

HIGH COURT OF CHHATTISGARH AT BILASPUR

DIVISION BENCH:

Hon'ble Shri T.P. Sharma &

Hon'ble Shri C.B. Bajpai, JJ

Criminal Appeal No.557/2009

APPELLANTS

(In jail)

1. Rajendra @ Matauwa
2. Ram
3. Yashwant @ Bablu
4. Shivprasad @ Khunuwa
5. Rakumar
6. Kamlabai
7. Shivkumari
8. Smt. Rajkumari @ Kunwar
9. Smt. Saraswati Bai
10. Chhedilal @ Chheduwa
11. Lachhiman @ Laxman

Vs

RESPONDENT

State of Chhattisgarh

&

Criminal Appeal No.984/2011

APPELLANTS

(In jail)

1. Rakesh
2. Bhaga Bai @ Bhuri

Vs

RESPONDENT

The State of Chhattisgarh

Present:

Ms. Sangeeta Mishra, Advocate for the appellants in both the appeals.

Mr. S.K. Mishra, Panel Lawyer for the State in both the appeals.

J U D G M E N T

(06.03.2014)

T.P. Sharma, J

1. Criminal Appeals Nos.557/09 & 984/11 filed on behalf of appellants namely Rajendra @ Matauwa, Ram, Yashwat @ Khunuwa, Shiv Prasad, Rakesh, Rajkumar, Kamlabai, Bhagbai, Shivkumari, Smt. Rajkumari @ Kunwarbai, Smt. Saraswati Bai, Chhedilal @ Chheduwa, Lachchmin @ Laxman respectively filed against the judgment of conviction and order of sentence dated 01.08.2009 are being disposed of by this common judgment.

2. Challenge in above two appeals are to the judgment of conviction and order of sentence dated 01.08.2009 passed by the 1st Additional Sessions Judge, Mungeli in S.T. No.25/07 whereby & whereunder the Additional Sessions Judge after holding the appellants for constituting unlawful assembly having its common object to commit murder of Sushila Bai and in furtherance of common object of unlawful assembly, members of the unlawful assembly committed murder of Sushila Bai, convicted them under Sections 147 & 302/149 of the Indian Penal Code (for short 'IPC') and sentenced to undergo R.I. for 02 years and R.I. for life & fine of Rs.1,000/- respectively, in default to under R.I. for 03 months for each default.
3. Conviction is impugned on the ground that without an iota of evidence the trial Court has convicted & sentenced the appellants, as aforementioned, and thereby committed illegality.
4. As per case of the prosecution, Sushila Bai (since deceased) was married to appellant-Rajendra @ Matauva by chudi custom prevailing in their community. On 16.10.2006 at about 8.00 a.m. appellant Rajendra was present in his field along with his aunt appellant-Saraswati Bai. They were in compromising position and appellant Rajendra was committing intercourse with her. Unfortunate deceased noticed the said act when she reached to the field. She became upset, returned to her home where all the appellants were present. She narrated the said fact to them then they condemned her by saying that she is defaming them and thereafter they took her inside the room, poured kerosene oil and set her ablaze. On hearing her screams, Geeta Bai (PW-5), Sonic (PW-15), Chitrarekha (PW-6), Baggal @ Mangal (PW-7) came to spot and witnessed second part of the incident. She extinguished fire. She was brought to the hospital for treatment where she made dying declaration to Dr. G.S. Dau (PW-8) that the appellants & Sonu had caused burn injuries to her, which was recorded by the doctor in the medical examination report (Ex.P-12) and obtained her thumb impression. Thereafter she

was referred to the Burn Unit, CIMS, Bilaspur for further treatment. She received 95% burn injuries. The doctor sent intimation to the police vide Ex.P-11 at 10.00 a.m. Police Station Lormi recorded roznamcha vide Ex.P-33.

Head Constable Harish Chandra (PW-13) reached hospital and vide Ex.P-11 requested the doctor to opine whether Sushila Bai is fit to give statement or not. Dr. G.S. Dau (PW-8) gave certificate (Ex.P-13) that the injured is in a position to give statement. Head Constable Harish Chandra (PW-16) also recorded statement of Sushila Bai under Section 161 of Cr.P.C. vide Ex.P-34. Shri P.R. Nirmal (PW-12) received request vide Ex. P-32 for recording statement of the injured whereupon he went to the hospital and recorded her dying declaration vide Ex.P-14. At that time, she was in a fit state of mind to give statement which was certified by Dr. G.S. Dau (PW-8). During the course of treatment, Sushila Bai succumbed to the injuries on 20.10.2006. Death was intimated to the police station City Kotwali, Bilaspur and merg was recorded vide Ex.P-33. Finally, first information report was recorded vide Ex.P-34 & 34A.

