PETITIONER:
RAM BIHARI YADAV

Vs.

RESPONDENT:
STATE OF BIHAR & ORS.

DATE OF JUDGMENT: 21/04/1998

BENCH:
M.K. MUKHERJEE, SYED SHAH MOHAMMED QUADRI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

QUADRI, J.

On October 8, 1987, the learned VII Additional Sessions Judge, Dhanbad Convicted the appellant, in S.C. No. 80 of 1986, for an offence punishable under Section 302, IPC for committing the murder of his wife, Smt. Shivratri Devi, by causing burn injuries and sentenced him to imprisonment for life after trying him for offences under Section 377 IPC, for committing sodomy with PW-2, and under Section 302, IPC for intentionally causing death of his wife on November 13, 1985. The conviction of the appellant was upheld by the Division bench of Patna High Court in Criminal Appeal No. 207 of 1987 (R) on August 5, 1988. Against that judgment of the High Court, he filed this appeal by special leave.

The appellant was working as the officer-in-charge, Tisra P.S. in November, 1985 but was residing with his family in the quarters allotted to him at his former place of posting within the compound of Jharia, P.S. He had a servant, Narsingh Kumar (PW-2), aged about 16 years, with whom he was indulging in carnal intercourse which led to strained relations between him and his wife. At about 8.00 A.M., on November 13, 1985, after throwing kerosene oil on her person, he set fire to her and thus caused burn injuries. Thereafter, he went to the house of Dr. Mohan Kanaujiya (PW-8) who was residing behind the Jharia P.S. and informed him that his wife had suffered burn injuries. Dr. Kanaujiya proceeded to his house. Hearing about this, the neighbors, Tribhuban Jha (PW-3) and Anirudh Prasad Singh (PW-4) also came to the quarters of the appellant. PW-3 and PW-4, found among other things, the main gate of the quarters locked and when PW-6 could not get the keys from the appellant, the door of the house was broken and they entered the house. After securing the car of S.I. Kanhaiya Updhyay (PW-6), they sent her for treatment to Sadar Hospital, Dhanbad, where she was admitted as an in-patient. On 16.11.1985, the Inspector P.N. Ram (PW-11) could find PW-2 to record his statement and F.I.R. was got lodged through him. On the same day, PW-11 requested Sub-Divisional Judicial magistrate, Dhanbad, to record the statement of Smt. Shivratri Devi. At about 1.00 P.M. , on that day, Shri

L.K. Sharma , II class Judicial Magistrate (PW-7) went to the Sadar hospital and recorded her dying declaration (Exh.2) wherein she stated that her husband had burnt her. On the following day she succumbed to the injuries. Dr. Roy Sudhir Prasad (PW-5) assisted by Dr. D.K. Dhiraj (PW-9) conducted postmortem examination on her dead body. PW-5 has stated that the scalp hair of the deceased was burnt upto the roots in both parietal areas in 6" * 3- 1/2" and faint smell of kerosene oil was present on the scalp. He opined that the burn injuries were of first degree and were cause of her death and that the death was homicidal but not accidental. He issued postmortem report (Exh. 1). PWs. 2 and 6, however, turned hostile at the trial of the appellant.

His defence was on of denial; however, he took the plea that when Shivratri Devi went for igniting the oven insides the kitchen, she caught fire accidentally. He examined three witnesses, DWs.1 to 3. Paridhan Yadav (DW-1) is the appellant's father-in-law and Rajnath Yadav (DW-2) is appellant's brother-in-law . DW-1 spoke that the relation between the deceased and the appellant were cordial. DW-2 also said about their cordial relations and added that he and the appellant poured water on the body of the deceased when she caught fire.

Shri D.D. Thakur, the learned senior counsel and Shri Kalra, appearing for the appellant, have contended that there are no eye-witnesses to the occurrence and that the conviction was based solely on the dying declaration of the deceased (Exh. 2) by both the courts and when the deceased had given two dying declarations the first being Exh.5/4, recorded by Shri R.B. Singh, A.S.I. and the second being Exh.2, recorded by the learned II Class Judicial Magistrate, Dhanbad (PW-7)- which are inconsistent Exh.2 should not have been relied upon; further Exh.2 should not have been relied upon; further Exh.2 is not in the fore of question- answers and that it has not been certified by the doctor as to the mental capacity of the victim to give the declaration; the trainee nurse who attested was not examined; and that it is not corroborated by any independent evidence.

