Kunti Mishra (PW-1) and Brajbhushan Mishra (PW-2) on permissible legal parameters. There is no perversity in the findings based on the statement of Kunti Mishra (PW-1) and Brajbhushan Mishra (PW-2).

28. As discussed in previous paragraphs, PW-4 to PW-10 reached the scene of crime immediately after the incident and found that Shashi was in a burning condition and her father Brajbhushan Mishra (PW-2) was trying to extinguish the fire. In that attempt, he suffered burn

injuries. All the statements in this regard went unrebutted and therefore, despite note appended by the Court below in the statement of Brajbhushan (PW-2) regarding non-production of MLC of Brajbhushan will not make the prosecution case untrustworthy. Thus, the prosecution could establish with necessary clarity that victim's father suffered burn injuries while trying to extinguish the fire. In view of foregoing analysis, in our considered opinion, the prosecution could establish its case on the basis of ocular evidence beyond reasonable doubt.

Degree of burn injuries and dying declaration (DD) :-

29. Before the Court below, another argument of learned counsel for the accused was that since Shashi was burnt to the tune of 100%, it is difficult to believe that she was in a position to depose the statement. Dr. Piyush Nigam (PW-12) has recorded her dying declaration that victim was in a fit state of mind to depose the statement. His statement could not be demolished during cross-examination.

30. The Apex Court in **(2020) 11 SCC 489 [Purshottam Chopra and another vs. State (Government of NCT of Delhi)]** opined that dying declaration (DD) cannot be disbelieved merely because the victim suffered burn injuries to the extent of 100%. Thus, this argument deserves to be discarded.

Admissibility of DD when not read over :-

31. One of the sheet anchor of argument of appellant was regarding inadmissibility of dying declaration because it was admittedly not read over to the deceased. The said argument was advanced on the basis of judgment of Supreme Court in **Shaikh Bakshu (supra)** and the

judgment of this Court in **Garibdas @ Pappu Choudhari (supra)**. Similar question cropped up before a Division Bench of this Court in **Nafees Khan and another vs. State of M.P., 2021 SCC OnLine MP 2489**. This Court considered whether the decisions aforesaid regarding reading over the dying declaration (DD) can be treated to be binding precedent or *ratio decidendi.* This Court considered a full Bench decision of Bombay High Court on this aspect of dying declaration (DD). It is apposite to quote the relevant paragraphs of **Nafees Khan (supra)** :-

> "**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.

39…………

3……………

36………...

40……………

7…………..

In view of the aforesaid law laid down, in our view, the observations in the cases of <u>Shaikh Bakshu and Kantilal</u>, are based on the facts and would not, therefore, constitute a precedent or a ratio decidenti 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.

41…………..

42………..

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.”**
>
> **(Emphasis supplied)**

32. We are in respectful agreement with the view taken by the above judgment of Full Bench of Bombay High Court and the judgment of this Court in **Nafees Khan (supra)**. Thus, we are unable to hold that dying declaration vanishes in thin air merely because it was not read over to Shashi.

<u>Ink mark on thumb of deceased</u> :-

33. Another limb of argument of appellant was that in the postmortem report conducted by Dr. Sunil Sthapak (PW-15) shows that prosecution could not establish as to how ink mark from the thumb of deceased vanished. Thus, it causes a dent on dying declaration.

34. In our opinion, in the peculiar facts and circumstances of the case, this Court in **Garibdas @ Pappu Choudhari (supra)** had taken that view and not laid down a principle of law in this regard. However, even assuming that any such principle was laid down, minus the dying declaration also, prosecution could establish its case with necessary accuracy and precision. A holistic reading of evidence shows that it is only the appellant who set her wife ablaze. Thus, this argument will not cut any ice.

<u>Conversion of conviction into Section 304 – I/II</u> :-

35. It was strenuously contended with the aid of judgment of Supreme Court in **Nirmala Devi (supra)** that offence had taken place suddenly without there being any premeditation and hence, the conviction would be one under Section 304-I of IPC and not under

Section 302 of IPC. On the first blush, argument appears to be attractive but lost its complete shine when it was examined minutely on the basis of evidence available on record.

36. It cannot be said that appellant was not aware that his wife is on the family-way and at the advanced stage of pregnancy. Despite that, appellant poured petrol and set her ablaze. Along with deceased, the child in the womb also died and could not see the light of the day. Exception 4 of Section 300 of IPC reads as under :-

> **"Exception 4 :** Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and **without the offender having taken undue advantage or acted in a cruel or unusual manner**."
>
> **(Emphasis supplied)**

37. We are constrained to hold that the appellant has taken undue advantage and acted in a very cruel, unusual and barbaric manner. Consequently, we are unable to hold that the offence committed by the appellant does not fall within the ambit of murder. Thus, question of converting the conviction into some other provision does not arise. In the factual matrix of this case, the judgment of **Nirmala Devi (supra)** is of no assistance.

38. Since, the Court below has taken a plausible view on the basis of evidence on record, we find no reason to disturb the same. The appeal *sans* substance and is hereby **dismissed.**

(SUJOY PAUL) **JUDGE**	**(BINOD KUMAR DWIVEDI)** **JUDGE**

PK/manju