(2023) 12 CHH CK 0002

Chhattisgarh High Court

Case No: Criminal Appeal No. 1338 Of 2016

Kanhaiya Verma,	APPELLANT
Vs	
State Of Chhattisgarh	RESPONDENT

Date of Decision: Dec. 1, 2023

Acts Referred:
Indian Penal Code, 1860 â€" Section 302#Code Of Criminal Procedure, 1973 â€" Section 161, 313, 374(2)#Evidence Act, 1872 â€" Section 32, 32(1)

Citation: (2023) 12 CHH CK 0002

Hon'ble Judges: Sanjay K. Agrawal, J; Sanjay S. Agrawal, J

Bench: Division Bench

Advocate: B.L. Dembra, C.R. Sahu, Afroz Khan

Final Decision: Allowed

Judgement

Sanjay K. Agrawal, J

1. This criminal appeal preferred by the appellant herein under Section 374(2) of the CrPC is directed against the impugned judgment dated 29-6-2016

passed by the 5th Additional Sessions Judge, Raipur, in Sessions Trial No.175/2014, by which the appellant has been convicted under Section 302 of

the IPC and sentenced to undergo imprisonment for life & pay fine of â‚¹ 1,000/-, in default, additional rigorous imprisonment for one month.

2. Case of the prosecution, in brief, is that on 25-5-2014 at about 1.30 p.m., at Village Charauda, Near the house of Smt. Ritu Verma (deceased),

Verma Gali, Police Station Dharsinwa, District Raipur, the appellant poured kerosene oil over the body of his wife Ritu Verma and alighted matchstick

by which she suffered grievous injuries and she was admitted the hospital where she succumbed to the burn injuries sustained by her and died on 30-

5-2014. During the course of treatment, her dying declaration was recorded by Jageshwar Kaushal (PW-12), Tahsildar, vide Ex.P-12 in which she has

implicated the present appellant as the assailant. Before dying declaration, on 26-5-2014, she was certified to be in fit state of mind for giving dying

declaration. After death of Ritu Verma, her dead body was subjected to postmortem vide Ex.P-11 which was conducted by Dr. S.K. Bagh (PW-11)

who opined that death was due to cardio-respiratory failure as a result of burn injuries and their complication. Seized articles were sent for chemical

examination to the FSL, Raipur, from where report Ex.P-21 was received in which presence of kerosene oil was found on Article A Ã¢â‚¬" plastic

jerrycan. Statements of the witnesses were recorded under Section 161 of the CrPC.

3. After due investigation, the appellant was charge-sheeted before the jurisdictional criminal court and charge was framed against him under Section

302 of the IPC and the case was committed to the Court of Sessions, Raipur, from where the learned 5th Additional Sessions Judge, Raipur received

the case on transfer for trial.

4. The prosecution in order to bring home the offence, examined as many as 15 witnesses PW-1 to PW-15 in support of its case and exhibited 24

documents Exs.P-1 to P-24. Defence has examined one witness Pradeep Verma (DW-1) and exhibited one document Ex.D-1 i.e. the statement of

Khileshwar Verma recorded under Section 161 of the CrPC, in support of its case. Statement of the accused / appellant was recorded under Section

313 of the CrPC in which he abjured the guilt and pleaded innocence and false implication.

5. The trial Court after completion of trial and upon appreciation of oral and documentary evidence on record, by its impugned judgment, convicted and

sentenced the appellant as mentioned in the opening paragraph of this judgment which is sought to be challenged in this criminal appeal preferred

under Section 374(2) of the CrPC by the appellant.

6. Mr. B.L. Dembra, learned counsel appearing for the appellant, would submit that the dying declaration is inadmissible in evidence in view of the

fact that the doctor who has certified the deceased to be in fit state of mind to give statement, has not been examined. Jageshwar Kaushal (PW-12),

Tahsildar / Executive Magistrate has not stated before the Court that the deceased was in fit state of mind to give dying declaration. In that view of

the matter, the appellant is entitled to be acquitted on the basis of benefit of doubt and also on the ground that he has also made attempt to extinguish

the fire.