The Investigating Officer reached to the spot on 16.10.2006 and seized burnt slipper, mala, match-box, piece of saree, lamp containing some kerosene oil vide Ex.P-1. Burnt pieces of red colour blouse, petticoat and bed sheet were recovered from the spot vide Ex.P-2. After the death of Sushila Bai, after summoning the witnesses vide Ex.P-4, the Investigating Officer prepared inquest of the dead body of the deceased vide Ex.P-3 on 20.10.2006. Spot map was prepared vide Ex.P-6. Dead body was sent for autopsy to CIMS, Bilaspur vide Ex.P-15A. Dr. Vijay Kumar Verma (PW-19) conducted autopsy vide Ex.P-15 and noticed *anti mortem* burn injuries of 90% covering almost all the body except foot. Internal organs were congested. According to the doctor, cause of death was shock & toxemia as a result of extensive burn. Accused persons were

arrested vide Ex. P-17 to P-31. Statements of witnesses were recorded under Section 161 of Cr.P.C.

5. After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate 1st Class, Mungeli, who, in turn, committed the case to the Court of Additional Sessions Judge, Mungeli. In order to prove the guilt of the accused persons, the prosecution has examined as many as 16 witnesses. The accused persons were examined under Section 313 of Cr.P.C. where they denied the circumstances appearing against them and pleaded innocence & false implication. The appellants have taken the defence that it was the case of accident and Sushila got burned as a result of accident. Present appellant Rajendra, husband of deceased, tried his level best to save her. Other appellants have also taken a defence that it was the case of accident. They have been falsely implicated by the previous husband and maternal relatives of the deceased who were not happy with the marriage of deceased with appellant-Rajendra.
6. The trial Court, after providing opportunity of hearing to the parties, convicted and sentenced the accused persons as mentioned in paragraph-1 of this judgment.
7. We have heard learned counsel for the parties, perused the impugned judgment and record of the trial Court.
8. Learned counsel for all the appellants vehemently argued that conviction is substantially based on two dying declarations, Ex.P-14 & Ex.P-34. Initially Ex.P-34 was the statement recorded under Section 161 of Cr.P.C. but after the death of deceased, it became dying declaration in terms of Section 32 of the Evidence Act. She further submits that as per case of prosecution, one local-made lamp (चिमनी) has been used for pouring kerosene, which is very small object for light and hardly contains 100 ml kerosene. Even it was not possible to hold aforesaid lamp by more than one person or even by one person by using both the hands. Therefore, even in case of

pouring kerosene oil over the deceased, only one person had poured kerosene oil and it was not possible for all accused persons to set her ablaze by lighting match-stick and this may be the act of only one person. Deceased was brought to hospital by her husband appellant Rajendra which by itself is sufficient to establish the fact that appellant Rajendra was not having any motive to kill his wife. She further submits that evidence of prosecution witnesses (without admitting the case of prosecution) and circumstances indicate that on seeing her husband in compromising position with his aunt-Saraswati Bai, the deceased got annoyed, she lost her temper, she came back to house, poured kerosene oil on her body and set herself ablaze. When it was noticed by appellant-Rajendra then he tried to save her. This is the case of suicide and in a fit of anger she has stated against the appellants including one Sonu, who was not alive on the date of incident, which shows the degree of annoyance of the deceased. Dying declarations (Ex.P-13 & P-34) are not made voluntarily by the deceased and it was under annoyance. Except the evidence of dying declaration, the prosecution has not collected any other evidence. Witnesses Geeta Bai (PW-5), Sonic (PW-15), Chitrarekha (PW-6), Baggal @ Mangal (PW-7) reached the spot have not stated anything against the appellants. Although the prosecution had declared Geeta Bai (PW-5) & Chitrarekha (PW-6) hostile but even in their cross-examination they have not stated anything to show any involvement of the appellants *inter alia* they have stated that the deceased was a quarrelsome lady, she used to quarrel with others and even once she has attempted suicide in the house of her former husband, which shows her tendency. There was difference between the cup & the lips and may prove & must prove. Only on the ground that the deceased was wife of appellant Rajendra and died as a result of burn injuries received in the house of the appellants, conviction of the appellants, all relatives of the husband of the deceased, that too for heinous offence like murder is not

sustainable under the law. The prosecution has utterly failed to prove its case against the appellants.

