

SHAILESHBHAI @ PAPPU BALUBHAI CHUNARA & ANR. A

v.

STATE OF GUJRAT

(Criminal Appeal No. 1974 of 2012)

AUGUST 07, 2014

[DIPAK MISRA AND V. GOPALA GOWDA, JJ.] B

Penal Code, 1860 - ss. 302/34, 323 and 114 - Murder - Conviction and sentence u/ss. 302/34, 323 and 114 on basis of dying declaration that accused persons poured kerosene on victim and set her ablaze - Defence case that there were three inconsistent dying declarations - On appeal, held: Two doctors made an endorsement respectively and the executive magistrate recorded the dying declaration - No inconsistency in the said recordings - Testimony of the magistrate reliable as also testimony of victim consistent - Thus, order of conviction and sentence upheld - Evidence. C D

Dismissing the appeal, the Court

HELD: On the scrutiny of the dying declaration, it is found that there is no inconsistency in all the recordings, namely, by doctor 'S', who had made an endorsement at the time of admission; doctor 'KP', who also made an endorsement and recorded three names; and the Executive Magistrate who had recorded the dying declaration. Nothing has been brought on the evidence to discredit the testimony of the Executive Magistrate who recorded the dying declaration in questionnaire form. There was no circumstance from which it could remotely be inferred that she was tutored or her statement was embellished by any kind of influence. On the contrary, her testimony was consistent and, therefore, the reliance placed on the same by the trial judge as well as by the E F G

A High Court was absolutely impeccable and, therefore, there was no flaw in the judgment of conviction and order of sentence. [Paras 6, 14, 15] [1082-C-D; 1083-D-F]

Lella Srinivasa Rao v. State of A.P 2004 (2) SCR 659: (2004) 9 SCC 713; *Amol Singh v. State of Madhya Pradesh* (2008) 5 SCC 469; *Sharda v. State of Rajasthan* 2009 (16) SCR 441; (2010) 2 SCC 85; *State of Rajasthan v. Sharavan Ram & Anr.* 2013 (5) SCR 1076: (2013) 12 SCC 255; *Kamla v. State of Punjab* (1993) 1 SCC 1; *Kishan Lal v. State of Rajasthan* 1999 (1) Suppl. SCR 517: (2000) 1 SCC 310; *State of A.P. v. P. Khaja Hussain* 2009 (6) SCR 660 : (2009) 15 SCC 120; *Laxmi (Smt) v. Om Prakash and others* 2001 (3) SCR 777: (2001) 6 SCC 118; *Kundula Bala Subrahmanyam and another v. State of Andhra Pradesh* 1993 (2) SCR 666: (1993) 2 SCC 684 - referred to.

D

Case Law Reference

	2004 (2) SCR 659	Referred to	Para 7 , 8
	(2008) 5 SCC 469	Referred to	Para 7, 9
E	2009 (16) SCR 441	Referred to	Para 7 , 10
	2013 (5) SCR 1076	Referred to	Para 7
	(1993) 1 SCC 1	Referred to	Para 11
F	1999 (1) Suppl. SCR 517	Referred to	Para 11
	2009 (6) SCR 660	Referred to	Para 11
	2001 (3) SCR 777	Referred to.	Para 12
G	1993 (2) SCR 666	Referred to	Para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1974 of 2012.

From the Judgment and Order dated 02.05.2012 in

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SHAILESHBHAI @ PAPPU BALUBHAI CHUNARA v. 1077
STATE OF GUJRAT

Criminal Appeal No. 1644 of 2005 of the High Court of Gujarat at Ahmedabad. A

Dr. Sumant Bharadwaj, Dr. Sushil Kr. Gupta, Mridula Ray Bharadwaj, Manoj Kumar for the Appellants.

Hemantika Wahi, Jesal, Puja Singh for the Respondent. B

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In this appeal, by special leave, the assail is to the judgment of conviction and order of sentence dated 02/05/2012 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1644 of 2005, whereby the Division Bench, placing reliance on the dying declaration of the deceased Champaben, has affirmed the decision of the learned Trial Judge, who had found the accusedappellants guilty of offence punishable under Section 302/34, 332 and 114 of the Indian Penal Code, 1860 (for short, "the IPC"). C D

2. The broad essential facts, which need to be stated for the adjudication of this appeal, are that the deceased, Champaben, was staying with her mother-in-law, brother-in-law and children in a hut near the Water Tank, Macchipir Area, Baalvatika, Ahmedabad and the said hut was sold off by her mother-in-law. The said transaction had brought the deceased Champaben and her children to a miserable state of penury and eventually they were forced to live on the footpath. As alleged, the mother-in-law and brother-in-law had left them in the lurch and went to live elsewhere. On 13.12.2001, as per the case of the prosecution, the accused-appellants attacked her and gave her fist and kick blows and then A-3, namely, Chinabhai caught hold of her and Balubhai Hemabhai Chunara poured kerosene and set her ablaze. A-2, Shailesbhai @ Pappu Balubhai Chunara, aided and abetted the offence. On the basis of the statement made by the deceased on 13.12.2001, the criminal law was set in motion and accused persons were arrested. The dying declarations of Champaben H

A were recorded regard being had to her sinking condition. Eventually, she succumbed to her injuries on 22.12.2001.