7. Mr. Afroz Khan, learned State counsel, would support the impugned judgment and submit that the trial Court is absolutely justified in convicting the

appellant for the aforesaid offence, as the prosecution has proved the offence against the appellant beyond reasonable doubt, as such, the appeal

deserves to be dismissed.

8. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with

utmost circumspection.

9. The two questions that arise for consideration in the present appeal are, whether the death of deceased Ritu Verma was homicidal in nature and

whether the appellant is the author of the crime in question?

10. Since both these questions are interlinked with each other, we shall deal with both of them together considering the nature of evidence brought on

record.

11. Conviction of the appellant is mainly based on the dying declaration Ex.P-12 given by deceased Ritu Verma to Jageshwar Kaushal (PW-12),

Tahsildar / Executive Magistrate.

12. At this stage, it is appropriate to notice Section 32(1) of the Indian Evidence Act, 1872, which reads thus:

Ã¢â‚¬Å“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.Ã¢â‚¬"Statements, written or

verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose

attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court

unreasonable, are themselves relevant facts in the following cases:Ã¢â‚¬

(1) when it relates to cause of death.Ã¢â‚¬"When the statement is made by a person as to the cause of his death, or as to any of the circumstances of

the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and

whatever may be the nature of the proceeding in which the cause of his death comes into question.

xxx xxx xxxÃ¢â‚¬â€‹

13. The general ground of admissibility of the evidence mentioned in Section 32(1) of the Evidence Act is that in the matter in question, no better

evidence is to be had. The provisions in Section 32(1) constitute further exceptions to the rule which exclude hearsay. As a general rule, oral evidence

must be direct (Section 60). The eight clauses of Section 32 may be regarded as exceptions to it, which are mainly based on two conditions: a

necessity for the evidence and a circumstantial guarantee of trustworthiness. Hearsay is excluded because it is considered not sufficiently trustworthy.

It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination. But where there are

special circumstances which gives a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

The Supreme Court emphasized on the principle enumerated in the famous legal maxim of the Law of Evidence, i.e., nemo moriturus praesumitur

mentire which means a man will not meet his Maker with a lie in his mouth. Our Indian Law also recognizes this fact that Ã¢â‚¬Å“a dying man seldom

liesÃ¢â‚¬â€¹ or in other words Ã¢â‚¬Å“truth sits upon the lips of a dying manÃ¢â‚¬â€¹. The relevance or this very fact, is an exception to the rule of hearsay evidence.

14. Section 32(1) of the Evidence Act is famously referred to as the Ã¢â‚¬Å“dying declarationÃ¢â‚¬ section, although the said phrase itself does not find

mention under the Evidence Act. Their Lordships of the Supreme Court have considered the scope and ambit of Section 32 of the Evidence Act,

particularly, Section 32(1) on various occasions including in the matter of Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 in

which their Lordships have summarised the principles enumerated in Section 32(1) of the Evidence Act, including relating to Ã¢â‚¬Å“circumstances of the

transactionÃ¢â‚¬â€¹, which are as under: -

Ã¢â‚¬Å“21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following

propositions emerge:-

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a

suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the

Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to

widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be

confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical

culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with

the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context.

Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest

that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a

very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being

subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by

the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is

strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be

relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and

which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of

time alone in such cases would not make the statement irrelevant.Ã¢â‚¬â€‹

15. In the matter of Purshottam Chopra and another v. State (Government of NCT of Delhi) (2020) 11 SCC 489, principles relating to recording of

dying declaration and its admissibility and reliability were summed up in paragraph 21 as under: -

Ã¢â‚¬Å“21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability

could be usefully summed up as under:-

21.1. A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the court.

21.2. The court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary

statement, which was not the result of tutoring, prompting or imagination.

21.3. Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it

should not be acted upon without corroborative evidence.

21.4. When the eyewitnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

21.5. The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person

recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement.

21.6. Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is

expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of

recording the dying declaration.

