

Nabi Shareef Vs. State of A.P.

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Court : Andhra Pradesh

Decided On : Apr-21-2004

Reported in : 2004(1)ALD(Cri)882; II(2004)DMC849

Judge : Bilal Nazki and ; P.S. Narayana, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 498A

Appeal No. : Criminal Appeal No. 569 of 2002

Appellant : Nabi Shareef

Respondent : State of A.P.

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : E. Ayyapu Reddy, Adv.

Disposition : Appeal allowed

Judgement :

P.S. Narayana, J.

1. A-1 in S.C. No. 476/1999 on the file of Metropolitan Sessions Judge, Hyderabad is the appellant. A-1 and A-2 were prosecuted for offences under Sections 498-A and 303, I.P.C and by judgment dated 18.4.2002, A-1 was found guilty of the offence under Section 302, I.P.C and was convicted and sentenced to suffer life

imprisonment and A-1 and A-2 were found not guilty of the offence under Section 498A, I.P.C. Aggrieved by the same, A-1 had preferred the present appeal.

2. The short episode of the prosecution is as hereunder:

Inspector of Police, Shamshergunj Police Station had laid charge-sheet in Crime No. 147/1998 as against A-1 and A-2 for offences under Sections 498A and 302, I.P.C. A-1 is the husband and A-2 is the mother-in-law of Parveen Begum, hereinafter referred to as deceased for the purpose of convenience. The marriage of the deceased was celebrated with A-1 two years prior to her death and they begot a male child out of the said wedlock and she had happy marital life with A-1 for about 5 months and thereafter A-1 and A-2 started harassing her and they refused to give money for household expenses and also for day-to-day needs. P.W. 1, the father of deceased, requested the accused not to harass his daughter. Two months prior to the incident, A-1 brought the deceased to her parents and left with them and 20 days thereafter the father of A-1 died and thereafter P.W. 1 sent the deceased to her in-law's house to attend the death ceremony. A-1 and A-2 harassed the deceased. A-1 poured kerosene and set her on fire on 28-9.1998 at about 8 a.m. and thereby she sustained burn injuries and she was shifted to Osmania General Hospital for treatment and the dying declaration of the deceased was recorded by P.W. 10 on 28.9.1998 at about 3.40 p.m. P.W. 1 - the father, P.W. 2 the mother, P.W. 3 - the sister of the deceased, rushed to the hospital and it is stated that the deceased informed them that her husband poured kerosene and set her on fire. P.W. 1 made an oral report to the Station House Officer, Shamshergunj Police Station which was reduced to writing and a case was registered as Crime No. 147/1998 under Sections 498A and 307, I.P.C. P.W. 11, the Inspector of Police, Shamshergunj Police Station, the Investigating Officer, inspected the scene of offence and effected seizure of M.Os. 1 to 4. P.W. 4 is the son-in-law of P.W. 1. On 30.9.1998 the deceased ultimately had succumbed to burn injuries. In view of the same, P.W. 11 filed Ex. F11 alteration and sent requisition to P.W. 7 - Mandal Revenue Officer, to conduct inquest on the dead body of the deceased. P.W. 7 conducted the inquest on the dead body of the deceased on 30.9.1998 at 11.30 a.m. After inquest, the dead body of the deceased was sent to post-mortem examination, conducted by P.W. 8. After

completion of investigation, P.W. 11, the Inspector of Police, laid charge-sheet in the Court of XIV Metropolitan Magistrate, Hyderabad and the learned Magistrate took the charge-sheet on file as P.R.C. No. 9/1999 and inasmuch as the offence of Section 302, I.P.C. is exclusively triable by a Court of Session, the learned Magistrate committed the case to Metropolitan Sessions Division, Hyderabad by order dated 28.9.1999 and on committal the case was taken on file as S.C. No. 476/99 and on appearance of the accused, the charges aforesaid were framed by the learned Metropolitan Sessions Judge, Hyderabad.

