



HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.292 of 2014

*{Arising out of judgment dated 27-1-2014 in Sessions Trial No.186/2012  
of the 1<sup>st</sup> Additional Sessions Judge, Durg}*

1. Sumitra Bandhe, W/o Fagwa Ram Bandhe, aged about 43 years
2. Dilip Bandhe, S/o Fagwa Ram Bandhe, aged about 28 years.
3. Mamta Bandhe, D/o Fagwa Ram Bandhe, aged about 21 years.

All R/o Subhash Chowk, Dundera, P.S. Utai, District Durg (C.G.)

(In jail)

----- Appellants

Versus

State of Chhattisgarh, through District Magistrate, Durg, District  
Durg (C.G.)

----- Respondent

For Appellants: Mr. Praveen K. Dhurandhar, Advocate.  
For Respondent/State: Mr. Animesh Tiwari, Deputy Advocate General.

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

Judgment On Board  
(06/02/2023)

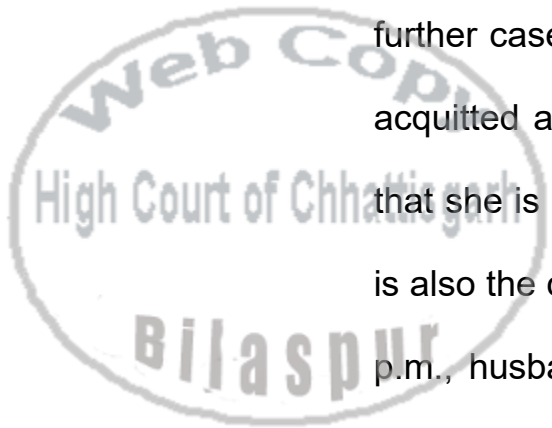
**Sanjay K. Agrawal, J.**

1. This criminal appeal preferred by the appellants herein namely Sumitra Bandhe (A-2), Dilip Bandhe (A-3) & Mamta Bandhe (A-4) under Section 374(2) of the CrPC is directed against the impugned judgment dated 27-1-2014 passed by the 1<sup>st</sup> Additional Sessions Judge, Durg, in Sessions Trial No.186/2012, by which while acquitting accused Faguwaram (A-1), the trial Court has convicted the present accused / appellants – A-2, A-3 & A-4 for offences under Sections 302 read with Section 34 & 498A of the IPC and



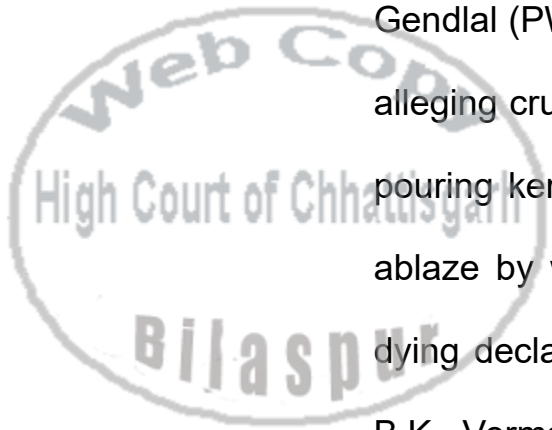
sentenced them to undergo imprisonment for life & pay a fine of ₹ 1,000/- each, in default, to further undergo additional rigorous imprisonment for one year and rigorous imprisonment for three years & fine of ₹ 500/- each, in default, additional rigorous imprisonment for six months, respectively. Both the sentences were directed to run concurrently.

2. Case of the prosecution, in short, is that marriage of deceased Ramabai was solemnized with appellant No.2 herein Dilip Bandhe (A-3) on 16-5-2005 and out of their wedlock, they were blessed with a boy child, who was 3 years old on the date of offence. It is the further case of the prosecution that the three appellants herein one acquitted accused used to quarrel with deceased Ramabai stating that she is not fit for their family and she does not work at home. It is also the case of the prosecution that on 19-7-2012 at about 10:00 p.m., husband of the deceased – Dilip Bandhe (A-3) came to the house in inebriated condition and started abusing the deceased and thereafter, he tried to strangulate her and thereafter, he poured kerosene oil over the body of the deceased and thereafter, mother-in-law of the deceased – Sumitra Bandhe (A-2) & sister-in-law of the deceased – Mamta Bandhe (A-4) set her ablaze by a matchstick and thereafter, she was rescued by her brother-in-law and another sister-in-law and subsequently, she was admitted to District Hospital, Durg and thereafter, she was readmitted to Sector-9 Hospital, Bhilai where during the course of treatment, she succumbed to the injuries sustained by her and died on 25-7-2012. On 20-7-2012, when the deceased was admitted to District





