(2002) 2 MPHT 542 : (2002) 3 MPLJ 153 : (2002) 1 MPLJ 132

Madhya Pradesh High Court (Gwalior Bench)

Case No: Criminal Appeal No. 5 of 2002

Ram Das	APPELLANT
Vs	
State of M.P.	RESPONDENT

Date of Decision: Feb. 11, 2002

Acts Referred:
Evidence Act, 1872 â€" Section 32#Penal Code, 1860 (IPC) â€" Section 302, 376(1), 450

Citation: (2002) 2 MPHT 542 : (2002) 3 MPLJ 153 : (2002) 1 MPLJ 132

Hon'ble Judges: R.B. Dixit, J; Deepak Verma, J

Bench: Division Bench

Advocate: J.P. Gupta and A.K. Jain, for the Appellant; P.D. Agrawal, Government Advocate, for the Respondent

Final Decision: Partly Allowed

Judgement

R.B. Dixit, J.

Lust in the eyes, coupled with intoxicant mind, turns a human being into a furious beast who fails to recognise a mother like lady before him to

satisfy his sexual desire, so much so, as to cause her death on being resisted from so doing. This is what exactly had happened, according to the

prosecution, on the fateful night of 22-3-2000 at about 9-30 P.M. when deceased Ramkatori a widow of about 50 years of age was sleeping in

her house when the appellant/accused resident of the same locality aged about 22 years entered her apartment by jumping from the rear side of the

roof of her house and suddenly took her by surprise as she found to have been caught hold by the appellant/accused and thrown on the ground.

She admonished the accused by saying that she is like mother of him but of no avail as she was made helpless at the point of knife and was raped.

When she tried to raise hue and cry, she was silenced by assaulting her with knife on her chest and abdomen.

When after making assault on the deceased, accused ran away, the deceased somehow tied a loin cloth on the bleeding injuries and managed to

come to Police Station, Ambah with the help of local people who had gathered outside her residence and lodged First Information Report (Ex. P-

12). She was immediately rushed to the hospital where first aid treatment was provided to her and Dr. R.G. Verma (P.W. 1) who examined her

injuries found as follows :--

(1) Slab would 1.5 x 0.8 x 1.8 cm present vertically over left lateral aspect of chest wall edges regular clear cut directed downward backward;

(2) Stab would 2.5 x 1.5 x 2.0 cm present vertically over left lateral aspect of chest below injury No. 1;

(3) Stab wound 3.5 x 2.5 cm opening abdominal cavity over left side of abdomen below umbilicus below 7 cm anterior to superior iliac spine.

Intestine and omcntum coming out from the wounds.

For confirmation of rape with victim, she was referred to Gynecologist, however, it seems that looking to her critical condition, she was referred to

J.A. Group of Hospitals at Gwalior for further treatment. Meanwhile, her dying declaration (Ex. P-2), was also recorded by Naib Tehsildar J.N.

Paliwal (P.W. 8) in midnight about 1-20 AM. The deceased was admitted in female surgical ward in J.A. Group of Hospitals, Gwalior, where,

operation regarding injuries on the abdomen was performed in supervision of Professor of Surgery Dr. S.M. Tiwari (P.W. 13) and Dr. Arun

Raghuvanshi, a Surgeon under him, had questioned the deceased regarding history of case whereupon, she had related as follows :--

On 22-3-2000, at about 11 PM she was alone at her home sleeping when a man named Ramdas jumped into her house from the roof and

entered her room and tried to persuade her for sexual intercourse. On refusing, Ramdas stabbed the knife on chest and abdomen. On sustaining

the stab injuries, she became helpless and could not resist so Ramdas raped her and ran away. She was taken to Ambah Hospital by her relatives

and neighbours where MLC was dealt and primary treatment was given.

It was also noticed that the patient was conscious and well oriented, responding well to verbal commands. Since operation was to be carried out in

order to save the life of deceased, it seems that she was also hurriedly examined by Dr. Vijaya Sharma, Gynecologist who had then found patient

unconscious under the influence of anesthesia and the result of examination was recorded on Bed Head Ticket (Ex. P-18) itself, wherein, no injury

other than the stab wounds were found. However, no definite opinion regarding rape has been given in the report, perhaps for the reason that on

her being injured on vital portions of the body, round about the private parts. It was also not possible to examine her properly for confirmation of

rape or her.