3. The prosecution had examined P.W. 1 to P.W. 11 and marked Exs. P-1 to P-11 and M.Os. 1 to 4. On behalf of the defence, D.W. 1 was examined and Exs, D-1 to D-4 were marked. On appreciation of the oral and documentary evidence, the learned Sessions Judge acquitted A-1 and A-2 of the charge under Section 498-A, I.P.C, but convicted A-1 of the charge under Section 302, I.P.C. and sentenced him to life imprisonment on the strength of Ex. P-9 dying declaration. The defence of the accused is that the deceased was suffering from mental disorder and she committed suicide by setting fire to herself and this case was foisted against them. The charge Section 498-A, I.P.C. was held to be not established, but however the learned Sessions Judge convicted A-1 on the strength of Ex. P-9. Hence the core question to be considered in the present criminal appeal is whether the prosecution had proved its case against appellant/A-1 beyond all reasonable doubt and whether the conviction and sentence imposed on the appellant/A-1 by the learned Sessions Judge be maintained or are liable to be set aside.

4. Mr. Ayyappa Reddy, the learned Counsel representing the appellant submitted that in the facts and circumstances of the case, the conviction and sentence imposed on the appellant/A-1 cannot be sustained since Ex. P-9 itself is doubtful especially in the light of the evidence of P.W. 10. The Counsel also had drawn the attention of this Court to Rule 33 of the Criminal Rules of Practice and had taken this Court through the evidence of prosecution in detail and also the evidence let in on behalf of defence i.e., the evidence of D.W. 1. The learned Counsel also submitted that the overall facts and circumstances may have to be taken into consideration and also would contend' that EX. P9 is highly suspicious in the facts and circumstances of the case especially in the backdrop of disbelieving the

harassment as deposed by P.W. 1 to P.W. 3 and acquitting the accused of the charge under Section 498-A, I.P.C. The learned Counsel also submitted that P.W. 10 had not deposed whether the deceased was able to understand Telugu and in what manner when the deceased had no knowledge of Telugu, he had recorded the statement of the deceased when the deceased could speak only in Urdu and could not speak in Telugu.

5. The learned Additional Public Prosecutor on doubt made a serious endeavour to support the judgment questioned in the present criminal appeal and would contend that there cannot be any doubt or suspicion in relation to Ex. P-9 especially in the light of the clear evidence of P.W.-10. The learned Counsel also would submit that the mere fact that P.W. -10 does not know Urdu will not alter the situation in any way since P.W.-10 deposed that he can understand Urdu and that would be sufficient and there is no communication gap in understanding the statement made by the deceased and hence the dying declaration was rightly relied upon by the learned Sessions Judge after recording the reasons in detail and the said conviction and sentence may have to be confirmed by this Court in the present criminal appeal. The learned Counsel also placed reliance on certain decisions in this regard.

6. P.W. 1, the father of the deceased deposed that A-2 is his younger sister and A-1, son of A-2, is his son-in-law. P.W. 1 also deposed about the marriage and giving of Rs. 20,000/- to A-I and certain other details. P.W. 1 further deposed that after marriage for five months A-I and the deceased lived happily in the house of A-I and thereafter A-I started harassing the deceased for money and two months prior to the incident A1 brought the deceased after beating her and left her at his house, but however in view of the death of the father of A-I, 20 days prior to the incident, P.W. 1 persuaded his daughter to go to the house of A-I and on 20th day of demise of the father of A-I, A-I quarrelled with his daughter and the same was informed by A-2 to him and on the date of the incident at about 8 a.m. he went to taxi stand at Afzalgunj and at the same time A-2 came to the taxi stand and brought Talisman (Taviz) which belonged to the deceased and she asked him to come to her house and ask the deceased as to why the deceased kept Talisman with her. Meanwhile, P.W. 4 Ismail, his elder son-in-law came to the taxi stand and

asked him (P.W. 1) to go over to Osmania General Hospital, Hyderabad and he went there and came to know that his daughter was burnt and he was not allowed into the burns ward and at about 5 p.m. he was allowed to see his daughter and when he questioned the deceased she informed that A-1 set fire to her and on 30.9.1998 at about 3.30 a.m. the deceased succumbed to the burn injuries and at about 5 p.m. on the date of the incident, police took his statement Ex. P-1. P.W. 1 was cross-examined at length.