Reliance is placed in the matter of **Atbir vs. Government of NCT of Delhi**¹ in which the Hon'ble Supreme Court while summarizing the principles laid down in its earlier judgments has held that in case of ability to make statement, supported by medical evidence & certificate, and clarity in its contents, contents are safe to rely as dying declaration *inter alia* the prosecution is required to prove that the deceased was in fit state of mind and has clearly stated the cause of her death relevant under Section 32 (1) of the Evidence Act, 1882 and if such circumstance is proved then the dying declaration alone would be sufficient for conviction of the accused.

Reliance is also placed in the matter of **Kashi Vishwanath v. State of Karnataka**² in which the Hon'ble Supreme Court has held that in case of glaring contradictions in all three dying declarations as to who poured kerosene on her body and put on fire by using match-stick and in absence of explanation on the part of prosecution as to why dying declarations were recorded in the language other than of the deceased, absence of certificate that it was read over and explained, makes possibility of deceased being influenced by somebody in making dying declaration. Therefore, dying declaration of such nature is not safe to rely.

9. On the other hand learned counsel for the State opposed both the appeals and submitted that the prosecution has proved its case beyond all shadows of doubt. There are three dying declarations having consistency made by the deceased relating to burn injuries which resulted into her death. First dying declaration was made by her to Dr. G.S. Dau (PW-8), who had first examined her at 10.40 a.m. and mentioned history of injuries in the medical report (Ex.P-12)

¹ (2010) 9 SCC 1

² 2013 Cri.L.J. 3655

stated by the injured at the time of her examination naming all the appellants as per statement of the deceased who has stated that they poured kerosene oil on her and set her ablaze. This statement was recorded within 02 hours 40 minutes of the incident. Thereafter, the Investigating Officer reached to the hospital. Head Constable Harish Chandra (PW-16) immediately recorded statement of Sushila Bai under Section 161 of Cr.P.C. in which she has given detailed statement showing the part played by the appellants which has become her dying declaration after her death. He asked the doctor regarding fitness of the deceased by submitting application of Ex.P-13, the doctor (PW-8) certified that she is in a position to give statement. Thereafter vide Ex.P-32 Head Constable Harish Chandra (PW-16) requested the Executive Magistrate for recording dying declaration. On the basis of said request, Shri P.R. Nirmal (PW-12), Tahsildar-cum-Executive Magistrate, recorded dying declaration vide Ex.P-14 after obtaining certificate from Dr. G.S. Dau (PW-8).

All the three dying declarations corroborate each other and they are not inconsistent. These dying declarations are proved by the persons who have recorded the same i.e. Dr. G.S. Dau (PW-8), Head Constable Harish Chandra (PW-16) & Shri P.R. Nirmal (PW-12). The aforesaid witnesses are public authorities and not interested witnesses. The dying declarations recorded by the public authorities in discharge of their public duty cannot be doubted only on the ground that dying declarations contain names of all the appellants. This is a case of brutal murder by pouring kerosene on the deceased and setting her ablaze that too by wrongdoer i.e. her husband who has committed adultery with appellant-Saraswati Bai, who is also accused, and instead of condemning appellants Rajendra & Saraswati, other relatives have condemned and killed the deceased. In the aforesaid circumstances, the Court below has rightly convicted and

sentenced the appellants on the basis of evidence adduced on behalf of the prosecution. There is no substance in the appeals.

10. In order to appreciate the arguments advanced on behalf of the parties, we have examined evidence adduced on behalf of the prosecution.
11. In the present case, homicidal death of deceased Sushila Bai, as a result of extensive burn injuries within four days of incident, has not been disputed substantially on behalf of the appellants. Even otherwise, from the evidence of Dr. G.S. Dau (PW-8), injury report (Ex.P-12), Dr. Vijay Kumar Verma (PW-9) & autopsy report (Ex.P-15), it is established that death of deceased is the result of extensive anti mortem burn injuries i.e. complication on account of burn injuries.
12. As regards the question of complicity of the appellants crime in question, conviction is substantially based on the dying declarations of the deceased i.e. Ex.P-12, P-14 & P-34. As per evidence of Dr. G.S. Dau (PW-8), on 16.10.2006 injured Sushila was brought to the Community Health Centre, Lormi. He immediately intimated the police about medico-legal case vide Ex.P-11 at 10.00 a.m. He examined her vide Ex.P-12 and found 90% burn injuries on the body except palm and soul. She informed him that her in-laws have caused burn injuries to her and told names of all the appellants. He referred her to Burn Unit, CIMS, Bilaspur for further treatment. Document Ex.P-12 reveals history of burn and as per Ex.P-12, Lachhiman, Saraswati, Pokal Ram Ballu, Puran, Chhenduwā, Khunuwa, Rakesh, Rajkumar, Rajendra, Kamla, Bhuri, Rajkumari, Sonu, caught hold her, poured kerosene and set her ablaze.
13. Roznamcha Sanha was recorded vide Ex.P-33. Head Constable Harish Chandra (PW-16) immediately rushed to the hospital and recorded statement (Ex.P-34) of injured Sushila under Section 161 of Cr.P.C. which also revealed that Lachhiman, Khunuwa, Kheduwa said to her that she is defaming them and thereafter Lachhiman, Saraswati,

Pokalram, Ballu, Puran, Chheduka, Khunuwa, Rakesh, Rajkumar, Rajendra, Kamla, Bhuri, Ramkumari, Sonu caught hold her, they took her inside the house, poured kerosene on her body and Lachhiman set her on fire by using match stick.

14. Third dying declaration of Sushila was recorded by P.R. Nirmal (PW-12), Tahsildar, vide Ex.P-14. As per his evidence, injured was in fit state of mind to give statement. He has recorded her statement in which she has deposed that she had seen her husband committing intercourse with his aunt i.e. appellant Rajendra was committing intercourse with appellant Saraswati, and therefore some dispute took place and thereafter 8-10 persons took her inside the room, poured kerosene oil on her and set her ablaze. She further told the names of persons who have caused burn injuries to her that she has named the persons set her ablaze in her statement given to the police. None has made any attempt for extinguishing fire and after breaking open the door, she herself came out and extinguished fire with the help of sand. This witness has categorically deposed that facts mentioned in dying declaration of Ex.P-14 are as per version of the deceased. Firstly he had obtained fitness certificate from the doctor and thereafter recorded her statement. Dr. G.S. Dau (PW-8) has deposed that before recording dying declaration (Ex.P-14), he has given fitness certificate of Ex.P-13 and thereafter only dying declaration was recorded.

15. The defence has cross-examined Dr. G.S. Dau (PW-8) at length, in Para-8 he has specifically deposed that he has treated her and gave fitness certificate. In Para-7 he has admitted that injured was in a position to talk but he has denied the suggestion that she has stated him that on account of annoyance, she set herself ablaze. In Para-9 he has very specifically stated that in case of medico-legal case they first provide primary treatment and thereafter they examine the patient. In Para-10 he has further deposed that firstly he provided primary treatment and also intimated the police vide Ex.P-11.

16. Head Constable Harish Chandra (PW-16) recorded her statement (Ex.P-34) under Section 161 of Cr.P.C. which became second dying declaration after the death of Sushila Bai. This witness in his detailed evidence has deposed that he has recorded statement of the injured as per her version. He obtained thumb impression over the statement of Ex.P-34. He had issued letter of Ex.P-13 relating to fitness of mind of injured. He also requested the Tahsildar, Lormi vide Ex.P-32 for recording of dying declaration. Defence has cross-examined this witness at length and in Para-12 he has specifically deposed that within 5-10 minutes he reached to the hospital. In Para-13 he has further deposed that he took about 10 minutes to record her statement. In Para-14 he has specifically admitted that the doctors were providing her preliminary treatment. In Para-16 he has admitted that injured was in talking condition, therefore, he has not obtained fitness certificate from the doctor. In Para-17 he has further submitted that considering the injuries of injured, he was of the view that recording of her dying declaration is necessary. In Para-20 he has further deposed that he has obtained thumb impression of the injured. In Para-21 he has admitted that there is difference in the ink of writing and thumb impression, but he has explained that he has written the dying declaration by pen and taken thumb impression by using stamp-pad which he was keeping. In Para-26 he has admitted that at the time of recording of statement of Ex.P-34 he did not know whether Sonu is alive or dead. In Para-34 he has denied the suggestion that injured was unconscious. In Para-35 he has denied the suggestion that he has not requested the Tahsildar, Lormi for recording of dying declaration. He has also denied the suggestion that at the instance of first husband of the deceased namely Jagdish, he has prepared Ex.P-34 after showing the same as anti dated.