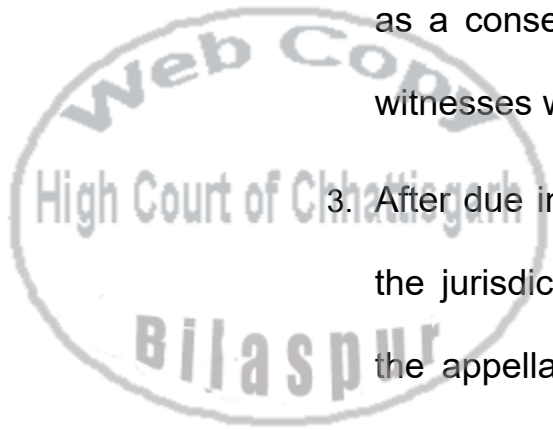
Hospital, Durg by her husband, Bhagwati Prasad (PW-3) – owner of the vehicle, Tilakram (PW-4) – neighbour & Naresh Kumar (PW-6) – neighbour, at that time, mother of the deceased – Gayatri Bai (PW-1) & father of the deceased – Gendlal (PW-7) visited District Hospital, Durg. On 21-7-2012, the deceased was again admitted to Sector-9 Hospital, Bhilai where she gave the medical history to Dr. Uday Kumar (PW-14) that she sustained burn injuries accidentally while cooking on a kerosene oil stove at about 11:00 p.m. on 19-7-2012 which was recorded in Ex.P-22 proved by Dr. Uday Kumar (PW-14). Thereafter, on 23-7-2012, written report was made by Gendlal (PW-7) – father of the deceased, to the police vide Ex.P-12 alleging cruel treatment on the part of the accused / appellants and pouring kerosene oil on the body of the deceased and setting her ablaze by which she suffered injuries. Thereafter, on 24-7-2012, dying declaration (Ex.P-17) was recorded by Executive Magistrate B.K. Verma (PW-9) at Sector-9 Hospital wherein the deceased implicated all the accused persons i.e. the three appellants herein (A-2 to A-4) and one acquitted accused (A-1) that they poured kerosene oil on her body and set her ablaze. Thereafter, dehati nalishi Ex.P-15 was recorded by Yoddha Prasad Deshmukh (PW-8) – Head Constable, on the instance of the deceased wherein it was informed that on the date of incident, husband of the deceased (A-3) poured kerosene oil over the body of the deceased and mother-in-law (A-2) & sister-in-law (A-4) set her ablaze by matchstick. Statement of the deceased under Section 161 of the CrPC was recorded by Yoddha Prasad Deshmukh (PW-8) vide Ex.P-32





wherein the deceased has implicated the appellants herein in the offence in question. Thereafter, on 24-7-2012, FIR was registered by Yoddha Prasad Deshmukh (PW-8) vide Ex.P-16 for offence punishable under Section 307 read with Section 34 of the IPC and on the next day i.e. 25-7-2012 at 10:30 p.m., the deceased died during treatment at Sector-9 Hospital, Bhilai and morgue intimation was recorded vide Ex.P-22 by Smt. Baby Nanda (PW-13) – ASI. Inquest was prepared vide Ex.P-14 and dead body was subjected to postmortem vide Ex.P-18 conducted and proved by Dr. Vipin Jain (PW-10) who opined that cause of death was septicemia and shock as a consequence of antemortem burn injury. Statements of the witnesses were recorded under Section 161 of the CrPC.

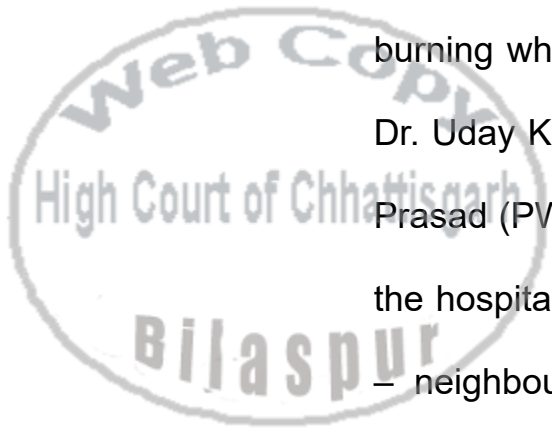
3. After due investigation, the appellants were charge-sheeted before the jurisdictional criminal court and charges were framed against the appellants herein and one acquitted accused under Sections 302 read with Section 34 & 498A of the IPC and the case was committed to the Court of Sessions, Durg from where the learned 1<sup>st</sup> Additional Sessions Judge, Durg, 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 15 witnesses PW-1 to PW-15 in support of its case and exhibited 32 documents Exs.P-1 to P-32. Defence has examined five witnesses DW-1 to DW-5 in support of its case and exhibited 19 documents Exs.D-1 to D-19. 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.