7. P.W. 2 is the wife of P.W. 1 who had deposed corroborating the evidence of P.W. 1 in all material particulars. No doubt she had improved the version implication A-2 also along with A-1.

8. P.W. 3 is the sister of the deceased. She also had supported the evidence of P.W. 1 and P.W. 2. P.W. 3 deposed that A-2 poured kerosene and A-1 set fire. P.W. 1 deposed that A -1 set fire. P.W. 4 is the son-in-law of P.W. 1. P.W. 4 speaks about M.Os. 1 to 4 and Ex. P-2 is the observation-cum-seizure report. The rough sketch of the scene of offence is Ex. P-3. P.W. 5 is the mediator of Ex. P-4 inquest report. P.W. 6, the Casualty Medical Officer deposed about Ex. P-5 wounds certificate issued by him. P.W. 6 deposed that he examined Nawaz Shareef and deposed that the patient informed him that he sustained burn injuries to his left hand on 28.9.1998 at his residence and he found burn injuries on the left hand of A-1.

9. P.W. 7 is the then Mandal Revenue Officer (Inquest) and the inquest was held on the presence of P.W. 5 and another. P.W. 7 recorded the statement of the parents of the deceased. The Panchayatdars opined that the cause of death of the deceased was due to burn injuries. Ex. P-4 is the inquest report. P.W. 7 also deposed: that she had sent the dead body for post-mortem examination. P.W. 8, the Associate Professor of Forensic Medicine, Osmania Medical College, had deposed that about 93% of the body surface area of the deceased was burnt. Ex. P-6 is the requisition and Ex. P-7 is the post-mortem examination report.

10. P. W. 9, the Sub-Inspector of Police, Shamshergunj Police Station deposed that he got telephonic message and he had given Ex. P-8 requisition to the VI Metropolitan Magistrate in this regard. P.W. 10, the VI Metropolitan Magistrate was

examined who recorded the dying declaration on requisition. P.W. 11 is the Inspector of Police, Shamshergunj Police Station, the Investigating Officer, who had deposed about the investigation, recording of statements and other details.

11. D.W. 1 is Dr. Muralidhar who had deposed about the case history sheet of the deceased and Ex. D-4 was marked.

12. In P.V. Radhakrishna v. State of Karnataka, II (2003) DMC 220 (SC)=III (2003) CCR 47 (SC)=A.I.R. 2003 S.C. 2859, it was held that dying declaration is only a piece of untested evidence and it must like any other evidence satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it and if 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 can be no legal impediment to make it the basis of conviction even if there is no corroboration. Dying declaration can be the basis for conviction if it was made voluntarily and truthfully Shanmugam v. State of Tamil Nadu, VI : 2003 CriLJ418 ; Kanaksingh Raisingh Rav v. State of Gujarat, VII : 2003 CriLJ855 . In Kushal Rao v. State of Bombay, : 1958 CriLJ106 , the Apex Court at paras 16 and 17 held:

'On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid,

(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) that a dying declaration which has been 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, and

(6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, for which there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of torturing by interested parties,

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.'

13. In *T. Koti Reddy v. State of A. P.*, 1993(1) ALT CrI 140, it was held:

'Section 145 of the Evidence Act only enables cross-examination of the witnesses as to the correctness of either of the two statements. The fact that two statements made by the deceased person were in existence does not invariably and automatically invite any assumption that among the two, the earlier statement should be accepted. Section 32 of the Evidence Act makes the statement of fact by a person who is dead or cannot be found relevant; that provision does not justify an assumption that among the two statements of a dead person, the earlier shall be invariably accepted and the subsequent statement containing deviation from the earlier one shall be necessarily rejected. In assessing the credibility of

one or the other statement the ordinary rules which apply to assess the credibility of statements is not excluded.'