On the above contentions, the short question that arises for consideration is whether the courts below are justified in convicting the appellant on the basis of Exh.2, the dying declaration of the deceased.

The law relating to dying declaration - the relevancy, admissibility and its probative value- is fairly settled. More often the expressions 'relevancy and admissibility' are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case. in this case, the thrust of the submission relates not to relevancy or admissibility but to the value to be given to Exh.2. A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section 32 of the Evidence Act and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive

evidence requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case.

Mr. Kalra strenuously contended that the deceased made two dying declarations, Exh.2 should not have been taken into consideration. According to the learned counsel the first dying declaration is Exh. 5/4. The original of Exh. 5/4 is not to be found on record. Shri R.B. Singh, A.S.I. who is said to have recorded the original of Exh. 5/4 has not to be found on record. Shri R.B. Singh, A.S.I. who is said to have recorded the original of Exh. 5/4 has not been examined. Assertions in documents produced in Court, when no witness is testifying are inadmissible as evidence of that which is asserted. As such Exh. 5/4 is not admissible in evidence. It is, however, suggested that on the basis of the original of Exh. 5/4 entry in the case diary, GD 517 is made so it could be treated as the original. We are afraid we cannot accept this contention as well. 3D entry only keeps a copy of the dying declaration. The Station House Officer who made that entry has not come into the witness box. PW 11, investigating officer, who is said to have signed that entry did not prove the same. It follows that neither Exh. 5/4 nor GD 517 can be taken as the evidence of the first dying declaration of Smt. Shivrati Devi. Thus, Exh. 2, is the only dying declaration which remains and was rightly relied up for convicting the appellant.

The learned counsel next relied up the observations of the Court in Khushal Rao vs. The state of Bombay (1958) SCR 552 and State (Delhi Administration vs. Laxman Kumar & Ors. (1985) 4 SCC 476, and argued the Exh. 2, not being in the form of question answer and not having been certified by the doctor should not have been accepted by the courts below to convicts the appellant. In Kushal Rao's case, this Court has laid down, inter alia, that a dying declaration which was recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and as far as practicable, in the words of the maker of the declaration stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character. In that case, three dying declarations were recorded within two and a half hours of the occurrence; the first by the doctor attending on the victim; the second by the police officer and the third by the learned Magistrate. The High Court took the view that corroboration of the dying declaration, was necessary and on the question whether the conduct of the accused in absconding and being arrested in suspicious circumstances, would be enough to corroborate the dying declarations, certificate under Article 134(1) (c) was granted by the Bombay High Court. This court held that the said circumstances could not afford corroboration if corroboration was necessary and that there was no absolute rule of law, not even rule of prudence that had ripened into a rule of law that a dying declaration in order that it might sustain an order of conviction must be corroborated by other independent evidence.

In Laxman Kumar's case (supra), then housewife was admitted to the hospital with burn injuries. Her dying declaration was recorded by the police officer but if was not in question-answer form and it was not certified by the doctor to the effect that she was in a fit condition to give the statement though it was not certified by the doctor to the effect that she was in a fit condition to give the

statement though it was merely attested by him. It contained partial impression of finger tip of the deceased. The Trial Court pointed out various suspicious factors for not accepting the dying declaration for resting conviction thereon. The High Court, however, relied upon the dying declaration and convicted the accused. On appeal, this Court endorsed the suspicious circumstances indicated by the Trial Court, which included that under the relevant Rules applicable to the accused, the investing officer was not to scribe the dying declaration; that it was not in question-answer form and that there was no positive evidence that the palms or left hand thumb of the victim had been so badly affected that she was not in a position to use thumb or any of the fingers and concluded that the dying declaration was not acceptable. This Court did not lay down, in any of the aforementioned cases that unless the dying declaration is in question-answer form it could not be accepted. Having regard to the sanctity attached to a dying declaration as it comes from the mouth of a dying person though, unlike the principle of English law he needn't be under apprehension of death, it should be in the actual words of the maker of the declaration. Generally, the dying declaration ought to be recorded in the form of questions-answers but if a dying declaration is not elaborate but consists of only a few sentences and is in the actual words of the maker the mere fact that it is not in questions-answer form cannot be a ground against its acceptability or reliability. The mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters which can be observed by any person. But to lend assurance to those factors having regard to the importance of the dying declaration, the certificate or a medically trained person is insisted upon. in the absence of availability of a doctor to certify the above mentioned factors, if there is other evidence to show that the recorder of the statement has satisfied, himself about those requirements before recording the dying declaration there is no reason as to why the dying declaration should not be accepted. However, it is pointed out by Shri Kalra that in a recent case in State of Orissa vs. Parsuram Naik (1997) 11 SCC 15, this court has declined to rely upon the dying declaration as it was not certified by the doctor that the maker of the declaration was full senses and was medically fit to make a statement. There the accused was charged with committing the murder of his wife by burning her at her parental house. The dying declaration was recorded by the doctor who, however, did not certify that she was in full senses and was medically fit to make a statement. The maker of the declaration died within fifteen minutes of the recording of the statement. On the facts of that case, the High Court did not consider it safe to rely upon the dying declaration and acquitted the accused. This Court, in the appeal against acquittal having regard to the fact that she had sustained extensive burn injuries and died within fifteen minutes of the recording of the statement, took the view that she might not be in a proper and fit condition to make a statement as regards her cause of death and agreed with the High Court that exclusive reliance could not be placed on such a dying declaration to hold the husband guilty or committing her murder.

