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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
JUSTICE SUJOY PAUL
&
JUSTICE BINOD KUMAR DWIVEDI
ON THE 20th OF DECEMBER 2023
CRIMINAL APPEAL No.1822 OF 2016**

BETWEEN :-

**SANJAY AHIRWAR S/O SHRI MAHESH
AHIRWAR, AGED ABOUT 35 YEARS, R/O
IN FRONT OF DR. KOL, POLIPATHAR
GWARIGHAT, POLICE STATION
GORAKHPUR, DISTRICT JABALPUR
(MADHYA PRADESH**

..APPELLANT

(BY SHRI SUNIL PANDEY - ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH
THROUGH POLICE STATION
GORAKHPUR DISTRICT JABALPUR
(MADHYA PRADESH)**

..RESPONDENT

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

*This criminal appeal coming on for hearing this day, **Justice Sujoy Paul**, passed the following :*

J U D G M E N T

This criminal appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 assails the judgment dated 29/03/2016 passed in Sessions Trial No.412/2013 decided by learned Additional

Sessions Judge, Jabalpur whereby appellant was held guilty for committing offence under Section 302 of IPC and directed him to undergo sentence of Life imprisonment with fine of Rs. 1000/-, with default stipulation.

2. In short, the case of prosecution is that deceased Jyoti is the wife of present appellant. The appellant allegedly poured Kerosene on Jyoti and set her ablaze. There are multiple dying declarations in this matter.

3. First dying declaration (Ex.P/19) was recorded on 17/03/2013 at 11:40 P.M. by Sub Inspector Rajkumar Tiwari (PW-15). Second dying declaration (Ex.P/11) was recorded by Dr. A. K. Verma (PW-8) on 18/03/2013 at about 02:30 A.M. and the third dying declaration (Ex.P/12) was recorded by Smt. Rashmi Chaturvedi- Executive Magistrate/Tahsildar, Omti, Jabalpur (PW-11) on 18/03/2013 at about 11:25 P.M.

4. *Dehati Nalishi* (Ex.P/18) was recorded at the instance of deceased Jyoti by Rajkumar Tiwari (PW-15). This *Dehati Nalishi* (Ex.P/18) was recorded on 17/03/2013 at around 23:55 O' clock. This *Nalishi* assumes the character of dying declaration because of death of deceased Jyoti.

Contention of appellant :-

5. Shri Sunil Pandey, learned counsel for the appellant by taking this Court to the multiple dying declarations mentioned hereinabove urged that there are inconsistencies in the dying declarations. However, there is one thing which is common in all the dying declarations that deceased Jyoti has stated that appellant used to consume liquor and on

the date of incident also, he was under the influence of liquor. A quarrel took place and during quarrel, he slapped her and then after pouring Kerosene on her, set her ablaze.

6. Learned counsel for the appellant submits that when there are multiple dying declarations and there are inconsistencies in such dying declarations, the conviction recorded on the basis of dying declarations cannot sustain judicial scrutiny.

7. To elaborate, Shri sunil Pandey, learned counsel for the appellant submits that in dying declaration dated 17/03/2013, the signature of deceased finds place whereas in dying declaration dated 18/03/2013 (Ex.P/11) the thumb impression of deceased is there. Pertinently, in dying declaration dated 18/03/2013 (Ex.P/12) there exists neither a thumb impression nor her signature. This dying declaration was recorded by the Executive Magistrate Smt. Rashmi Chaturvedi (PW-11).

8. Dr. Verma (PW-8) categorically admitted that victim was admitted in the hospital at 12:30 in the night. Thus, question of recording the dying declaration prior to that time does not arise. This creates doubt on the dying declarations recorded prior to the admission of deceased in the hospital.

9. Learned counsel for the appellant by placing heavy reliance on an affidavit (Ex.D/1) urged that in this affidavit, the thumb impression of deceased finds place which is supported by Bhuri Bai (mother of deceased) as a witness. The contents of the affidavit were read over by the Notary to the deceased and she accepted that such dying declaration was her version. Before that, Notary has consulted the

doctor available there doing house job and he informed the Notary that victim is in a fit state of health/mind to give the statement. This affidavit is prepared on 17/05/2013 just before her death i.e. on 19/05/2013 and therefore, this affidavit/dying declaration should prevail.

10. Another limb of argument of Shri Sunil Pandey, learned counsel for the appellant is that the deceased's brother Sunil Kumar (PW-3) and mother Bhuri Bai (PW-5) have turned hostile and did not support the case of prosecution. In this view of the matter, the dying declarations have lost much of their significance.

11. It is further argued that incident had taken place on 17/03/2013 and victim died on 19/05/2013. The statement of Dr. A. K. Verma (PW-8) shows that the family members of Jyoti got her discharge despite knowing her condition was not good. The doctor categorically stated that if treatment would have been continued, she could have been perhaps saved. The cause of death is Septicemia. Thus, in this backdrop, it cannot be said that appellant had intention to cause death of his wife Jyoti. The alternative argument of Shri Pandey is that the incident had taken place in sudden impulse and without there being any premeditation and therefore, it will not be covered under Section 302 of IPC.