14. In *Jayaraj v. State of Tamil Nadu*, : 1976 CriLJ1186 , it was held:

'When the deponent (while making his dying declaration) was in severe bodily pain (because of stabbing injuries in abdomen), and words were scarce, his natural impulse would be to tell the Magistrate, without wasting his breath on details, as to who had stabbed him. The very brevity of dying declaration, in the circumstances of the case, far from being a suspicious circumstances, was an index of its being true and free from the taint of tutoring, more so when the substratum of the dying declaration was fully consistent with the ocular account given by the eye-witnesses.'

15. In *Paniben v. State of Gujarat*, I : 1992 CriLJ2919 , it was held;

'Though a dying declaration is entitled to great weight, it is worth while to note that the accused has no power to cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of their tutoring, prompting or a produce of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can be based for conviction without any further corroboration. 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.'

There cannot be any doubt that conviction can be based on dying declaration if it is reliable or trustworthy. Whether dying declaration can form the basis of conviction would depend upon the facts and circumstances of a given case since while appreciating the reliability or trustworthiness of a dying declaration all the facts may have to be carefully and cautiously scrutinized.

16. In the backdrop of the legal position specified supra, now it has to be appreciated whether the conviction and sentence imposed on the appellant/AI be sustained on the strength of Ex. P-9.

17. Before proceeding to appreciate the other essential aspects in relation to Ex. P-9, it may be appropriate to have a look at Ex. P-9, the dying declaration recorded by P.W. 10, which reads as hereunder:

'Dying declaration of Praveen Begum, w/o. Mohd. Nabi Shareef r/o. Falaknuma recorded in female burns ward of O.G.H. on 28.7.1998.

Q. What is your Name? Ans. Parveen Begum.

Q. Where are you now? Ans. I am in the hospital.

Q. Do you know I am Magistrate? Ans. I know.

Q. Are you able to understand my questions? Ans. Yes, I am understanding.

The patient is physically and mentally fit enough to give the statement.

Sd/-

Dr. M. Muralidhar

Since the declarant is giving reasonable answers, I felt that she is physically and mentally fit enough to give the statement. The duty Doctor who is present also endorsed the same. Hence, I proceeded to Record D.D.

Q. How did you sustain burns and who is responsible for it?

Ans. My husband Mohd. Nabi quarreled with me. During the altercation, my husband poured kerosene over me and set fire and challenged me that you do whatever you want to do. Due to this I sustained burns and my husband is responsible for it.

The statement read over to me and it is correct.

The patient is physically and mentally fit enough till the closure of the statement.

Right toe impression is taken and both the thumbs are partly burnt.

Sd/-

(Dr. M. Muralidhar)

28.9.98 at 3.50 p.m.

Recording closed by 3.50 p.m.

Recorded by me

Sd/-

VI MM, Hyd. //

True Translation//

Sd/-

Translator 24.7.02'

18. P.W. 1, the father of the deceased in chief-examination itself had stated about the relationship and also had deposed as hereunder:

'.. I was not allowed to go into the ward. At about 5 p.m. on the date of incident, I was allowed to see my daughter.

I questioned the deceased as to how she sustained burn injuries. She informed me that A.1 set fire to her. On 30.9.1998 at about 3.30 a.m. (night) Praveen Begum succumbed to the burn injuries in the hospital.

On the date of incident, at about 5 p.m. police took my statement at the hospital. The contents in the statement are read over and explained to me in Urdu. Then I signed in the statement. It is Ex. P.1...'

19. P.W. 1 in cross-examination had further deposed:

'...From 12 noon to 5 p.m. the hospital staff did not allow me to enter into the wards saying that the deceased was unconscious (witness says that the Magistrate came to ward of the deceased at about 4.30 or 5 p.m.). It is true that I have not stated in Ex. P.1 that when I questioned my daughter as to how she sustained injuries, she informed me that A.1 set fire to her. I have not stated as in Ex. D.1 to the effect that I suspect that my son-in-law, his mother and their family members were responsible for the burning of my daughter.'