Dr. Vikas Jain, House Surgeon on duty on 24-3-2000, at 5.45 AM regretfully declared that the deceased could not survive despite of using all life

saving measures. On receiving merg intimation (Ex. P-3), panchnama of the dead body (Ex. P-4) was prepared and the autopsy on the dead body

was conducted by Dr. P.L. Gupta (P.W. 9) alongwith his Asstt. Dr. Neeta Jain who found as follows :--

(1) Stitched wound present in midlinc of body anteriorly over the umbilical region size 16cm long having 18 stitches and wound opens in abdominal

cavity;

(2) Stitched wound present 4 cm long present on lateral wall abdomen right side. This wound is 8 cm away from the wound No. 1. A rubber

drainage tube kept in left on opening stitches. It is having clear margins;

(3) Stitched wound present over left lateral way of abdomen 7 cm long, drainage tube present. This wound is reaching in abdomen cavity up to left

kidney cutting the left kidney and omcntum, depth 15 -18 cm, margins are sharp;

(4) Stitched wound present over left lateral wall of chest in 4th intercostal space. It is 2 cm long, depth is 6 cm, culling left pleura and left lung

producing left sided hydro.

The cause of death, due to shock and hacmorrhacge on account of multiple injuries and homicidal in nature.

Accused was apprehended on 30-3-2000 and recovery of knife, weapon of assault, was made from him on the basis of discovery statement (Ex.

P-8). Charge-sheet was filed and after commitlal to Sessions, accused on being questioned, abjured the guilt and claimed lo be Iried. According lo

him, he was falsely implicated because of some dispute with Sub-Inspector Ahirwar of Ambah Police Station. Learned IVth Addl. Judge lo

Sessions Judge, Morena, after recording prosecution and the defence evidence, in Sessions Trial No. 207/2000 and examining the accused u/s

313 of Cr.PC, found him guilly, by his impugned judgment dated 21-12-2001, of the offence under Sections 450, 376(1) and 302 of IPC, and

sentenced him to Rigorous Imprisonment of 3 years and fine of Rs. 500/-, 10 years and fine of Rs. 500/- and death sentence with fine of Rs.

1000/- respectively, against which, the present appeal being Cr. Appeal No. 5/2002 and Death Reference 1/2001, have been preferred, which

were both taken up together for analogous hearing and are being disposed of by this common order.

The learned senior counsel Shri J.P. Gupta, appearing of the appellant/accused has contended before us that dying declaration (Ex. P-2), only

piece of evidence on the basis of which, appellant has been found guilty of the aforesaid offences, is completely inconsistent with the First

Information Report alleged to have been lodged by the deceased and her statement Ex. P-13, recorded u/s 161 of Cr.PC. Apart from the fact, in

absence of proper medical certificate regarding her fit state of mind, the dying declaration becomes highly suspicious and in such a situation,

appellant is entitled to be acquitted by awarding him, atleast benefit of doubt. However, the learned Govt. Advocate, appearing for the State has

supported the findings of the learned Trial Court, based on proper appreciation of evidence on record. We have given our anxious consideration to

the rival submissions made by learned counsel for the parties and have carefully perused the record.

Unfortunately, for the prosecution, the main witness Munnalal (P.W, 3), who is brother-in-law of deceased, has turned hostile. It is surprising that

even when he has admitted in his statement that he was called by the Police, Ambah and was taken to Hospital, however, it cannot be imagined

that he had no talks with the deceased or that the deceased did not tell him anything. The learned senior counsel for the appellant has submitted

that in view of the inconsistency regarding presence of this witness in the First Information Report, and dying declaration of the deceased, his

presence on the spot becomes highly improbable. In our opinion, whatever may be the case, since the Trial Court has also not believed the

statement of this witness and since the witnesses of recovery of weapon Kriparam (P.W. 4), and Prem Pal (P.W. 6) have also turned hostile,

although, the recovery has been proved by the Investigating Officer, R.S. Ghuraiya (P.W. 11), the only evidence remains to be examined is that of

dying declaration of the deceased.