12. To support this contention, he placed reliance on a judgment of Telangana High Court in **Chityala Srinivas @ Srinu vs. State of A.P. (CRA No.1155 of 2013)** decided on 26/08/2022. A recent Division Bench judgment of this Court in **CRA No.831 of 1996 (Prakash Kumar Mewari v. State of Madhya Pradesh)** decided on 14/11/2022

is also relied upon. By placing reliance on a recent judgment of Supreme Court reported in **2023 LiveLaw (SC) 698 (Irfan @ Naka vs. The State of Uttar Pradesh)** Shri Pandey submits that the Apex Court summarized the principles for examining the genuineness and admissibility of a dying declaration. If aforesaid dying declarations are examined in the light of this judgment, none can be relied upon. *Lastly*, he placed reliance on another judgment of this Court in **CRA No.220 of 2014 (Sonu @ Ballu Hathkaiya vs. P.S. Katanti, State of M.P.)** decided on 03/07/2023.

Contention of Government Advocate :-

13. Per *contra*, Shri A. N. Gupta, learned Government Advocate submits that the affidavit (Ex.D/1) is prepared to save the skin of the appellant. The affidavit is unreliable because even name of the doctor who allegedly certified the health condition of deceased is not mentioned. The place is also not clear. If signature of mother of deceased Bhuri Bai available in the affidavit is examined with her signature in the Court statement, it will be clear that it does not tally with her signature taken in the Court. The first page of affidavit does not contain any thumb impression of the deceased. Thus, as an after thought, this affidavit was prepared which is totally unreliable. He supported the order of conviction and sentence passed by the Court below.

14. No other point is pressed by learned counsel for the parties.

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

Findings :-

Validity of Dying Declarations :-

16. The Apex Court in its recent judgment in **Irfan @ Naka (supra)** has culled out the principles for the purpose of determining the weight and admissibility of a dying declaration. The relevant paras read thus:-

“62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility:—

- (i) Whether the person making the statement was in expectation of death?
- (ii) Whether the dying declaration was made at the earliest opportunity? “Rule of First Opportunity”
- (iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?
- (iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?
- (v) Whether the statement was not recorded properly?
- (vi) Whether, the dying declarant had opportunity to clearly observe the incident?
- (vii) Whether, the dying declaration has been consistent throughout?
- (viii) Whether, the dying declaration in itself is a manifestation/fiction of the dying person's imagination of what he thinks transpired?
- (ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.”

(Emphasis supplied)

17. So far, multiple dying declarations are concerned, the Apex Court in **(2022) 8 SCC 576 (Uttam v. State of Maharashtra)** poignantly held as under :-

“15. In cases involving multiple dying declarations made by the deceased, the question that arises for consideration is as to which of the said dying declarations ought to be believed by the court and what would be the guiding factors for arriving at a just and lawful conclusion. The problem becomes all the more knotty when the dying declarations made by the deceased are found to be contradictory. Faced with such a situation, the court would be expected to carefully scrutinise the evidence to find out as to which of the dying declarations can be corroborated by other material evidence produced by the prosecution. Of equal significance is the

condition of the deceased at the relevant point in time, the medical evidence brought on record that would indicate the physical and mental fitness of the deceased, the scope of the close relatives/family members having influenced/tutored the deceased and all the other attendant circumstances that would help the court in exercise of its discretion.”

(Emphasis supplied)

18. A plain reading of both the judgments aforesaid makes it clear that there is no strait-jacket formula for the purpose of accepting a dying declaration. Putting it differently, there is no hard and fast rule as to which dying declaration will prevail. The Court needs to examine the dying declarations carefully and then decide which dying declaration inspires confidence.

19. It is noteworthy that in **Irfan @ Naka (supra)** the Apex Court laid down the test to examine the dying declaration. If the dying declarations in hand are examined on the touchstone of said principles, it will be clear that deceased made the statement when she was in expectation of death. The dying declaration was made at the earliest possible opportunity and followed by few more dying declarations. One such dying declaration was recorded by the Executive Magistrate. We are unable to entertain any suspicion on dying declarations merely because Sunil (PW-3) brother of deceased and Bhuri Bai (PW-5) mother of the deceased did not support the dying declarations. A careful scrutiny of dying declarations makes it clear that all the dying declarations are almost in the same line. It is averred that the appellant used to quarrel with the deceased and on the fateful day, he came home

under the influence of liquor, slapped her and then out of said quarrel poured kerosene and set her ablaze. The minor contradictions are liable to be ignored and does not cause any serious dent to the dying declarations. Since the dying declarations were recorded by the Executive Magistrate, Doctor and Constable, we find no reason to disbelieve the said dying declarations. Little variation in time etc. will not cause any serious dent to the dying declarations.