20. P.W. 1 also deposed:

'A.1 and his brother have taken the deceased to the hospital in a tempo. Neither myself nor Ismail tried to go to Police Station to give a report.'

Thus, the oral dying declaration as deposed by P.W. 1 said to have been made by the deceased is that A-1 set fire to the deceased.

21. P.W. 2 is the mother of the deceased. In chief-examination she had deposed:

'...At about 5.30 or 6 p.m. on the same day, I was allowed to speak to my daughter. I questioned the deceased as to how she sustained injuries. She informed me that A.2 poured kerosene on the body and A.1 lit fire to her. The accused set fire to the deceased as their demand to bring money from us was not fulfilled by the deceased...'

22. This is said to be the oral dying declaration made by the deceased to P.W. 2.

P.W. 3, the sister of the deceased deposed in the chief-examination itself as hereunder:

'...At about 6 p.m. I saw the deceased who was taking treatment in the burns ward. I asked the deceased as to how she sustained burn injuries. She stated that A-2 poured kerosene on her body and A-1 set her fire and that one day prior to the incident A-1 and A-2 quarrelled with the deceased with regard to Talisman.'

23. This is said to be the yet another oral dying declaration of the deceased made to F.W. 3.

24. RW. 4 is the son-in-law of P.W. 1 who had deposed in cross-examination:

'.....At the time of admission of the deceased, P.W. 1 who was present was a silent observer. At the time of admission, the doctor questioned the deceased but there was no response...'

He further deposed:

'.....It is true that I stated before the police that today early morning when I was present in my house, Nabi Shareef and his brother Rahmat Shareef came to my house and informed that Smt Parveen Begum set fire to herself in her house. It is true that I stated before police that I along with Nabi Shareef and Rahmat Shareef took the deceased in a tempo to Osmania General Hospital..'

25. P.W. 5 is the inquest mediator. P.W 6, the Assistant Professor of Surgery, Osmania General Hospital, deposed that he examined a patient by name Nabi Shareef brought by P.C. 6298 of Shamshergunj Police Station and the patient informed him that he sustained burn injuries to his left hand on 28.9.1998 at his residence and Ex. P-5 is the wound certificate. P.W. 7 is the Mandal Revenue Officer who conducted inquest. P.W. 8 is the Associate Professor of Forensic Medicine who conducted post-mortem examination and the cause of death is stated to be due to burns. P.W. 9 is the Sub-Inspector of Police, Shamshergunj Police Station, who had given the requisition.

26. P.W. 10 is the most crucial witness - VI Metropolitan Magistrate, at the relevant time. On 28.9.1998, on requisition, P.W. 10 had recorded the dying declaration of the deceased. The cross-examination of P.W. 10 is crucial, which is as hereunder:

'It is not true to suggest that the names of the two doctors are found on Ex. P.9. I have not specifically written on Ex. P.9 as to whether any of the relatives of the deceased influenced or tutored her to give a statement against the accused. I came to the conclusion that the declarant who was in a fit state of mind basing on all the questions put by me. The deceased did not state before me as Nabi Shareef but she stated as Mohd. Nabi her husband. The declarant gave the statement in Urdu language. I do not know reading and writing of Urdu (witness

adds that he can understand Urdu). I have not incorporated the actual words used in Urdu by the declarant in Ex. P.9. I have not written the Urdu words as spoken to by the declarant in Telugu language.

I have not written in Ex. P.9 that I sent away all the attendants of the declarant from that room. I have not seen the Medical record of the declarant to know whether she gave any statement to the attending doctors.'