Naih Tehsildar, J.N. Paliwal (P.W. 8), had stated that on 23-3-2000, he recorded the dying declaration (Ex. P-2), after verifying the fit mental

condition of the deceased, which was duly certified by Doctor Shri R.G. Verma. On being questioned, the deceased has told that accused Ramdas

s/o Sukhram, had entered her house at about 9 PM who was under influence of liquor. He asked her to have sex with him and when she rebuked

him by saying that you are younger than my son Ashok, and on her refusal, the accused told her that unless she allows to satisfy his lust, he will not

leave her alive. The accused then applied force to her and assaulted 3 or 4 times with knife on her stomach and committed rape with her. On her

raising hue and cry, she was assaulted again with knife on her stomach between both of her thighs. When bleeding did not stop, and her screams

did not attract anyone from the locality, she somehow managed to tie a scarf around her waist and came staggering at Police Station.

It is to be noticed that in the First Information Report (Ex. P-12), recorded by Investigating Officer, R.S. Ghuraiya, no assault was made by the

accused before commission of rape on the deceased. She was assaulted only after she tried to raise alarm. Another inconsistency pointed out by

the learned counsel for the appellant in the FIR, that is, about arrival of Munnalal brother-in-law and other people of the locality on hearing

screams of the deceased. On the basis of this discrepancy, in FIR, and dying declaration, the learned counsel for the appellant has argued that the

name of Munnalal in the FIR has been mentioned in order to introduce him as a witness in the case. It has also been pointed out that the

subsequent recording of statement of deceased u/s 161 of Cr.PC, is also of no help to the prosecution as it is verbatim copy of the FIR. According

to learned counsel of the appellant, aforesaid FIR seems to have been recorded by the Police Officer concerned, subsequent to the admission of

victim in the Hospital, which is not admissible in evidence as it bears no certification of the Medical Officer about its being dictated by the deceased

in fit state of mind.

After careful perusal of the FIR, and the dying declaration, we are of the considered opinion that in so far as the commission of rape and barbarous

assault with knife on the deceased, made by the accused, is concerned, there is no material discrepancy between FIR and her dying declaration,

which was subsequently, recorded hurriedly by Naib Tehsildar as she was being shifted in ambulance to J.A. Group of Hospitals at Gwalior. It

was but natural that some slight variance may occur between both the documents in view of the critical condition of patient.

In view of the inconsistency in the FIR, and the declaration regarding arrival of Munnalal and other people of the locality, soon after the

occurrence, the learned counsel for the appellant has drawn our attention towards admission in the medical evidence of Dr. R.G. Verma and Dr.

P.L. Gupta that due to serious injuries to the victim, it was not possible for her to have walked half a kilometer from her house for lodging police

report at the police station. It would be beneficial to refer the statement of defence witness Hari Kishan (D.W. 1), who has stated that at about

9.30 PM, after hearing screams of the deceased, some 10 to 15 people of the locality had gathered and found the deceased lying unconscious

because of profused bleeding from the injuries. She was brought to the police station by these people on a four wheel thela, goes to indicate that

she might have been helped by some people of locality to come to the police station and to the Hospital. However, in so far as non-involvement of

accused in the crime is concerned, the statement of this witness was rightly held unreliable by the Trial Court in view of his belonging to the same

caste or community of the accused and residing in his neighbourhood. That apart, we would like to make it clear that it has been clearly mentioned

in the dying declaration of the deceased that she had managed to come to the police station having wrapped a loin cloth on her injuries.

Learned counsel appearing for the appellant heavily drawing support from the observations of the Apex Court in the decision in the case of K.

Ramachandra Reddy and Another Vs. The Public Prosecutor, , has urged that the dying declaration of the deceased, has also turned out to be

suspicious in view of critical condition and in absence of proper certification by the medical officer regarding her fit state of mind. What has been

noticed on the top of the dying declaration by Dr. R.G. Verma is that ""patient is fully conscious to give statement"". It is to be noticed that in the

aforesaid decision of the Apex Court it has been clarified that the dying declaration being not a statement on oath, so that its truth could be tested

by the cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it.

While great solemnity and sanctity is attached to the words of a dying man because, a person on the verge of death is not likely to tell lies or to

concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of

either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the

statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any

influence or rancour. Once the Court is satisfied then the dying declaration be sufficient to hold the conviction proper even without any further

corroboration.

In the case of Maniram Vs. State of M.P., , one of the important requirement of the dying declaration, as observed, was that when the declarant is

in hospital, it was the duty of the person who has recorded the dying declaration to do so in the presence of doctor after duly being certified by the

doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. Dying declaration was disbelieved in the

case of Darshna Devi v. State of Punjab, reported in 1996 SCC (Cr.) 38, when doctor started treating the deceased, he was semi-unconscious,

his pulse was not pulpable and his blood pressure was not recordable and the doctor had further certified that the deceased was not in fit condition

to make his dying declaration.

The Hon. Supreme Court in the case of Ram Bihari Yadav Vs. State of Bihar and Others, , had emphasised that though dying declaration is

indirect evidence, being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive

evidence and tike any other substantive evidence requires no corroboration for forming basis of conviction of an accused. But then the question as

to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case. It was further

observed that mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters

which can be observed by any person. But to lend assurance to those factors having regard to the importance of the dying declaration, the

certificate of a medically trained person is insisted upon. In the absence of availability of a doctor, to certify the above mentioned factors, if there is

other evidence to show that the recorder of the statement has satisfied himself about those requirements before recording the dying declaration,

there is no reason as to why the dying declaration should not be accepted.

Learned counsel for the appellant has further placed reliance of a decision of the Apex Court in the case of Dandu Lakshmi Reddy Vs. State of

A.P., , wherein, it has been observed that when the sphere of scrutiny of the dying declaration falls within a restricted area, the Court cannot afford

to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to one was wrong or that in the other,

was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence.

Adopting such a strain, to the detriment of the accused, in a criminal case, is not a feasible course. Thus, the Court cannot sideline the difference in

the version of the deceased as to what she was doing at the relevant point of time was not proper. However, in our opinion, on the facts in the

present case, there is no such material divergence relating to the very occasion of crime.

The Hon. Supreme Court in the case of Paparambaka Rosamma and Others Vs. State of Andhra Pradesh, , had expressed the view that

consciousness and fitness of mind are distinct conditions. Doctor''s certification was not only about consciousness but also about fit state of mind of

the deceased that existed before recording of dying declaration is essential, In this case, the dying declaration was not accepted as true and genuine

because, the certificate of expert at the end of it only recorded that ""patient is conscious while recording the statement"". It was observed that the

circumstances of the case are pointer to the fact that the deceased was disappointed and frustrated in her married life. It is in these circumstances,

the dying declaration wherein, all the 3 accused alleged to have committed the crime, cannot be accepted. The statement if the dying declaration,

the deceased had stated that A-1 to A-3 poured kerosene on her and thereafter, she also poured kerosene on herself. Then she stated ""they have

burnt me with a lighted match-stick raised a reasonable doubt as to whether, she was in a fit deposing state of mind at the time when the dying

declaration was recorded. However, the facts and circumstances of the present case, are entirely different as the victim remained in a fit state of

mind throughout even when she was questioned next day on the operation table at the J. A Group of Hospitals, Gwalior.