21.7. As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the

decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

21.8. If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there

is no legal impediment in recording conviction on its basis even without corroboration.Ã¢â‚¬â€‹

16. A Constitution Bench of the Supreme Court in the matter of Laxman v. State of Maharashtra (2002) 6 SCC 710 has clearly held that a

certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established

otherwise. Their Lordships held in paragraph 5 of the report as under: -

Ã¢â‚¬Å“5. The Court also in the aforesaid case relied upon the decision of this Court in Harjit Kaur v. State of Punjab (1999) 6 SCC 545 wherein the

Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an

endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying

declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations

of this Court in Paparambaka Rosamma v. State of A.P. (1999) 7 SCC 695 (at SCC p. 701, para 8) to the effect that

in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to

accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration

has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the

effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the Magistrate categorically

stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of

mind whereafter he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma v. State of A.P.8 must be held to

be not correctly decided and we affirm the law laid down by this Court in Koli Chunilal Savji v. State of Gujarat (1999) 9 SCC 562.

17. The Constitution Bench of the Supreme Court in Laxman (supra) has held that what is essentially required is that the person who records a dying

declaration must be satisfied that the deceased was in a fit state of mind. Their Lordships further held that where it is proved by the testimony of the

Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the

court ultimately holds the same to be voluntary and truthful.

18. Bearing in mind the aforesaid principles of law laid down by their Lordships of the Supreme Court in the aforesaid judgments (supra), it is quite

vivid that the prosecution is required to prove that the deceased has given dying declaration which is true and voluntary and further, while giving dying

declaration, she was in fit state of mind to give the dying declaration. In the present case, dying declaration has been recorded by Jageshwar Kaushal

(PW-12) on 26-5-2014 at 6.30 p.m. vide Ex.P-12 in which one doctor has certified that the deceased was in fit state of mind to give statement,

however, surprisingly, the doctor who has certified that the deceased is Ã¢â‚¬Å“fit for statementÃ¢â‚¬ has not been examined by the prosecution for reasons

best known to it. Even Jageshwar Kaushal (PW-12), who has been examined before the Court and who has proved the dying declaration, has only

proved the dying declaration, but did not make statement about his satisfaction that the deceased was in fit state of mind to give statement and even in

his examination-in-chief and in cross-examination, he has only stated that doctor was present, but he did not say that the deceased was in fit state of

mind to give statement and that the doctor has certified that she was in fit state of mind to give dying declaration. As such, there is absolutely no

evidence on record to hold that the victim / deceased was in fit state of mind physically and mentally to give dying declaration. Furthermore, one more

mitigating circumstance that has been brought on record in the dying declaration Ex.P-12 itself is, the victim herself has stated that after the appellant

having poured kerosene oil on her body and having alighted matchstick, when she started burning, also made endeavour to extinguish the fire, though

thereafter absconded from the spot as stated by Khileshwar Verma (PW-5).

19. In that view of the matter, we are of the considered opinion that the prosecution has failed to establish that the deceased was in fit state of mind

physically and mentally to give statement / dying declaration in absence of examination of the doctor who has certified the deceased to be in fit state

mind to give statement and satisfaction has not been recorded by the Executive Magistrate in the statement before the Court or in the dying

declaration itself that the deceased was in fit state of mind to give dying declaration, as she has sustained 60% burn injuries.

20. In that view of the matter, we are unable to hold that the prosecution has been able to bring home the offence against the appellant beyond

reasonable doubt and as such, the appellant is entitled to be acquitted on the ground of benefit of doubt.

21. In view of the aforesaid discussion, we are unable to sustain the conviction of the appellant under Section 302 of the IPC, as the conviction is not

well merited. As such, conviction and sentences imposed upon the appellant under Section 302 of the IPC are liable to be set-aside and are hereby

set-aside. The appellant is acquitted of the said charge. Since he is in jail from 1-6-2014, we direct that he be set at liberty forthwith if not required to

be detained under any other process of law.

22. The appeal is allowed accordingly.

23. Let a certified copy of this judgment along with the original record be transmitted to the trial Court concerned for necessary information and

action, if any. A certified copy of the judgment may also be sent to the concerned Jail Superintendent forthwith wherein the appellant is suffering the

jail sentence.