27. P.W. 11 is the Inspector of Police - Investigating Officer, who had deposed about the details of the investigation. D.W. 1 deposed that he is the Assistant Professor of Surgery, Gandhi Medical College, Hyderabad and the case history of the deceased is in his handwriting. Ex. D-4 is the photostat copy wherein it was mentioned, 'Alleged to have burnt herself at her residence at 8 a.m. today'. In Ex. P. 1 P.W. 1 expressed suspicion that his son-in-law, his mother and their family members are responsible for the burning of his daughter. It is pertinent to note that, as stated supra, D.W. 1 in the case history recorded, 'Alleged to have burnt herself at her residence at 8 a.m. today.' Ex. P-9 dying declaration and the evidence of P.W. 10 would be very crucial as already referred to supra. P.W. 10 did not put questions to the deceased in Urdu while recording her dying declaration. The deceased could understand the questions of P.W. 10, but it is not clear. P.W.-10 does not know Urdu, but however P.W. 10 deposed that he can understand Urdu.

28. A-2 is none other than the sister of P.W.I. A-I is the son of A-2 and son-in-law of P.W. 1. P.W. 4 is yet another son-in-law of P.W. 1. P.W. 1 deposed that his daughter informed him that A-1 set fire to her. P.W. 2 and P.W. 3 deposed that A-2 poured kerosene and A-I lit the fire. The learned Metropolitan Sessions Judge acquitted both the accused of the charge under Section 498-A, I.P.C. It is very pertinent to note that the evidence of P.W 1 to P.W. 3 in regard to harassment had been disbelieved by the learned Sessions Judge and hence acquittal was recorded in relation to the charge under Section 498-A, I.P.C. In the light of this backdrop, the learned Metropolitan Sessions Judge, in our considered opinion, should have been more careful and cautious in appreciating the evidence of P.W. 10 and Ex. P-9. Apart from these contradictory versions in Ex. P-9 when compared

to the oral dying declarations of P.W. 1, P.W. 2 and P.W. 3, the earliest version recorded by D.W. 1 also would make the prosecution case doubtful. P.W. 10 commenced recording the statement of the deceased at 3.40 p.m. and ended at 3.50 p.m. The evidence of P.W. 1 to P.W. 3 is that the deceased was said to have been unconscious at that time. In cross-examination of P.W. 11, he deposed that before recording of Ex. P-I statement, the Magistrate already had recorded the dying declaration of the deceased. The appellant/A-1 also received burn injuries and the evidence of P.W. 1 shows that A-1 and his brother and P.W. 4 had taken the deceased to the hospital. The conduct of these witnesses, all close relatives of the appellant/A-1, would go to show that implicating the appellant/A-1 is just an afterthought. The conviction is based on the strength of Ex. P-9 only which, in our opinion, is doubtful for the reasons referred to supra, The other oral dying declarations also are contradictory, especially the evidence of P.W. 2 and P.W. 3 improving the case by implicating A-2 also. A dying declaration surrounded by suspicion of this nature cannot be the basis of conviction. Rule 33 of the Criminal Rules of Practice reads as hereunder:

(1) While recording a dying declaration, the Magistrate shall keep in view the fact that the object of such declaration is to get from the declarant the cause of death or the circumstances of the transaction which resulted in death.

(2) Before taking down the declaration, the Magistrate shall disclose his identity and also ask the declarant whether he is mentally capable of making a declaration. He should also put simple questions to elicit answer from the declarant with a view to knowing his state of mind and should record the questions and answers, signs and gestures together with his own conclusion in the matter. He should also obtain whenever possible a certificate from the Medical Officer as to the mental condition of the declarant.

(3) The declaration should be taken down in the words of the declarant as far as possible. The Magistrate should try to obtain from the declarant particulars necessary for identification of the accused. Every question put to the declarant and every answer to sign or gesture made by him in reply shall be recorded.

(4) After the statement is recorded, it shall be read over to the declarant and his signature obtained thereon, if possible, and then the Magistrate shall sign the statement.'

Stress was laid by the learned Counsel for the appellant on the language employed in Rule 33(3) wherein it is specified that the declaration should be taken down in the words of the declarant as far as possible. Rule 33(4) also specifies that after recording the statement, the same shall be read over to the declarant and his signature to be obtained if possible and the Magistrate shall then sign the statement. In *G. Mahadeo Mane v. State of Maharashtra*, 1993 (1) ALT (Crl.) 233, the Apex Court observed:

'The dying declaration recorded by the Executive Magistrate is entitled to great weight. The doctor also endorsed that the patient was in condition of giving the statement. The Executive Magistrate in his evidence has clearly stated that he enquired the injured and recorded her statement as per her narration. In the cross-examination he admitted that he did not put different and separate questions. Learned Counsel for the appellant submitted that since the Executive Magistrate did not record the statement by way of questions and answers and recording is defective and, therefore, it should not be acted upon. There is no force in this submission. The form by itself is not important. The statement is clear. Because of the mere fact that the entire thing is not recorded by way of separate questions and answers, the value of the dying declaration is not detracted. Further, the Executive Magistrate in his evidence has clearly stated that this is the version given by the deceased. The other dying declarations are also to the same effect. None of these dying declarations suffer from any infirmity. They are also corroborated by medical evidence and other circumstantial evidence.'

The learned Additional Public Prosecutor made a serious attempt to support the judgment of the learned Metropolitan Sessions Judge on the strength of Ex. P-9 and the evidence available on record. In *Sreeram Murthy v. State of A.P.* III (1998) CCR 153 (SC)=VI (1998) SLT 506 =1998 CrL.J. 4063, the Apex Court held at para 5:

'What is contended by the learned Counsel for the appellant is that the declarations Ex. P.23 and Ex. P.33 ought not to have been relied upon as they contain improvements. He further pointed out that in the last dying declaration a clear attempt was made to involve the father of the appellant who has now been acquitted by the High Court. Because of some doubt arising therefrom the appellant's father was given benefit of doubt. That does not necessarily mean that it was not genuine. In any case, it does not have any bearing upon the genuineness and truthfulness of the first dying declaration-Ex. P.26, which was recorded by the Additional First Class Judicial Magistrate after ascertaining the physical and mental fitness of the person making it. In that declaration she has clearly stated that she was set on fire by her husband.'

29. In *Bakshish Singh v. State of Punjab*, : 1957 CriLJ1459 , it was held at para 5 as hereunder:

'Another reason given by the Additional Sessions Judge for rejecting the dying declaration was that the deceased gave the narrative of events in Punjabi and the statement was taken down in Urdu. In the Punjab that is how the dying declarations are taken and that has been so ever since the Courts were established and judicial authority has never held that to be an infirmity in dying declarations making them inefficacious.

As a matter of fact in the Punjab the language used in the subordinate Courts and that employed by the Police for recording of statements has always been Urdu and the recording of the dying declaration in Urdu cannot be a ground for saying that the statement does not correctly reproduce what was stated by the declarant. This, in our opinion, was a wholly inadequate reason for rejecting the dying declaration.'

30 In *State of Karnataka v. Shariff*, : 2003 CriLJ1254 , it was held at para 24 :

'We are a little surprised that the High Court took the view that having regard to the nature of injuries sustained by the deceased she could not have been in a position to make a statement. P.W. 12 Dr. K.M. Nagabhushan clearly recorded in the Accident Register that the patient was conscious, her orientation was good and that she answered well to the questions. He also noted that the pulse was

86/minute, CVS/RS was NAD. P.W. 5 Dr. Rangarajan before whom the statements of the victim were recorded by P.W. 11 and P.W. 14 on 24th and 26th July, 1986 respectively deposed that she was able to speak. He clearly stated that it is not true that the victim was not in a condition to make statement or that she was unconscious. In view of this clear statement of the Doctor that the victim was in a position to make a statement, the High Court, in our opinion, erred in discarding the dying declarations merely on the basis of her injury report and post-mortem examination report. P.W. 4 Dr. H.K. Manjunath who had performed the postmortem examination, had merely stated that he was not in a position to say if the victim was in a position to talk after sustaining the injuries and till she died. The last ground given by the High Court is regarding the language spoken by the deceased. P.W. 5 Dr. Rangarajan has stated in paras 2 and 3 of his statement that the victim was answering in Kannada language in which language her statement was recorded by P.W. 11 and P.W. 14. We are, therefore, of the opinion that the view taken by the High Court is wholly perverse and also contrary to settled principles of law and, therefore, cannot be sustained.'