The Apex Court in the case of Gulam Hussain and Another Vs. State of Delhi, , has again reiterated that the dying declaration must be dealt with

caution for the reason that the maker of the statement had not been subjected to cross-examination. There is no rule of law or rule of prudence that

a dying declaration cannot be accepted unless it is corroborated. Even where the prosecution had failed to fully establish the recording of the said

statement and as the prosecution is left with only one dying declaration, it would not be safe to convict the appellants only on the basis of the

aforesaid dying declaration unless corroborated in other material particulars. But from the facts it is evident that the material facts stated in the dying

declaration have been corroborated and it having been found to be of the truthful version can be relied upon in convicting the accused. It has

further been made clear in the case of Smt. Laxmi v. Om Prakash and Ors., reported in 2001 AIR SCW 2481, that the dying declaration is to be

judged and appreciated in the light of surrounding circumstances, and its weight determined by the defence to the principles governing the weigh of

evidence.

In the case of Panchdev Sharma v. State of Bihar, reported in JT 2001 (10) SC 322, it was held that there is no rule of law that a dying

declaration cannot be acted upon unless it is corroborated. The confidence of the Court, is the summumbonum and in the event of there being any

affirmation thereto, in the judicial mind, question of any disbelieve or distrust would not arise. In the event, however, of there being some infirmity

howsoever, negligible it be, the Court, unless otherwise, satisfied about the credibility thereof, ought to look for some corroboration, if however, it

is otherwise, question of requirement of a corroboration, would not arise ; dying declaration alluring confidence of the Court would be a sufficient

piece of evidence to sustain conviction. There is no formal as such of dying declaration, neither the declaration need be of any longish nature and

neatly, structured.

Taking into consideration the implications arising under the various decisions of the Apex Court, referred to hereinabove, it would appear that in so

far as the fitness of mind of the deceased at the time of recording dying declaration is concerned, it is to be assessed on the basis of surrounding

circumstances and in totality of the facts and circumstances of each case. The Hon. Supreme Court on its decision in the case of The State of

Orissa Vs. Sudhansu Sekhar Misra and Others, , rendered by the Constitution Bench, has observed that every judgment must be read as

applicable to the particular facts proved or assumed to be proved. Since the generality of the expression which may be found there, is not intended

to be exposition of the whole law, but it governed and qualified by the particular facts of the case in which such expressions are to be found.

In so far as present case is concerned, apart from the FIR, there is nothing to disbelieve the statement of Naib Tehsildar who had recorded the

dying declaration that he himself was satisfied about the fit mental condition of the deceased coupled with the certificate of doctor appended at the

beginning of the dying declaration clearly mentioning her to be ""fully conscious"" goes to indicate her fitness of mind for recording dying declaration.

Making of the dying declaration, has further been corroborated by Dr. R.G. Verma (P.W. 1), and her version of incident recorded as a case

history by the doctors at the J.A. Group of Hospitals before performing her operation. It is to be noticed that the bed head ticket (Ex. P-18), was

summoned during trial on the request of defence counsel and was proved by Dr. M.S. Tiwari (P.W. 13) in whose supervision, the deceased was

admitted and treated at the J.A. Group of Hospitals, however, he was not at all cross-examined by the defence on the point of case history as

related by the patient/deceased and in the circumstances, there is no reason to disbelieve this document, wherein, it has been clearly indicated that

the patient was conscious, well oriented and responding well to the verbal command"". This in our opinion, is a sufficient corroboration of her dying

declaration as well as her condition as to her fitness of mind.

In such a situation, in our opinion, dying declaration of the deceased not being the result of either tutoring, prompting or a product of her

imagination, was rightly relied upon by the Trial Court. It would not be out of place here to mention that by fit state of mind, what is meant by the

Hon. Apex Court, is not simply a certificate from the doctor to that effect, but in facts and circumstances of the each case, a duty has been cast

upon the Court to examine other attending circumstances so as to justify whether the deceased was in a fit state of mind to recollect as to what had

happened to her at the time of incident and to see whether the deceased was in a position to give true account of the happening. It is to be noticed

that in the present case, the deceased was in a position even after sustaining grievous injuries to come upto the police station and to hospital of her

own and the version of the incident by her to police, and Naib Tehsildar in the dying declaration as well as to the doctors attending her at the time

of operation, is consistent and seems to be free from any influence of tutoring or imagination etc.