In the light of the above discussion we shall read here Exh. 2 which reads thus;

" Mujhe mere pati ne jala diya.
Mujhe pata nahin kyon jalaya.
Main Jyada nahin kah sakti hoon

Kyon ke bahut pyass lagi hai."

The learned II Class Judicial Magistrate (PW -7) stated that pursuant to the order of Sub-Divisional Judicial Magistrate, on November 16, 1985 he recorded the dying declaration of Smt. Shivratri Devi in Sadar Hospital and signed the same; as both the hands of Smt. Shivratri Devi in Sadar Hospital and signed the same; as both the hands of smt. Shivratri Devi were badly burnt, he took impression of her left toe on the declaration and certified accordingly. He further stated that he put certain questions to Smt. Shivratri Devi with a view to test her memory but he did not record this fact in the statement and that she was conscious while giving her statement; he added, he got the doctor searched but no doctor was available at 1.00 P.M. when the statement was recorded by him; trainee nurse was attending upon her and he got her signature on the statement. He also stated that the ASI who was with him identified the lady and after making enquiries from the lady, he satisfied himself about her identity.

From a plain reading of Exh.2 as well as the statement of PW 7, it is clear that the learned magistrate has satisfied himself about the identity of Smt. Shivratri Devi; he put questions to her and satisfied himself about her condition that she was fit enough to make the statement. The statement itself consists of two sentence. Having regard to all the facts and circumstances both the courts below have relied upon the dying declaration and we find no cogent reason to take a different view of the matter. Having found that the dying declaration is true and acceptable there is no escape from the conclusion that the appellant was responsible for intentionally causing burn injuries to his wife Smt. Shivratri Devi, which resulted in her death.

Though, no corroboration of dying declaration as such is necessary to convict the accused a principle which has been laid down in Khushal rao's case (supra), however, in this case, there is circumstantial evidence which corroborates the dying declaration, viz., the statements of PWs 3 and 4 that they found the victim in her room where the smell of kerosene was present, the statement of PW-5, the doctor who conducted the postmortem examination after four days of the accident noticed smell of kerosene from the scale of the deceased, statements of PWs 4 and 6 who rushed to the house of the appellant immediately after hearing of the incident and found that the house was locked from inside and the appellant was delaying in opening the lock on one pretext or the other; the plea of the appellant that she died of accident while igniting the oven and that the appellant and DW-2 put water on her was belied from the evidence on record as no sign of water was found in the kitchen and that the ash in the oven was found in tact. These facts corroborate and lend assurance to the truth of the declaration of the deceased "mere pati ne mujhe jala diya hai" .

Before parting with this case we consider it appropriate to observe that though the prosecution has to prove the case against the accused in the manner stated by it and that any act or omission on the part of the prosecution giving rise to any reasonable doubt would go in favour of the accused, yet in a case like the present one where the record shows that investigating officers created a mess by bringing on record Exh. 5/4 and GD Entry 517 and have exhibited remiss and/or deliberately omitted to do what they ought to have done to bail out the appellant who was a member of the police force or for any extraneous reason, the interest of justice demands that such acts or omissions of

the officers of the prosecution should not be taken in favour of the accused, for that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellant. In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice.

For the above reasons, we are of the view that the Trial Court as well as the High Court has rightly based the conviction on Exh. 2, the dying declaration. We find no merit in the appeal ad accordingly dismiss the same. The appellant, who is on bail, will now surrender to his bail bonds to serve out the sentence imposed upon him.