B 3. After completing the investigation, the prosecution laid the chargesheet under Sections 302/34, 323 and 114 of the IPC before the competent Court which in turn committed the matter to the Court of Session. The learned Sessions Judge, on the basis of the evidence brought on record and placing reliance on the dying declarations of Champaben, convicted the accused persons and imposed the sentence. Suffice it to say, all of them were convicted under Section 302/34 IPC, apart from separate sentence imposed under Sections 323 and 114 of the IPC. The learned trial Judge repelled the plea of the defence that there were three dying declarations and there was manifest inconsistency and hence, they did not deserve acceptance.

D 4. On an appeal being preferred, the High Court adverted at length to the legal acceptability of the dying declarations and found that there was actually no inconsistency and accordingly affirmed the judgment of conviction and order of sentence.

E 5. We have heard Dr. Sumant Bharadwaj learned counsel for the appellants and Ms. Hemantika Wahi learned counsel for the State.

F 6. There is no dispute that the conviction has been recorded on the sole basis of the dying declaration. As the material brought record would reveal, on the date of occurrence, the deceased was immediately taken to L.G. Hospital, where initially she was treated by Dr. Sandip, PW-2, and there is an endorsement in the case papers that "alleged history of burns over body by Shailesbhai Chunara's friends at Water tank, Baalvatika." After the said endorsement, the treatment commenced and about 3.15 p.m. she was taken to Dr. Kunjan Patel, who recorded the history of injuries and noted that she had suffered severe burn injuries being burnt by three persons, H namely, Balubhai Hemabhai, Shailesbhai Balubhai and

Chinabhai Balubhai. Thereafter, a dying declaration was recorded after the investigating agency requisitioned the presence of Executive Magistrate, namely, Binodbhai Mafatbhai Patel (PW-3). On a perusal of the said dying declaration, we find that Dr Kunjan Patel had certified that patient was conscious and fit for making a dying declaration. The Executive Magistrate has recorded the dying declaration in the questionnaire form wherein the deceased had clearly stated that she had a quarrel with the accused-appellants and they had caused burn injuries on her legs, chest and other part of the body. The learned Magistrate has also deposed that he had taken care that no one else was present at the time of recording of the dying declaration.

7. Mr. Bharadwaj learned counsel for the appellant attacking the acceptability of the dying declaration has urged that when there are more than one dying declaration, and inconsistency is perceptible, the Court should be extremely careful before placing reliance on it. To bolster the said submission he has drawn inspiration from the decisions in *Lella Srinivasa Rao v. State of A.P.*¹, *Amol Singh v. State of Madhya Pradesh*², *Sharda v. State of Rajasthan*³ and *State of Rajasthan v. Sharavan Ram & Anr.*⁴.

8. In *Lella Srinivasa Rao* (supra) the Court, appreciating the evidence on record, noticed that there was inconsistency between the two dying declarations and, therefore, thought it unsafe to base the conviction on the basis of the second dying declaration. It is apt to state here that in the said case, in the first dying declaration there was no mention about the appellant having treated the deceased with cruelty or of his having caused harassment to the deceased. That apart, the Court noticed that his name did not find place in the relevant portion

1. (2004) 9 SCC 713.
2. (2008) 5 SCC 469.
3. (2010) 2 SCC 85.
4. (2013) 12 SCC 255.

A of the first dying declaration though the said dying declaration was recorded by a Magistrate after taking all precautions.

B 9. In *Amol Singh* (supra) the Court noticed certain inconsistencies between one dying declaration and the other. In that context, it was opined that the Court has to examine the nature of the inconsistencies, namely, whether they are material or not and while scrutinizing the contents of various dying declarations it becomes the duty of the court to examine the same in the light of various surrounding facts and circumstances. In the said case the Court found several C discrepancies even as regards the manner in which the kerosene was sprinkled and on facts did not find the dying declaration inspiring credence.

D 10. In the case of *Sharda* (supra) the Court observed that a dying declaration to deserve acceptance should inspire full confidence of the court of its correctness and the court is required to see that such statement of the deceased is not a result of either tutoring, prompting or product of imagination. Emphasis was also laid on the satisfaction of the fact that the E deceased was in a fit state of mind.

F 11. In *Shravan Ram and another* (supra) the Court referred to the decisions in *Kamla v. State of Punjab*⁵, *Kishan Lal v. State of Rajasthan*⁶, *Lella Srinivasa Rao* (supra), *Amol Singh* (supra) and *State of A.P. v. P. Khaja Hussain*,⁷ and, eventually, came to hold that there were discrepancies and contradictions between the two dying declarations and, therefore, the conviction could not be based on such dying declaration.

G 12. In *Laxmi (Smt) v. Om Prakash and others*⁸, the Court

5. (1993) 1 SCC 1.

6. (2000) 1 SCC 310.

7. (2009) 15 SCC 120.

H 8. (2001) 6 SCC 118.

after referring to the maxim "Nemo moriturus praesumitur mentire" which means, "No one at the point of the death is presumed to lie", opined that: -

"If in a given case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances coming to its notice, the court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying declaration so infirm as to prick the conscience of the court, the same may be refused to be accepted as forming a safe basis for conviction."

13. At this juncture, we may also fruitfully refer to a two-Judge Bench decision in *Kundula Bala Subrahmanyam and another v. State of Andhra Pradesh*⁹ where the Court observed that:

"A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations then the court has also to scrutinise all the dying declarations to find

9. (1993) 2 SCC 684.

A out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same."

B 14. Keeping mind the aforesaid principles, we shall
 scrutinize whether the dying declarations withstand the attack
 made by the learned counsel for the appellant or they survive
 the assault to stand erect on the pedestal of credibility. To
 appreciate the controversy, as raised, we required the learned
 C counsel for the State to read out the statements in original to
 us. That apart, the learned counsel for the State has translated
 the same for better appreciation. On a keen scrutiny of the same
 we find that Dr. Sandip had only made an endorsement at the
 D time of admission. Dr. Kunjan Patel also had made an
 endorsement and at that time he had recorded the three names
 and thereafter the Executive Magistrate had recorded the dying
 declaration. Emphasis of Dr. Bharadwaj, learned counsel is that
 the deceased should have mentioned all the names to Dr.
 Sandip. As is perceivable, Dr. Sandip has not recorded the
 E dying declaration. He, at the time of entry to the hospital, only
 mentioned the same as a requisite endorsement. In any case,
 we do not see any inconsistency in all the recordings, namely,
 by Dr. Sandip, Ext. 20, Dr. Kunjan Patel, Ext. 13, and Mr.
 Vinodbhai Mafatbhai Patel, Executive Magistrate, Ext. 16.

F 15. We are disposed to hold so, as from the endorsement
 it is manifest that the deceased had, while availing treatment,
 said that the accused persons were totally hostile to her and in
 order to extinguish her life spark had poured kerosene on her.
 It is also reflectible from the hospital records tendered in
 G evidence that the patient was conscious and well oriented and
 was in a position to follow the instructions. While the patient was
 in that condition, the Magistrate was called to record the dying
 declaration. About the fitness of the patient Dr. Kunjan Patel
 had examined the patient and clearly stated that she was in a
 H fit and conscious condition to give a dying declaration. The

Executive Magistrate had taken precautions by removing all the relatives of the injured from the room and approached the doctor to verify about the fitness of the patient, and after being satisfied that she was fit enough to give dying declaration, recorded the same in a questionnaire form. The deceased during recording of the statement has categorically stated that she had a quarrel on the date of occurrence with Balu Hema, Shailesh Balu and China Balu and, therefore, Balu Hema poured kerosene on her and China Balu caught hold of her and Shailesh Balu burnt her by igniting a match stick. It is submitted by Mr. Bhardwaj that the deceased should have mentioned all the names before the doctor at the first instance. The said submission suffers from fundamental fallacy inasmuch as Dr. Sandip was only making an endorsement at the time of entry into the hospital. He was not recording any dying declaration. It was only an endorsement which was required for the hospital record. As is evident, she has mentioned the names before Dr. Kunjan Patel who really treated her. Nothing has been brought on the evidence to discredit the testimony of the Executive Magistrate who has recorded the dying declaration in questionnaire form. There is no circumstance from which it can remotely be inferred that she was tutored or her statement was embellished by any kind of influence. On the contrary, her testimony has been consistent and, therefore, the reliance placed on the same by the learned trial Judge as well as by the High Court is absolutely impeccable and, therefore, we do not find flaw in the judgment of conviction and order of sentence.

16. Consequently, the appeal, being devoid of merit, stands dismissed.

Nidhi Jain

Appeal dismissed.