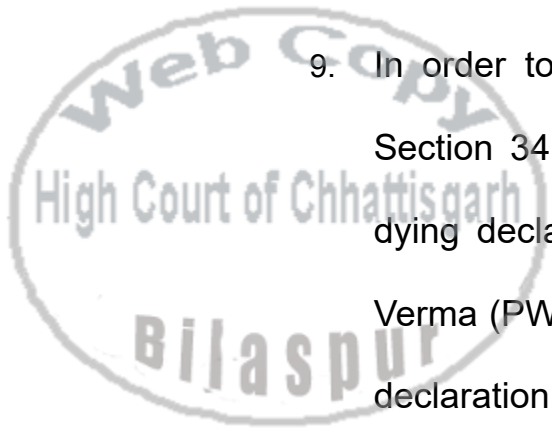
5. The trial Court after completion of trial and upon appreciation of oral and documentary evidence on record, by its impugned judgment, while acquitting accused Faguwaram (A-1), convicted and sentenced the appellants herein as mentioned in the opening paragraph of this judgment which is sought to be challenged in this criminal appeal preferred under Section 374(2) of the CrPC by the appellants.
6. Mr. Praveen K. Dhurandhar, learned counsel appearing for the appellants, would submit that the deceased died due to accidental burning which is proved by Ex.P-22 – bed head ticket recorded by Dr. Uday Kumar (PW-14) as well as by the statements of Bhagwati Prasad (PW-3) – vehicle owner, who accompanied the deceased to the hospital, Tilakram (PW-4) – neighbour & Naresh Kumar (PW-6) – neighbour, who also have accompanied the deceased to the hospital and to whom she has made oral dying declaration stating that she suffered burn injuries by accident. Furthermore, dying declaration Ex.P-17 was recorded without there being any certificate by doctor to be mentally and physically fit, particularly in presence of Gayatri Bai (PW-1) – mother & Gendlal (PW-7) – father of the deceased; the deceased was under their influence and no medical certificate was attached that she was in fit mental state to give statement. Even the dying declaration in form of dehati nalishi Ex.P-15 is a suspicious and doubtful document. As such, the appeal, 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. Animesh Tiwari, learned State counsel, would support the impugned judgment and submit that the trial Court is absolutely justified in convicting the appellants for the aforesaid offences as the prosecution has proved the offences against the appellants beyond reasonable doubt and as such, 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. In order to convict the appellants under Sections 302 read with Section 34 & 498 of the IPC, the trial Court has relied upon the dying declaration Ex.P-17 recorded by Executive Magistrate B.K. Verma (PW-9) as well as the dehati nalishi Ex.P-15 – second dying declaration, to base its conviction.
10. The question for consideration would be, whether the dying declaration recorded vide Ex.P-17 by Executive Magistrate B.K. Verma (PW-9) and the second dying declaration – dehati nalishi recorded by Yoddha Prasad Deshmukh (PW-8) – Head Constable vide Ex.P-15 during the course of treatment, would be relevant under Section 32 of the Evidence Act?
11. 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 the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**<sup>1</sup> 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**<sup>2</sup> reviewing the earlier authorities. In **Sharad Birdhichand** (supra), following propositions have been held:

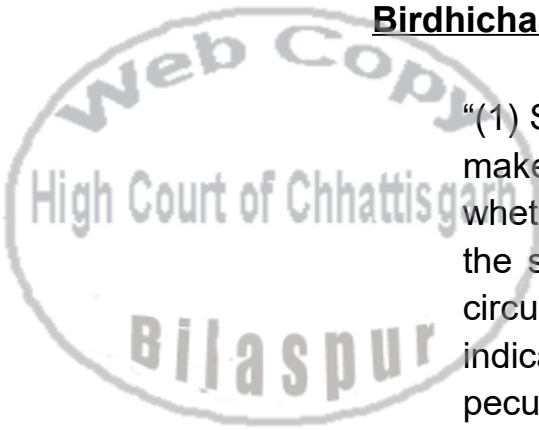
“(1) Section 32 is an exception of the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in 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