20. There is no prescribed format for recording the dying declaration. The dying declarations were properly recorded and we do not find any illegality in the same. The dying declarations, as noticed above, are by and large consistent throughout. There is no material to suggest that dying declaration is a manifestation / fiction of the declarant. The dying declarations are certainly voluntarily given and inspire confidence of this Court. Thus, we are unable to hold that dying declarations aforesaid are not trustworthy and conviction recorded on the basis of said dying declarations is liable to be interfered with.

21. So far affidavit (Ex.D/1) which is projected by Shri Pandey, learned counsel for the appellant is concerned, we are unable to accept the genuineness of this affidavit. If we tally the signatures of Bhuri Bai (PW-5) available on the affidavit with that of her statement, the signatures are totally different. Thus, in exercise of power under Section 73 of the Indian Evidence Act, we are of the considered view that if signatures of Bhuri Bai available on her Court statement are examined in *juxtaposition* to her signature available on the affidavit, it is clear like noon day that both the signatures are different. Thus, affidavit creates doubt. We also find substantial force in the argument of Shri A.N. Gupta, learned Govt. Advocate that the name of Doctor

who allegedly certified that the victim was in a fit state of mind was not mentioned. Thus, this affidavit does not inspire confidence of this Court and cannot improve the case of appellant.

Alteration of conviction and sentence :-

22. The alternative argument of learned counsel for the appellant was that the offence allegedly committed by the appellant does not attract Section 302 of IPC. To support this contention, he placed reliance on the statement of Dr. A. K. Verma (PW-8), who clearly admitted that family members of victim got her discharged from the hospital despite knowing that her health condition was not good. Thus, Doctor clearly stated that if treatment would have been continued, she could have been perhaps saved. Apart from this, it is argued that incident had taken place on 17/03/2013 and deceased died on 19/05/2013 because of septicemia. In the manner the incident had taken place and she died, it clearly shows that the appellant did not have any intention to murder his wife. The incident had taken in spur of moment and in that event Exception 4 of Section 300 of IPC would be attracted. He rightly placed reliance on the judgment of **Talangana High Court** passed in **Cr.A. No.1155 of 2013 (Chityala Srinivas @ Srinu Vs. State of A.P.)**

23. This alternative argument, in our judgment has substantial force. This Court in the case of **Prakash Kumar Mewari (supra)** considered the legal journey on this aspect. A previous Division Bench judgment reported in **ILR 2009 M.P. 1160 (Vinod Kumar Vs. State of M.P.)** was relied upon. The relevant portion of said judgment reads as under :-

“18. It is true that by the evidence of dying declaration, it has been established that accused caused the death of Panchshila by setting her on fire, but from the contents of Ex.P/6 as well as of Ex.P/20, it seems to us that the incident occurred suddenly when accused admonished deceased saying that she had gone to the house of Vijay Thakur and had indulged in sinful act. It was mentioned by her that accused told her that he had received information that she had gone to the house of Vijay Thakur. **On appreciating the mental condition of the accused, as reflected by his conduct at the time of commission of the offence, it can be gathered that he acted on a sudden impulse, in a sudden quarrel and without premeditation. In these circumstances, we are unable to hold that accused intended to commit murder of the deceased, but his act of setting fire to deceased must be held to have been done with the intention of causing her death or causing such bodily injury as was likely to cause death, in which case the offence would be one punishable under section 304 Part-I of the Penal Code, 1860.**

19. In the result, the conviction of the appellant under section 302 of the Penal Code, 1860 and the sentence of life imprisonment awarded to him by the trial Court are set aside and instead, he is convicted under section 304 Part-I of the Penal Code, 1860 and sentenced to rigorous imprisonment for 10 years. The appellant is in custody since 4.5.1999. If he has completed his sentence of 10 years, he shall be released forthwith if not required in any other case.

(Emphasis Supplied)

24. This Court after taking into account the judgment of Supreme Court reported in (2011) 14 SCC 477 (Sayaji Hanmant Bankar v. State of Maharashtra) and (2015) 2 SCC 638 (K. Ravi Kumar v. State of Karnataka) came to hold that the incident had taken place

suddenly and in that event the conviction under Section 302 of IPC deserves to be converted into an offence under Section 304, Part -1 of IPC. Ten years actual sentence will subserve the ends of justice.

25. In the instant case also, the facts are almost similar *qua* the case of **Prakash Kumar Mewari (supra)**. A sudden quarrel took an ugly shape wherein the appellant poured kerosene and set the victim ablaze. Thus, we are inclined to hold that offence under Section 302 of IPC is not made out. Resultantly, the conviction of appellant is converted into Section 304 Part-I of IPC and in our opinion adequate sentence would be R.I. for ten years. If the appellant has already undergone actual sentence of ten years, he shall be treated to have undergone the requisite sentence. If his presence is not required in the prison for any other offence/case, he be released forthwith. The impugned judgment dated 29th March 2016 passed in Sessions Trial No.412 of 2013 stands *modified* to the extent indicated above.

26. The appeal is **partly allowed** to the extent indicated above.

(SUJOY PAUL)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE