AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.976 of 2013

{Arising out of judgment dated 30-8-2013 in Sessions Trial No.38/2012 of the Additional Sessions Judge (FTC), Korba}

1. Tejram Yadu, S/o Bhagwat Prasad Yadu, aged 34 years.

2. Gangaram Yadu, S/o Bhagwat Yadu, aged 36 years

Both are R/o Village Kirta, Post Temri, Nandghat, Bemetara, Presently R/o Village Bhulsideah Rajgamar, Balco Nagar, Korba, Civil & Revenue Distt. Korba (C.G.)

(In Jail)

----- Appellants

Versus

State of Chhattisgarh, Through Station House Officer, Police Outpost Rajgamar, P.S. Balco Nagar, Korba (C.G.)

----- Respondent

For Appellants: Mr. K.P.S. Gandhi, Advocate.
For Respondent/State: Mr. Sudeep Verma, Deputy Govt. Advocate.

Hon'ble Shri Sanjay K. Agrawal and
Hon'ble Shri Radhakishan Agrawal, JJ.

Judgment On Board
(02/02/2023)

Sanjay K. Agrawal, J.

1. This criminal appeal preferred by the appellants under Section 374(2) of the CrPC is directed against the impugned judgment dated 30-8-2013 passed by the Additional Sessions Judge (FTC), Korba, in Sessions Trial No.38/2012, by which they have been convicted for offence under Section 302 read with Section 34 of the IPC and sentenced to undergo imprisonment for life and pay a fine of ₹ 5,000/- each, in default, to further undergo additional rigorous imprisonment for one year.

2. Case of the prosecution, in short, is that marriage of Mamta (since deceased) was solemnized with appellant No.1 in the year 2001 and on the date and time of offence, they were blessed with two daughters living as one daughter had already died two days after the date of her birth and for which the appellants used to taunt Mamta that she could not give birth to a male child and that would not continue their lineage. It is the further case of the prosecution that on 11-1-2012 in between 6:00 a.m. and 7:00 a.m., at Village Bhulsidih, Chowki Rajgamar, Police Station Balco Nagar, District Korba, the appellants in furtherance of their common intention poured 3 litres of kerosene oil on the body of Smt. Mamta Yadu and set her ablaze by which she started crying out of pain and she was taken to Government Hospital, Korba, it was informed by Dr. R.K. Divya (PW-11) to the police authorities vide Ex.P-14 and ultimately, finding the case to be a difficult one, as deceased Smt. Mamta Yadu has suffered 93% deep burn injuries, she was referred to CIMS, Bilaspur on 11-1-2012 where Dr. Rahul Bhargav (PW-9) – duty doctor, examined her and started treating her vide his MLC report Ex.P-12 and upon examination, he found that the deceased was 93% burnt, but the relatives of the deceased got her discharged from CIMS and admitted her to Jawaharlal Nehru Hospital & Research Centre, Sector-9, Bhilai where the treatment started vide Ex.P-19. On 13-1-2012 at 9:45 p.m., opinion was given by Dr. Madhusudan Gupta (PW-19) that deceased Mamta was in fit mental and physical state of mind to give declaration and accordingly, on 13-1-2012 between 10:10 p.m. and 10:40 p.m.

exhaustive and elaborate dying declaration of the deceased was recorded vide Ex.P-22 by Executive Magistrate C.P. Mishra (PW-21) and thereafter on the next day on 14-1-2012 at 6:30 p.m., during the course of treatment, Smt. Mamta Yadu succumbed to the injuries sustained by her and ultimately died vide death certificate (part of Ex.P-19) pursuant to which postmortem was conducted by Dr. N.C. Rai (PW-22) vide Ex.P-23 who opined that death was on account of septicemia and 85% burn. Accordingly, panchnama was conducted vide Ex.P-2 and dehati nalishi was prepared vide Ex.P-20. Crime details were recorded vide Ex.P-21 and statements of the witnesses were recorded under Section 161 of the CrPC. FIR was registered vide Ex.P-15 against the appellants for offence punishable under Section 302 read with Section 34 of the IPC. Property seizure memo was prepared vide Ex.P-5 and a 5 litre kerosene plastic jar containing 100 m.l. kerosene oil and burnt pieces of blouse were seized. Seized kerosene jar was sent to the Food Inspector, Korba for query and query report was received vide Ex.P-17 confirming the traces of kerosene oil in the jar. Spot map was prepared vide Ex.P-4.

3. After due investigation, the appellants were charge-sheeted before the jurisdictional criminal court and charges were framed against the appellants under Section 302 read with Section 34 of the IPC and the case was committed to the Court of Sessions, Korba from where the learned Additional Sessions Judge (FTC), Korba, received the case on transfer for trial and for hearing and disposal in accordance with law.

4. The prosecution in order to bring home the offence, examined as many as 22 witnesses PW-1 to PW-22 in support of its case and exhibited 24 documents Exs.P-1 to P-24. Defence has not examined any witness in its support and not exhibited any document. Statements of the accused / appellants were recorded under Section 313 of the CrPC in which they abjured the guilt and pleaded innocence and false implication and claimed to be tried.

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 appellants 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 appellants.

6. Mr. K.P.S. Gandhi, learned counsel appearing for the appellants, would submit that dying declaration as recorded by the Executive Magistrate is not true and voluntary statement of the deceased, as she was found to have sustained 93% deep burn injuries and she was given strong painkillers like Fortwin injection etc., by which she had lost her mental alertness and suffering from drowsiness, therefore, she was not in fit state of mind to give dying declaration, particularly, Dr. Madhusudan Gupta (PW-19) without examining the deceased given certificate vide Ex.P-18, which goes to show that she was not in fit mental state of mind to give statement. He would further submit that the dying declaration which has been recorded in the state of drowsiness could not have been accepted by the trial Court, particularly when in the medical records Ex.P-19, the doctors

at Sector-9 Hospital, Bhilai have recorded that the deceased sustained burn injuries while cooking at home. Therefore, on the basis of dying declaration without further corroboration, it would be unsafe to convict the appellants for the aforesaid offence and as such, the appeal deserves to be allowed and the appellants deserve to be acquitted by setting aside the impugned judgment of conviction and order of sentence.

7. Per contra, Mr. Sudeep Verma, learned State counsel, would submit that the dying declaration Ex.P-22 is true and voluntary, it was given by the deceased in fit mental state, therefore, it is a reliable document and 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 appellants have solely been convicted on the basis of dying declaration Ex.P-22 and there is no other piece of evidence, no legal evidence much less oral and circumstantial evidence to convict the appellants except the aforesaid dying declaration. Therefore, it would be appropriate to consider the dying declaration recorded by Dr. Madhusudan Gupta (PW-19).

10. At this stage, it would be appropriate to notice Section 32 (1) of the Evidence Act which states as under: -

> "**32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**.—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:—

(1) when it relates to cause of death.—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 xxx"

11. Section 32(1) of the Evidence Act is famously referred to as the "dying declaration" 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**[1] in which their Lordships have summarised the principles enumerated in Section 32(1) of the Evidence Act, including relating to "circumstances of the transaction":

"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

1 (1984) 4 SCC 116

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."

12. Thereafter, in the matter of **Devinder alias Kala Ram and others v. State of Haryana**[2], wherein the deceased, who sustained burn injuries while cooking meals on stove, had made a statement to the doctor, their Lordships of the Supreme Court held that statement of the deceased recorded by the doctor is relevant under Section 32 of the Evidence Act and observed as under: -

> "14. In the facts of the present case, we find that PW 7, the Medical Officer of the Civil Hospital, examined the case of the deceased on 6-8-1992 at 6.30 a.m. and he has clearly stated in his evidence that on examination she was conscious and that there were superficial to deep burns all over the body except some areas on feet, face and perineum and there was smell of kerosene on her body. He also stated in his evidence that the deceased was brought to the hospital by her husband Kala Ram (Appellant 1). He has proved the bed-head ticket pertaining to the deceased in the hospital (Ext. DD) as well as his endorsement at Point 'A' on Ext. DD, from which it is clear that he was told by the patient herself that she sustained burns while cooking meals on a stove. This statement of the deceased recorded by PW 7 is relevant under Section 32 of the Evidence Act, 1872 which provides that statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts 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."

13. Recently, in the matter of **Purshottam Chopra and another v. State (Government of NCT of Delhi)**[3], principles relating to recording of dying declaration and its admissibility and reliability

2 (2012) 10 SCC 763
3 (2020) 11 SCC 489

were summed up in paragraph 21 as under: -

> “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."

14. The question for consideration is, whether the statement of the deceased recorded by Dr. Madhusudan Gupta (PW-19) during the course of treatment is relevant under Section 32 of the Evidence Act or not?

15. Section 32(1) of the Indian Evidence Act, 1872 makes it clear that when a statement, written or verbal, 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 statement is relevant. The Supreme Court in **Sharad Birdhichand Sarda** (supra) clearly held that Section 32 is an exception to the rule of hearsay and makes admissible, the statement of a person who dies, whether the death is homicide or a suicide, provided the statement relates to the cause of death or deals with circumstances leading to the death. The decision of the Supreme Court in **Sharad Birdhichand Sarda** (supra) has further been followed by the Supreme Court in the matter of **Kans Raj v. State of Punjab**[4] reviewing the earlier authorities.

16. Before considering the submission raised on behalf of the appellants, it would be appropriate to notice few facts which are apparent on the face of record.

17. Deceased Smt. Mamta Yadu suffered burn injuries on 11-1-2012 between 6:00 a.m. and 7:00 a.m. and she was immediately taken to District Hospital, Korba from where she was referred to CIMS at

4 AIR 2000 SC 2324

Bilaspur where she was examined by Dr. Rahul Bhargav (PW-9) vide Ex.P-12 who found that the general condition of the deceased was poor, but she was conscious and she has suffered 88% – 93% burn injuries and she had the past history of epilepsy. However, during the course of treatment, on the same day, relatives of the deceased got her discharged from CIMS and admitted her to JLN Hospital and Research Centre, Sector-9, Bhilai on 12-1-2012 at 3:45 p.m.. She was admitted in the Sector-9 Hospital at Bhilai by her brother Rohit Yadu (PW-1) where it was informed that she has sustained burn injuries while cooking at home and percentage of burn was assessed at 80%. In the initial assessment sheet which is a part of Ex.P-19, while recording assessment, the concerned doctor has mentioned that she had suffered injuries, as stated by the deceased herself, while cooking at her home. On 13-1-2012 at 8:00 p.m., her general condition was found poor and at night she was given injection Fortwin slow IV 1 amp and thereafter, on 13-1-2012 between 10:10 p.m. and 10:40 p.m., her dying declaration was recorded which states as under: -

मरणासन्न कथन

स्थान– सेक्टर–9 अस्पताल भिलाई दिनांक 13.01.2012 समय– 10.10 से 10.40

आहत का नाम–श्रीमति ममता यदु पति तेजराम यदु उम्र 27 वर्ष पता ग्राम– भुरसीडीह थाना – बासरो जिला कोरबा

कथन लेने वाले का नाम पद नाम– सी.पी.मिश्रा रा.पा.मं जि. एवं ना. तह. धमधा मुख्यालय दुर्ग

थाना प्रभारी भिलाई नगर जिला दुर्ग के पत्र दिनांक 13.01.2012 द्वारा प्राप्त सूचना पर आहत का मरणासन्न कथन लेने सेक्टर–9 अस्पताल भिलाई के H–3 वार्ड में उपस्थित हुआ। आहत के कथन देने योग्य होने के संबंध में राय लेने के बाद मरणासन्न कथन लिया गया–

प्रश्न	उत्तर
1– तुम्हारा क्या नाम है? 2– तुम्हारे पति का नाम? 3– कहॉ रहती है? 4– अभी कहॉ हो? 5– घटना कब की है? 6– घटना कैसे हुई?	1– ममता यदु 2– तेजराम 3– कोरबा के आगे भुरसीडीह गॉव में 4– भिलाई सेक्टर–9 अस्पताल में 5– दिनांक 11.01.2012 को सुबह 6 से 7 बजे के बीच 6– मेरा जेठ गंगाराम और पति तेजराम दोनों बहुत पीते हैं मुझसे झगड़ा करते थे मारते भी थे और बोलते थे कि उसको (ममता) को मारेंगे। मेरे 3 लडकी हो गई थी इसलिए कपट देते थे। 11 ता. को सुबह लगभग 6 बजे मेरा पति एवं जेठ गंगाराम मिट्टी तेल डालकर आग लगा दी। मिट्टी तेल लगभग 3 लीटर घर में ही था। कमरे से लगे हुए परछी में मेरा पति तेजराम बैठकर आग ताप रहा था। बाद में जेठ भी आ गया। मैं भैंसों कुट्टी खिलाकर घर आई। परछी के पास दूध दूहने के लिए बोलने हेतु पति के पास आई तो पहले मुझे मारे। मैं बोली कि हमेशा मारते रहते हो मेरे को मायके भेज दो इसी में झगड़ा हो गया और मिट्टी तेल डालकर जला दिए। मैं दौडते हुए आंगन में आई। मेरे बड़ा वाला जेठ गेसू यदु सुनकर आया और आग बुझाया।
7– अस्पताल कौंन लाया?	7– बड़ा जेठ गेसू आटो बुलाया अस्पताल ले जाने के लिए तो मेरा पति नहीं लाने दिया और दो घंटा रोक दिया। मायके फोन करने पर अगरहा गॉव से बुवा का लड़का संजय यादव आकर कोरबा सरकारी अस्पताल में भरती किया। वहॉ से बिलासपुर ले जाने के लिए बोलने पर बुवा का लड़का संजय बिलासपुर लाकर भरती किया। कौन सा अस्पताल था मुझे उस समय पता नही था।
8– यहॉ कौन लेकर आया?	8– सेक्टर –9 में मेरे भइया रोहित यदु एवं जीजा जी टेकराम आदि लेकर कल 12 तारिख को भरती किए है।
9– घर में कौन–2 रहते हैं?	9– मेरी सास फूलबाई, जेठ गंगाराम गेसू (परिवार सहित) मेरा पति एवं मैं तथा दो बेटी एक साथ रहते हैं। खाना अलग–2 बनाते हैं।
10– घटना के लिए जिम्मेदार कौन है?	10– दोनों है जेठ गंगाराम और मेरा पति तेजराम दोषी है।
11– और कुछ कहना चाहती हो?	11– कुछ नहीं

हाथ में पट्टी बंधी है इसलिए दस्तख्त नहीं कर सकूंगी। अंगूठा लगा सकती हूँ।

आहत का मरणासन्न कथन लिया। कथन के समय कोई पुलिस जन अथवा परिजन उपस्थित नहीं हैं। आहत हस्ताक्षर नहीं कर सकती इसलिए बांएं हाथ का अंगूठा निशानी लिया गया।

18. A careful perusal of the dying declaration would show that though the deceased had suffered 80-90% extensive deep burns and she was at that time given injection Fortwin, one of the painkillers, but she had given exhaustive and elaborate dying declaration implicating the appellants herein and she had also put her thumb impression in the dying declaration. On 14-1-2013, in the morning, her condition was found critical and in the evening, BP and pulse were found un-recoradable and ultimately, at 6:30 p.m. she

succumbed to death. Now, the question would be, whether the dying declaration given by her was true and voluntary and conviction can be based upon it without corroboration?

19. The Supreme Court in the matter of **Jayamma and another v. State of Karnataka**[5] considered the case of **Chacko v. State of Kerala**[6] and held as under: -

> "14.2. In *Chacko v. State of Kerala*[6], this Court declined to accept the prosecution case based on the dying declaration where the deceased was about 70 years old and had suffered 80 per cent burns. It was held that it would be difficult to accept that the injured could make a detailed dying declaration after a lapse of about 8 to 9 hours of the burning, giving minute details as to the motive and the manner in which he had suffered the injuries. That was of course a case where there was no certification by the doctor regarding the mental and physical condition of the deceased to make dying declaration. Nevertheless, this Court opined that the manner in which the incident was recorded in the dying declaration created grave doubts to the genuineness of the document. The Court went on to opine that even though the doctor therein had recorded "*patient conscious, talking*" in the wound certificate, that fact by itself would not further the case of the prosecution as to the condition of the patient making the dying declaration, nor would the oral evidence of the doctor or the investigating officer, made before the court for the first time, in any manner improve the prosecution case."

Their Lordships further considered the matter of **Surinder Kumar v. State of Haryana**[7] and held in paragraphs 16 and 17 as under: -

> "16. We may also take note of the decision of this Court in *Surinder Kumar*[7]. In the said case, the victim was admitted in hospital with burn injuries and her dying declaration was recorded by an Executive Magistrate. This Court, first doubted whether the victim could put a

5 (2021) 6 SCC 213
6 (2003) 1 SCC 112, paras 3 and 4
7 (2011) 10 SCC 173, paras 25, 26 and 28

thumb impression on the purported dying declaration when she had suffered 95-97% burn injuries. Thereafter, it was noted that "*at the time of recording the statement of the deceased … no endorsement of the doctor was made about her position to make such statement*", and only after the recording of the statement did the doctor state that the patient was conscious while answering the questions, and was "*fit to give statement*". This Court lastly noticed that before the alleged dying declaration was recorded, the victim in the course of her treatment had been administered Fortwin and Pethidine injections, and therefore she could not have possessed normal alertness. It was hence held that although there is neither a rule of law nor of prudence that the dying declaration cannot be acted upon without corroboration, the Court must nonetheless be satisfied that the dying declaration is true and voluntary, and only then could it be the sole basis for conviction without corroboration.

17. Consistent with the cited principles, this Court refused to uphold the conviction in *Sampat Babso Kale v. State of Maharashtra*[8]. The dying declaration in that case was made by a victim who had suffered 98% burn injuries, and the statement was recorded after the victim was injected with painkillers. This Court adopted a cautious approach, and opined that there were serious doubts as to whether the victim was in a fit state of mind to make the statement. Given the extent of burn injuries, it was observed that the victim must have been in great agony, and once a sedative had been injected, the possibility of her being in a state of delusion could not be completely ruled out. Further, it was specifically noted that: (SCC p. 744, para 14)

> "14. … the endorsement made by the doctor that the victim was in a fit state of mind to make the statement has been made not before the statement but after the statement was recorded. Normally it should be the other way around."
>
> (emphasis supplied)

20. Now, reverting to the facts of the case in light of the principles of law laid down by their Lordships of the Supreme Court, it is quite vivid that except the dying declaration and the evidence of the

8 (2019) 4 SCC 739, paras 14 and 16

brother of the deceased – Rohit Yadu (PW-1), there is no evidence available on record brought by the prosecution to prove the guilt against the appellants. Rohit Yadu (PW-1) has admitted his sister – deceased Smt. Mamta Yadu in JLN Hospital and Research Centre on 12-1-2012 at 3:45 p.m. (at page 98 of the paper book which is a part of Ex.P-19). The doctor has written note in the Doctor Consultation Slip that Rohit Yadu (PW-1) has brought the deceased to hospital in burnt condition and she was stated to have sustained burns while cooking at home. Furthermore, in the Initial Assessment Sheet (at page 100 of the paper book) which is also a part of Ex.P-19, the doctor has further written note that she has sustained burn injury while cooking at 6 a.m. on 11-1-2012 which was written on the basis as informed by the patient herself. When the deceased was admitted to CIMS, Bilaspur, which is a part of Ex.P-12, it has been stated that she sustained burns by wooden chulha at about 7:00 p.m. on 11-1-2012 at place home. As such, the oral evidence of Rohit Yadu (PW-1) is not worth reliable in view of her own statement before the doctor recorded at Ex.P-19 and as per the statement before the doctor at Ex.P-12, which has been proved by Dr. Rahul Bhargav (PW-9) – duty doctor at CIMS, Bilaspur. Accordingly, the oral evidence brought by the prosecution is not reliable leaving the matter to be decided on the basis of dying declaration Ex.P-22 recorded by Executive Magistrate C.P. Mishra (PW-21).

21. The Executive Magistrate – C.P. Mishra (PW-21) has recorded dying declaration on the basis of certificate given by Dr.

Madhusudan Gupta (PW-19) that the injured at that time was in fit state of mind and she is capable of giving dying declaration, but in cross-examination, Dr. Madhusudan Gupta (PW-19) has clearly admitted that he was a student at that particular time, he was not the regular doctor in the hospital and further admitted that he did not examine the injured medically while recording the statement, since she was talking, therefore, he has written note that she is capable of giving dying declaration and that is the reason why he did not mention anything about physical or mental condition of the injured at Ex.P-19. As such, there is no valid certificate of any doctor clearly indicating whether the injured Mamta, who has suffered 80-90% deep burn injuries, was in fit mental and physical state of mind to give dying declaration.

22. According to Modi, **A Textbook of Medical Jurisprudence and Toxicology**, 24th Edition 2011, at page 486, under Chapter 21 – Injuries from Burns, Scalds, Lighting and Electricity, while dealing with Classification of Burns, it has been stated that “Third degree burn refers to the destruction of the cuticle and part of the true skin, which appears horny and dark, owing to it having been charred and shrivelled. Exposure of nerve endings gives rise to much pain. This leaves a scar, but no contraction, as the scar contains all the elements of the true skin.

23. Admittedly, in the present case, deceased Smt. Mamta Yadu, at the time of giving dying declaration, suffered 80-90% severe deep burn injuries and she was being treated for that and on 13-1-2012 at 8:00 p.m., before recording the dying declaration, her general

condition was poor and she was given injection Fortwin which is one kind of painkiller. Immediately in between 10:10 p.m. and 10:40 p.m. on 13-1-2012, her dying declaration was recorded. Following the medical effect of administration of painkillers, it can safely be said that painkillers were bound to create drowsiness and usually arrest the mental alertness and it was given as the victim-Mamta was in great agony and pain. Following the decision of the Supreme Court in **Sampat Babso Kale** (supra), paragraphs 14 and 16, the possibility of the deceased being in state of delusion could not be completely ruled out due to drowsiness and immediately on the next day she died. Therefore, in absence of any evidence of corroboration, it would be unsafe to rely upon the dying declaration to convict the appellants for offence under Section 302 of the IPC.

24. Reverting finally to the facts of the case, it is quite vivid that when the dying declaration was recorded by C.P. Mishra (PW-21) – Executive Magistrate on 13-1-2012 in between 10:10 p.m. and 10:40 p.m., the deceased was suffering from 80-90% burns, her general condition was poor and she was administered Fortwin injection prior to recording her dying declaration. Rohit Yadu (PW-1) – brother of the deceased and the deceased herself have stated before the doctor that she sustained burns while cooking at home. Though the doctor has not been examined, but in medical record it has been clearly recorded that she suffered burn injuries while cooking which is also clear from Ex.P-12 proved by Dr. Rahul Bhargav (PW-9). There is no corroborative evidence to the dying declaration and there is no other evidence led by the prosecution to

connect the appellants with the offence in question. Therefore, it would be unsafe to convict the appellants on the solitary basis of dying declaration.

25. In view of the aforesaid analysis, we are of the opinion that the conviction recorded by the trial Court on the basis of dying declaration Ex.P-22 cannot be sustained. As such, conviction and sentences imposed upon the appellants under Section 302 read with Section 34 of the IPC are liable to be quashed and are hereby quashed. The appellants are acquitted of the said charge extending the benefit of doubt. Since they are in jail, they be set at liberty forthwith if not required to be detained under any other process of law.

26. The appeal is allowed accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Radhakishan Agrawal)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.976 of 2013

Tejram Yadu and another

Versus

State of Chhattisgarh

Head Note

In case of serious doubt as to whether victim / deceased was in fit state of mind to make dying declaration and in absence of certificate of doctor, it would be unsafe to convict an accused on the basis of dying declaration for offence under Section 302 of the IPC.

गम्भीर सन्देह की स्थिति में कि क्या पीड़ित/मृतक मृत्युकालिक कथन करने हेतु डॉक्टर के प्रमाण पत्र के अभाव में सही मनःस्थिति में था या नहीं? मृत्युकालिक कथन के आधार पर अभियुक्त को भारतीय दण्ड संहिता की धारा 302 के तहत् दण्डित किया जाना उचित नहीं होगा।