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1 AIR 1984 SC 1622

2 AIR 2000 SC 2324





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. Before considering the dying declaration Ex.P-17 recorded by Executive Magistrate B.K. Verma (PW-9) and the second dying declaration Ex.P-15 recorded by Yoddha Prasad Deshmukh (PW-8) – Head Constable, it would be appropriate to refer to Ex.P-22, which is the bed head ticket of Sector-9 Hospital, Bhilai, wherein the deceased was admitted on 21-7-2012 at 3:30 p.m. and was treated by Dr. Uday Kumar (PW-14) who recorded the medical history of the deceased where the deceased herself has informed that she sustained burn injuries accidentally during cooking by







kerosene oil stove. Dr. Uday Kumar (PW-14), who treated and got admitted the deceased in the hospital, in paragraphs 3 & 6 of his statement before the Court has clearly stated that on being asked from the deceased, she has clearly informed him that she sustained burn injuries while cooking on the kerosene oil stove which has duly been recorded in Ex.P-22. He has further stated that father & mother of the deceased – Gayatri Bai (PW-1) & Gendlal (PW-7) have not stated anything to him as to how the deceased sustained burn injuries.

13. In the matter of **Devinder alias Kala Ram and others v. State of Haryana**<sup>3</sup>, 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: -

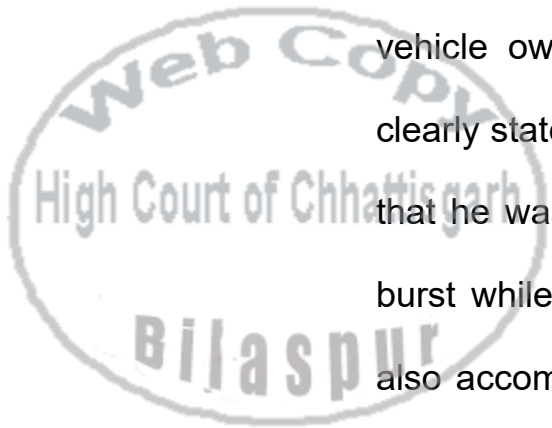
“14. In the facts of the present case, we find that PW 7, the Medical Officer of the Civil Hospital, examined the case of the deceased on 6-8-1992 at 6.30 a.m. and he has clearly stated in his evidence that on examination she was conscious and that there were superficial to deep burns all over the body 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

<sup>3</sup> (2012) 10 SCC 763



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.”

14. Reverting to the facts of the present case in light of the statement of Dr. Uday Kumar (PW-14), who has recorded the medical history of the deceased vide Ex.P-22 in his own words that she suffered burn injuries while cooking on the kerosene oil stove, this statement of the deceased recorded by Dr. Uday Kumar (PW-14) is relevant under Section 32 of the Evidence Act. Apart from this, Bhagwati Prasad (PW-3), who is one of the prosecution witnesses and is the vehicle owner who accompanied the deceased to hospital, has clearly stated in paragraphs 2 & 5 of his statement before the Court that he was informed by the deceased that her cooking stove got burst while cooking. Similarly, Tilakram (PW-4) – neighbour, who also accompanied the deceased to hospital, in paragraph 2 of his statement before the Court, has stated that when the deceased was admitted in the hospital, she informed the doctor that the incident took place due to burst of stove. Similarly, Naresh Kumar (PW-6), who is also neighbour, in paragraph 2 has stated that when the deceased was admitted in the hospital, she informed the doctor – Dr. Uday Kumar (PW-14) that the incident took place due to burst of stove. As such, the statement of Dr. Uday Kumar (PW-14) that the deceased made oral dying declaration to him vide Ex.P-22 at the time of admission in hospital is further corroborated by the statements of Bhagwati Prasad (PW-3), Tilakram (PW-4) & Naresh Kumar (PW-6) and nothing has been brought on record that the





statements made by Dr. Uday Kumar (PW-14), Bhagwati Prasad (PW-3), Tilakram (PW-4) & Naresh Kumar (PW-6) are incorrect statements; though Bhagwati Prasad (PW-3), Tilakram (PW-4) & Naresh Kumar (PW-6) have been declared hostile and though they have been confronted with their statements recorded under Section 161 of the CrPC, but despite having been asked leading questions to them, nothing has been brought on record to hold that their statements are unacceptable to the Court.

15. At this stage, it would be appropriate to consider the two dying declarations Exs.P-17 & P-15 projected by the prosecution and found proved by the trial Court.

16. The first dying declaration is Ex.P-17 which has been recorded by B.K. Verma (PW-9) – Executive Magistrate. It states as under: -

“मरणासन्न कथन”

स्थान सेक्टर 9 अस्पताल  
वार्ड नं. H-3  
बेड नं. 32  
दिनांक 24-07-2012  
समय 03-30 pm

थाना प्रभारी थाना उतई जिला दुर्ग से तहदीद एवं डाक्टर महोदय द्वारा मरीज रमा बाई पति दिलीप के कथन देने योग्य टिप्पणी के पश्चात मरणासन्न कथन दर्ज किया । डाक्टर महोदय का अभिमत संलग्न है।

प्रश्न	उत्तर
आपका नाम क्या है	रमा
पति का नाम क्या है	दिलीप
उम्र	23 वर्ष
कहां रहती हो	डुन्डेरा, थाना ऊतई
क्या घटना घटी	पिछले गुरुवार को रात्रि लगभग 10-00 बजे मेरे पति शराब पीकर आया एवं मुझसे झगड़ा एवं मारपीट करने लगा। घर से निकल जा कहने लगा। इसके बाद मेरा



	गला भी दबाया एवं मिट्टी तेल लाकर मेरे ऊपर डाल दिया। यह घटना रात्रि के लगभग 10-30 बजे के आसपास का है। फिर मेरी सास एवं ननद दोनो ने मिलकर माचिस जला दिया जिससे मैं जल गई।
आपके सास एवं ननद का नाम क्या है	मेरी सास का नाम सुमित्रा एवं ननद का नाम ममता है।
फिर क्या हुआ	मुझे जलाने के बाद मेरे देवर एवं ननद मेरे ऊपर पानी डाले
आपके देवर एवं ननद जो आपके ऊपर पानी डाले उसका नाम क्या है	देवर का नाम राजा एवं ननद का नाम अनिता है।
आपको अस्पताल लेकर कौन आया	गांव वाले गुरुवार के रात को लगभग 3-00 बजे प्राईवेट गाड़ी करके पति, सास एवं ग्राम डुन्देरा के 2-3 लड़के मुझे शासकीय अस्पताल दुर्ग लाये। लड़कों का नाम मुझे नहीं मालूम। फिर शनिवार को मुझे शासकीय अस्पताल दुर्ग से सेक्टर 9 अस्पताल लेकर आये।
और कुछ कहना है	पूर्व में भी मेरे पति मुझसे झगड़ा-लड़ाई करते थे। मायके से पैसा कौड़ी लाने को कहते थे। घटना के दिन सवेरे 9-00 बजे मेरे ससुर भी आये थे और बेटी लोगों को बोलकर गये कि झगड़ा लड़ाई करने पर जला देना।
आपने अपने आप को खुद तो नहीं जलाया	मैंने अपने आप को नहीं जलाया

पढा, सुना, समझा हस्ताक्षर किया

सही

24-07-12

समय 4-00 pm

(बी.के. वर्मा)

ना.तह. एवं

कार्यपालिक दण्डाधिकारी, दुर्ग, छ.ग.

टीप - कथन लेते समय उनके परिजन एवं पुलिस वाला उपस्थित नहीं था।

17. A careful perusal of the aforesaid dying declaration (Ex.P-17) would show that it has been recorded by Executive Magistrate B.K. Verma (PW-9) in Sector-9 Hospital, Bhilai, Ward No.H-3, Bed No.32. In the opening paragraph of the dying declaration, it has been stated that opinion of doctor is attached, but with the dying declaration there is no opinion of the doctor attached and when it has been confronted to B.K. Verma (PW-9), he has stated that the opinion of the doctor that the deceased was in a position to give dying



declaration was not with him and he has given it to the police, but the fact remains that no such opinion of the doctor has been brought on record by the prosecution which would show that opinion of the doctor was not obtained before recording dying declaration of the deceased particularly when the deceased has suffered 80-85% burn injuries.