31. In Chinnapattu Nagan v. State of A.P., 1999(2) ALT 460, it was held at para 6 as hereunder:

'The entire case is based on dying declarations. The first oral dying declaration was given by P.W. 2 by the deceased stating that she herself poured kerosene and set herself on fire. The second dying declaration of the deceased was recorded by P.W. 14 Magistrate. According to his evidence, on receipt of requisition received by him from the S.V.R.R. Hospital, Tirupati, he proceeded to the hospital and recorded her statement after putting formal questions. Ex. P-19 is the dying declaration. In Ex. P-19 it is stated by the deceased that the accused poured kerosene on her and set fire to her body as she refused to have sexual intercourse with him. Ex. P-19 is appended with a certificate of the fit state of mind of the deceased is used by the Doctor which states that the deceased was in a condition to give declaration. One more dying declaration which we have on record is alleged to have been recorded by Police Officer P.W. 9. According to his version, as soon as he received information regarding the offence in question, he rushed to the hospital and recorded the statement of the deceased under Section

161, Cr. P.C. which is admissible in evidence under Section 32 of the Evidence Act. The statement recorded is marked at Ex. P-5. In Ex. P-5, the deceased is alleged to have made a statement that the accused poured kerosene on her and set her fire when she refused to have sexual intercourse with him. This is all the evidence led by the prosecution to establish the guilt of the accused.

Considering the evidence on record, we can say that there are two dying declarations apart from the statement recorded under Section 161, Cr. P.C. One dying declaration is oral and the second dying declaration is written. Learned Counsel Mr. A.T.M. Rangaramanujam appearing for the accused appellant submitted at the Bar that when there are two sets of dying declarations inconsistent with each other, then the dying declaration which is in favour of the accused has to be accepted because in these two sets of dying declarations which is true and which is false cannot be inferred by any circumstance thus the benefit must go to the accused. We are in agreement with the submission made by learned Counsel. As a matter of fact, the oral dying declaration appears to be the first in time the deceased is alleged to have disclosed to P.W. 2 that her husband was not providing food and, therefore, she set herself fire by pouring kerosene. It appears from the record that the fire was sought to be put off by the people who gathered there including the neighbours and the daughter of the deceased. There was a chance for the interested witnesses to tutor the deceased the manner in which the dying declaration has to be given and, therefore, in our considered view the subsequent dying declaration involving the accused in crime appears to be an afterthought. As we have already observed above, the learned Public Prosecutor sought permission of the learned Sessions Judge to declare P.W. 2 hostile and further sought permission to crossexamine the witness. As stated earlier, the learned Public Prosecutor did not avail the opportunity of getting on record the contradictions of the witness and get them proved through the Investigating Officer. This is the lapse on his part.'

32. There cannot be any doubt or controversy to the effect that if the dying declaration is credible and trustworthy such dying declaration, even if it is uncorroborated, can be the basis for conviction. But, however, in the light of the discussion of the evidence in detail supra, the oral dying declarations made by the

deceased to P.W. 1 to P.W. 3 and also the dying declaration Ex. P-9 recorded by P.W. 10 and the evidence of D.W. 1 and the statement recorded in the case history sheet and also the conduct of the parties and the nature of evidence which had been let in through P.W. 1 to P.W. 3 and the fact that learned Sessions Judge had recorded acquittal relating to the charge under Section 498-A, I.P.C., Ex. P-9 cannot be said to be trustworthy and the same is highly doubtful and hence the conviction and sentence imposed by the learned Metropolitan Sessions Judge on the appellant/A-1, in our considered opinion, cannot be sustained. It is needless to say that the appellant/A-1 is acquitted of charge under Section 302, I.P.C. for which he was convicted and sentenced to undergo imprisonment for life by the learned Metropolitan Sessions Judge and he shall be set at liberty forthwith.

The criminal Appeal is accordingly allowed.

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