Although the learned counsel for the appellant has pointed out that non-mentioning of name of accused in the Post-mortem Requisition Form, as

well as in merg intimation wherein, it was only mentioned that the deceased was injured in a dispute. Similarly, in spot map Ex. P-5, presence of

witness Munna together with his signature has been obtained in his consent (Ex. P-18) at a time and date when he was present at J.A. Group of

Hospitals, Gwalior, instead on the spot.

This in our view, may be in a jealous efforts to give paddling to the case. In this respect, the Hon. Supreme Court in the case of Ambika Prasad

and Another Vs. State of (Delhi Administration, Delhi), , has made it clear that in a case of defective investigation, it would not be proper to acquit

the accused, if the case is otherwise established conclusively. A criminal trial is meant for doing justice to the accused, a victim and the society, so

that the law and order is maintained. A Judge does not preside over a criminal trial, merely to see that no innocent man is punished but, a Judge

also presides to see that a guilty man does not escape.

Learned counsel for the appellant has also urged that the version of deceased as appeared in her dying declaration, regarding commission of rape

on her, has not been properly corroborated by any medical evidence as the concerned lady doctor has not been examined in the Court, nor her

report was supplied to the accused with the charge-sheet. In this regard, as we have observed, hereinabove, that the first priority before the

doctors was, to save the life of deceased and therefore, she was hurriedly shifted from Ambah to Gwalior, where she was operated upon by

surgical specialists, even then the lady doctor had examined her as indicated in the Bed Head Ticket. However, it seems that in view of grievous

injuries near and around her private parts and further it was not possible to examine her thoroughly because of her unconsciousness due to

anesthesia. However, when her dying declaration is free from all doubts, regarding rape, committed on her, she being a widow aged about 50

years, the question of confirmation of rape in medical evidence, particularly when such a rape has been committed after she was made helpless, at

the point of knife or after inflicting stab wounds on vital parts of the body, does not arise and non- examination of the lady doctor is concerned, in

our opinion, is therefore is in no way detrimental to the prosecution. In facts and circumstances of the case, therefore, her version in the dying

declaration as to the commission of offence of rape, is sufficient to prove an offence punishable u/s 376(1) of IPC. Similarly from the evidence

discussed here in above, in our considered opinion, the offence under Sections 450 and 302 of IPC, are also found proved against

appellant/accused.

In so far as sentence of death is concerned, it has been submitted for the appellant that he was about 22 years of age at the time of incident and

was admittedly, under the influence of liquor. In the circumstances, his case does not fall under the category of rarest of the rare cases. In the case

of State of T.N. Vs. Suresh and Another, , where the accused had committed rape on sister-in-law, when she was sleeping with her child at night

by gagging her mouth with a cloth and then thrown her from the Balcony of the 4 storeyed building causing her death, even in such an inhuman and

despicable nature of crime, he was punished only with imprisonment of life.

In a recent decision of the Apex Court in the case of Bantu alias Naresh Gin v. State of M.P., reported in JT 2001 (9) SC 279, the accused was

about 22 years of age at the time of occurrence although no injuries were found to the deceased, probably of gagging mouth and nostrix which had

prevented her from raising any hue and cry and accused having no criminal record or nothing to indicate him as grave danger to the society, it was

held that it is not a case of rarest of the rare nature. Similarly, in the present case, the appellant/ accused was about 22 years of age and was

reportedly under the influence of liquor. It is true that his act is heinous and required to be condemned but at the same time, in our considered

opinion, it cannot be said that it is rarest of the rare case, where, accused requires to be eliminated from the society. The present accused has also

no criminal record, and cannot be treated to be grave danger to the society at large. Hence, there is no justifiable reason to impose the death

sentence.

In the result, death reference fails and is dismissed. However, the appeal is partly allowed only to the extent of imposition of sentence of death. We

confirm the conviction of the appellant under Sections 450, 376(1) and 302 of IPC and also confirm the punishment awarded to him by the

learned Trial Court, in so far as offence under Sections 450 and 376(1) of IPC is concerned, but we hereby modify the sentence of death awarded

u/s 302 of IPC to imprisonment for life and the amount of fine as imposed by the Trial Court. All the sentences are to run concurrently.