17. Undisputedly, dying declaration of Ex.P-14 was recorded by P.R. Nirmal (PW-12), Tahsildar, Lormi on 16.10.2006 at 11.15 a.m. which

clearly revealed that injured has informed the police about the persons who have caused burn injuries to her. This fact clearly reveals that Ex.P-34 has not been recorded after 16.10.2006 and it has been recorded on 16.10.2006 prior to 11.15 a.m. Three dying declarations reveal name of one Sonu, who was not alive at the time of incident and this shows that one part of dying declarations naming Sonu is not true. All the three witnesses of dying declarations are public authorities and they have specifically deposed that they have recorded dying declarations of injured Sushila Bai, as stated by her. She was in a position to give statement, she was not unconscious, she has named the appellants and deceased Sonu, who is also close relative of the appellants.

18. Dying declaration is also a kind of evidence and once it is proved to be true & voluntary then the same would be sufficient for drawing definite conclusion. Parties are required to adduce evidence that too of oral evidence as required under Section 60 of the Evidence Act but dying declaration is an exception to hear-say rule. While dealing with the question of exception to hear say rule in the matter of **B. Shashikala v. State of A.P.**³ the Supreme Court has held that dying declaration, an exception to hear-say rule, is admissible in evidence. In case of more than one dying declarations, the Courts are required to take proper precaution and scrutinize minutely which dying declaration is voluntary and true and whether the deceased was having opportunity to state and whether she was in fit state of mind.

19. In Atbir's case (supra) the Supreme Court has summarized the principles laid down in its earlier cases and observed in Para-22 as follows:-

"22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

³ AIR 2004 SC 1610

- (ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
- (iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
- (iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.
- (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
- (vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
- (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
- (viii) Even if it is a brief statement, it is not to be discarded.
- (ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
- (x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

20. On the basis of aforesaid touchstone of law, dying declarations in the present case were examined and it was found that the deceased was in a fit state of mind as per medical evidence. There was clarity in its contents and found nothing to make the dying declarations suspicious. In the light of aforesaid circumstances and in the touchstone of principles laid down, the dying declaration in the afore cited case was found credible & sufficient for conviction of the accused persons, but in case of Kashi Vishwanath (supra) on the ground of considerable infirmities, dying declaration has not been considered as true and voluntary. Statement given by the deceased

as to the cause of death or circumstances of transaction which resulted in death when the cause of death came into question.

21. While dealing with the question of reliability of dying declaration out of multiple varying and contradictory dying declarations in the matter of **Shudhakar v. State of Madhya Pradesh**⁴ the Supreme Court has held that dying declaration finds corroboration by the prosecution evidence is safe to rely. It has been further observed that dying declaration is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival at such time, it is expected that a person will speak the truth. Para-20 of the said judgment reads thus:-

"20. The "dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration."

22. While dealing with the same question in case of **Puran Chand v. State of Haryana**⁵ has held that in case of multiple dying declarations, oral dying declaration is an extremely weak type of evidence but it is not unnatural for a burnt woman to confide in her relatives and in case of contradictory multiple dying declarations, the Courts are required to examine which one is natural and probable. While considering reliability of dying declaration, the Courts are required to give weightage to all the attending

⁴ (2012) 7 SCC 569

⁵ (2010) 6 SCC 566

circumstances at the time of dying declaration. Para-17 of the aforesaid judgment reads thus:-

"17. Again, it is extremely difficult to reject a dying declaration merely because there are few factual errors committed. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned. We have tested the dying declaration with all these factors in mind and we are satisfied that even the trial court and the appellate court have fully satisfied themselves in respect of the acceptability of this dying declaration."

23. In the matter of **Bhajju alias Karan Singh v. State of Madhya Pradesh**⁶ the Supreme Court has held that conviction can base solely on dying declaration, without requiring any further corroboration, if such declaration is found truthful and voluntary. The Supreme Court has also observed the principles relating to dying declaration in Para-22, 25 & 26 as follows:-

22. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Evidence Act, 1872 (for short "the Act") is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a "dying declaration".

25. There is a clear distinction between the principles governing the evaluation of a dying declaration under the English law and the Indian law. Under the English

⁶ (2012) 4 SCC 327

law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declaration should have been made when in the actual danger of death and that the declarant should have had a full apprehension that his death would ensue. However, under the Indian law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration. The dying declaration is admissible not only in the case of homicide but also in civil suits. The admissibility of a dying declaration rests upon the principle of *nemo moriturus praesumitur mentire* (a man will not meet his Maker with a lie in his mouth).

26. The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the court, the same may be refused to be accepted as forming basis of the conviction."

24. In the light of aforesaid proposition of law, we have examined three dying declarations given by the deceased, which are Ex.P-12, given to Dr. G.S. Dau (PW-8) at the time of her medical examination, which is first dying declaration, statement of deceased recorded under Section 161 of Cr.P.C. by Head Constable Harish Chandra (PW-16) which became dying declaration after the death of deceased and Ex.P-14, which is third dying declaration recorded by P.R. Nirmal (PW-12), Executive Magistrate, which revealed that she has stated

names of the assailants in her statement recorded under Section 161 of Cr.P.C. i.e. Ex.P-34. There is no different in all the three dying declarations relating to names of assailants. Third dying declaration (Ex.P-14) depends upon second dying declaration i.e. Ex.P-34, relating to name of assailants which reflects that she has stated to said P.R. Nirmal (PW-12) that she has already stated names of persons who have poured kerosene oil and set her ablaze. Ex.P-14 has been recorded at 11.15 a.m. and as per evidence of Dr. G.S. Dau (PW-8), since examination of the deceased i.e. on 16.10.2006 from 10.40 a.m. to 11.15 a.m., she was in fit condition to give her statement. After four days of incident i.e. on 20.10.2006, she succumbed to the injuries. Out of three dying declarations although all are consistent with each other but second dying declaration (Ex.P-34) is a detailed dying declaration which revealed that she saw the appellant Rajendra, her husband, committing intercourse with his aunt i.e. appellant Saraswati, at field. She came back to her house and made complaint to appellant Lachhiman @ Laxman, Khunuwa & Chheduwa, then, all the appellants and Sonu, who was admittedly not alive on the date of incident, took her inside the room, poured kerosene oil and appellant Lachhiman @ Laxman set her ablaze. Kerosene was brought by appellant Lachhiman @ Laxman from the society. She has specifically deposed that she shouted then Geeta Bai (PW-5), Sonic (PW-15), Chitrarekha (PW-6), Baggal @ Mangal (PW-7) came, the appellants were present but they did not make attempt to extinguish fire which finds in Ex.P-14. Percentage of burn injuries is 95% but any of the appellant has not complained that during the course of extinguishing fire they also received burn injuries.

25.As per dying declaration, Geeta Bai (PW-5), Chitrarekha (PW-6), Baggal @ Mangal (PW-7) & Sonic (PW-15) reached to the spot. As per their evidence, they have seen her, she was burning. Geeta Bai (PW-5), who was declared hostile by the prosecution, has deposed that appellant Rajendra & Mangal (PW-7) were extinguishing fire and

in her cross-examination she has further admitted that appellant Laxmi is disabled and is not in a position to walk. Chitrarekha (PW-6) has also deposed that she has seen Sushila, she was burning in her courtyard and appellant Rajendra & Mangal (PW-7) were extinguishing fire. Mangal (PW-7) has also deposed that Sushila was burning, he and appellant Rajendra rushed towards her and extinguished fire. In Para-3 he has further deposed that Sushila herself was extinguishing fire and during the course of extinguishing fire, her thumb and other fingers were also burnt. Sonic (PW-15) has deposed that he reached to the spot and saw the injured body of Sushila.

26.As per case of the defence, Sushila Bai herself set her ablaze may be on account that she saw appellant Rajendra committing intercourse with appellant Saraswati as a result she got annoyed, poured kerosene on her and set herself ablaze. As per evidence of aforesaid witnesses, appellant Rajendra & Mangal (PW-7) have tried to extinguish fire but they have not stated that they have received any burn injury especially when the burn injuries of the deceased was 95% *inter alia* Mangal (PW-7) has tried to depose that the deceased herself was trying to extinguish fire. Evidence of these witnesses revealed that at the time of extinguishing fire, the deceased has received injuries in her hands but at the time of extinguishing fire, Mangal (PW-7) or appellant Rajendra has not received any burn injuries which show the extent of suppressing the facts. In case of extinguishment of fire by three persons, either of would not receive any burn injury or all would receive burn injuries.

27.The appellants have denied their presence on the spot and they have taken a specific defence that at the time of incident they were not present in the house and had gone to the field or some of them were sitting near the bridge. Incident took place at 8.00 a.m. in the morning, they are members of same family and in case all had gone to

the field then atleast commission of intercourse by one accused with another accused i.e. by appellant Rajendra with appellant Saraswati, in presence of other 13 members of the same family that too in an open field would have not been possible. Even otherwise, in order to prove the specific defence of alibi they have not examined any witness. In the light of specific three consecutive & consistent dying declarations made by the deceased such defence in absence of any other evidence does not appear to be natural and probable or even for drawing suspicion upon the story of the appellant.

28.The appellants have also taken a defence that the deceased was in the habit of committing suicide and just before one month of the incident in the house of her previous husband Jagdish, she has attempted to commit suicide and also caused lacerated injuries on the head of her previous husband namely Jagdish. The appellants were having opportunity to examine aforesaid person Jagdish, who has received lacerated wound that too over his head, in support of their defence but reasons best known they have not examined him.

29.The investigating agency has also rushed to the house of the appellant and had seized the articles found in the house. As per Ex.P-1, one local-made chimney containing some quantity of kerosene oil, match-box, burned match-stick, broken mala and other articles were seized i.e. the investigating agency had seized one small container of kerosene oil used as a lamp for lighting the house i.e. considerable quantity of kerosene, and this container was not found in the house. This shows that all the persons were not holding kerosene container.

30.As per dying declaration (Ex.P-34), appellant Rajendra along with other appellants had taken the deceased inside the room and after pouring kerosene on her, appellant Lachhiman @ Laxman set her ablaze by striking match-stick. The cause for incident was appellant-Saraswati, wife of Lachhiman @ Laxman, who was also present on the spot and has taken active participation in the incident. Active

participation of appellant Saraswati, her husband Lachhiman @ Laxman & appellant Rajendra, husband of deceased, is not unnatural. Virtually, objection of the deceased was direct attack upon the character of appellant Rajendra, Saraswati & Lachhiman @ Laxman, husband of Saraswati. Although the incident has taken place on sudden provocation but pouring kerosene oil, striking the match-stick and setting her ablaze are although series of act but are distinct act and the aforesaid appellants were having opportunity to withdraw themselves.

31. Each & every word and sentence of the dying declaration cannot be treated as Gospel's truth. Still the oral and written dying declaration is a kind of evidence that too hear-say evidence. The Courts are required to scrutinize the dying declaration along with other surrounding & attending circumstance minutely with a view to dispense substantial justice. Part of a dying declaration corroborated by other attending circumstances can be relied upon and part of a dying declaration insufficient for placing reliance in absence of other attending circumstances may not be relied upon as such reliance would not be safe.

32. All the appellants are members of one family and even if it is presumed that all the appellants had gone to different fields for work and in one field appellant Rajendra was committing intercourse with other appellant Saraswati, noticing the same by the deceased, her immediate reaction i.e. shouting, condemnation and complaint to all the members is not unnatural *inter alia* it would be natural which finds corroboration from Ex.P-14 that when the deceased saw Rajendra committing intercourse with Saraswati, a dispute took place and thereafter the incident had taken place in the house. In case of such serious act and dispute that too in the field, all the members were working in different fields will not work in the field and their immediate return to house would be very natural reaction.

33. At the time of incident, presence of all the members of one family is also not unnatural. Common statement has been made by the deceased in all the three dying declarations except the specific act of appellant Rajendra, Saraswati & Lachhiman @ Laxman. Detailed dying declaration of Ex.P-34 revealed that all the members have taken the deceased inside the room, thereafter poured kerosene on her and set her ablaze. This part of dying declaration revealed that all the members were interested to teach lesson to the deceased to save themselves and their family members from the defamation & embarrassment but at the time of teaching her lesson, appellant Rajendra, Saraswati & Lachhiman @ Laxman, who were having grudge against the deceased, exceeded their act and poured kerosene oil and set her ablaze. This part of dying declaration is clearly distinguishable from other parts of dying declaration especially relating to liability of the appellants which also finds support from seizure of small container from the spot. Dying declaration does not reflect the fact that other appellants were administering or instigating to pour kerosene and set her ablaze or to cause other injuries. They have also not made any attempt to extinguish fire. These circumstances show their reluctance and passive presence at the time of incident. The prosecution is always required to prove its case beyond shadows of doubt and the prosecution is required to stand on its own legs, it cannot take benefit of weakness of defence. Main dying declaration (Ex.P-34) supported by dying declarations of Ex.P-14 & Ex.P-12 requires serious scrutiny and analysis.

34. On close scrutiny and analysis of all the dying declarations, they are safe to rely to the extent of act attributed to appellants namely Rajendra, Saraswati & Lachhiman @ Laxman having grudge against the deceased but are not safe to rely relating to other appellants in absence of substantive corroboration from other sources. Mere passive presence of remaining appellants with their family members cannot be held them liable for commission of serious offence. After

appreciating the dying declarations, the Court below has convicted all the appellants under Sections 147, 302/149 of IPC but has not considered the aforesaid circumstance and insufficiency of evidence relating to other appellants except appellants Rajendra, Saraswati & Lachhiman @ Laxman and thereby committed illegality.

35. Dying declarations (Ex.P-34, P-14 & P-12) are safe to rely for drawing an inference that appellants Rajendra, Saraswati & Lachhiman @ Laxman have caused homicidal death of deceased Sushila Bai in sharing common intention but aforesaid dying declarations are not safe for drawing inference that aforesaid appellants along with other appellants have formed unlawful assembly having its common object to commit murder of Sushila Bai and in furtherance of common object of the said unlawful assembly, they poured kerosene oil on her and set her ablaze. Dying declaration is separable in two parts, one part is safe to rely but other part is not sufficient for placing reliance.

36. In the result;

- Criminal Appeal No.984/2011 filed on behalf of appellants Rakesh & Bhaga Bai @ Bhuri is allowed. Their conviction & sentences under Sections 147, 302/149 of IPC are hereby set aside. Appellant Rakesh is in custody, therefore, he be set at liberty forthwith if not required in any other case.
- Criminal Appeal No.557/09 filed on behalf of appellants No.2 to 8 & 10 namely Ram, Yashwant @ Bablu, Shivprasad @ Khunuwa, Rajkumar, Kamlabai, Shivkumari, Smt. Rajkumari @ Kunwar Bai, Chhedilal @ Chheduwa is allowed. Their conviction and sentences under Sections 147 & 302/149 of IPC are hereby set aside. Appellants- Ram, Yashwant @ Bablu, Shivprasad @ Khunuwa, Rajkumar & Chhedilal @ Chheduwa are in custody, they be set at liberty forthwith if not required in any other case.

- Criminal Appeal No.557/09 filed on behalf of appellants No.1, 9 & 11 namely Rajendra, Saraswati Bai & Lachhiman @ Laxman is partly allowed. Their conviction and sentence under Section 147 of IPC is hereby set aside. Their conviction under Section 302/149 of IPC is altered into Section 302/34 of IPC and they are sentenced to undergo rigorous imprisonment for life and fine of Rs.1,000/- each, in default of payment of fine to undergo additional R.I. for 03 months.
- Appellant No.9-Smt. Saraswati Bai is on bail. She shall immediately surrender before the Court below for serving remaining jail sentence. The Court shall also take appropriate steps for securing her attendance for serving remaining jail sentence

JUDGE

JUDGE

HIGH COURT OF CHHATTISGARH AT BILASPUR**DIVISION BENCH:**

Hon'ble Shri T.P. Sharma &
Hon'ble Shri C.B. Bajpai, JJ

Criminal Appeal No.557/2009**APPELLANTS**

(In jail)

1. Rajendra @ Matauva
2. Ram
3. Yashwant @ Bablu
4. Shivprasad @ Khunuwa
5. Rakumar
6. Kamlabai
7. Shivkumari
8. Smt. Rajkumari @ Kunwar
9. Smt. Saraswati Bai
10. Chhedilal @ Chheduwa
11. Lachhiman @ Laxman

Vs

RESPONDENT

State of Chhattisgarh

&

Criminal Appeal No.984/2011**APPELLANTS**

(In jail)

1. Rakesh
2. Bhaga Bai @ Bhuri

Vs

RESPONDENT

The State of Chhattisgarh

HEAD NOTE

1. Dying declaration is also a kind of evidence. Courts are required to scrutinize the dying declaration on the basis of other surrounding and attending circumstances minutely.

मृत्युकालीन कथन भी एक प्रकार की साक्ष्य है। न्यायालय को परिवर्ती और विद्यमान परिस्थितियों के आधार पर मृत्युकालीन कथन की सूक्ष्मता से जाँच करना आवश्यक है।

2. Part of dying declaration corroborated by other attending circumstances can be relied upon and part of dying declaration not corroborated by attending circumstances is not safe to rely.

मृत्युकालीन कथन के उस भाग पर भरोसा किया जा सकता है जिसकी पुष्टि अन्य विद्यमान परिस्थितियों से होती है और उस भाग पर भरोसा करना सुरक्षित नहीं है जिसकी पुष्टि विद्यमान परिस्थितियाँ से न होती हो।