18. The Supreme Court in the matter of **Laxman v. State of Maharashtra**<sup>4</sup> (Constitution Bench) has clearly held that a certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise and observed as under:

“3. ... Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

19. Following the principles of law laid down by their Lordships of the Supreme Court in **Laxman** (supra), recently in the matter of **Jagbir Singh v. State of NCT**<sup>5</sup>, it has been held by the Supreme Court that even absence of the certificate by a doctor is not fatal to act upon a dying declaration. However, the requirement remains that the person who records the dying declaration must ensure that the patient was in a fit condition, both mentally and physically, to give the declaration. It is held as under :

4 (2002) 6 SCC 710

5 (2019) 8 SCC 779





“38. The first question, one must bear in mind, is whether the deceased was in a physical and mental condition to make a dying declaration. It is not in dispute that in the dying declaration dated 27.01.2008, there is no certificate by the Doctor certifying that the patient was conscious or that the patient was mentally or physically fit to give the declaration. The patient was, in fact, admittedly lying in the hospital. Even in the narrative of the dying declaration, there are no questions seen put by PW29 to ascertain her condition. Undoubtedly, it is true that the certificate by a Doctor about the patient being conscious and fit to give a dying declaration would go a long way in inspiring confidence of the court. However, the Constitution Bench in *Laxman v. State of Maharashtra* (2002) 6 SCC 710 has held as follows :

“3. ... Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

39. We can proceed on the basis that even absence of the certificate by a Doctor is not fatal to act upon a dying declaration. However, the requirement remains that the person who records the dying declaration must ensure that the patient was in a fit condition, both mentally and physically, to give the declaration.”

20. Reverting to the facts of the case in hand in the light of the judgment of the Supreme Court in **Laxman** (supra) followed with approval in **Jagbir Singh** (supra), it is quite vivid that though Executive Magistrate B.K. Verma (PW-9) is said to have obtained the medical certificate of fitness of the deceased before recording the statement, but no such certificate has been brought on record along with the dying declaration of the deceased for the reasons best known to the prosecution and even otherwise, Shri B.K. Verma





(PW-9) – Executive Magistrate did not say that the patient was in fit condition both mentally and physically to give dying declaration. As such, the principles laid down by their Lordships of the Supreme Court in **Laxman** (supra) and **Jagbir Singh** (supra) have not been followed in principle, particularly in a case where the deceased / injured suffered 80-85% deep burn injuries. Accordingly, in absence of certificate by the doctor and in absence of any satisfaction recorded by B.K. Verma (PW-9) – Executive Magistrate, it would be unsafe to rely upon the dying declaration Ex.P-17, more particularly when the learned Executive Magistrate has recorded a note in the bottom of the dying declaration that while recording the statement, relatives of the deceased and police persons were not present which is falsified from the fact that Gayatri Bai (PW-1) – mother of the deceased, in her statement before the Court in paragraph 6 has clearly stated that at the time of recording dying declaration she was sitting with her daughter holding her and at that time, the Executive Magistrate, the doctor and the police, all were present, which is corroborated by the statement of Gendlal (PW-7) – father of the deceased in paragraph 18.

21. The Supreme Court in the matter of **State of Gujarat v. Jayrajbhai Punjabhai Varu**<sup>6</sup>, has held that the Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording

<sup>6</sup> AIR 2016 SC 3218

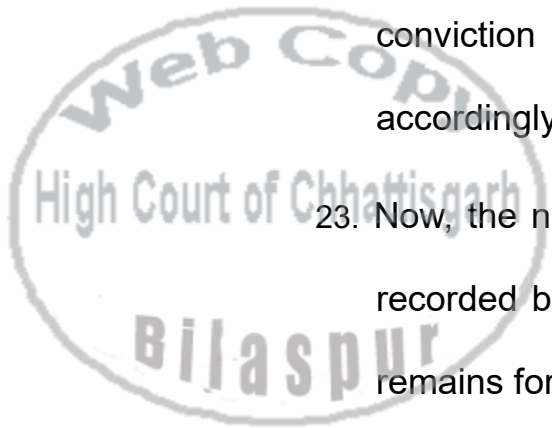


the dying declaration. It has been further held that the Courts must bear in mind that each criminal trial is an individual aspect.

22. Thus, in absence of certification by doctor and in absence of any satisfaction recorded by the Executive Magistrate while recording the dying declaration that the deceased was mentally and physically in fit condition to make dying declaration, and presence of parents of the deceased at the time of making dying declaration especially the mother holding her and presence of police personnel at the time of making dying declaration, as possibility of her being influenced cannot be ruled out and it would be unsafe to base conviction on the dying declaration Ex.P-17 and we hold so accordingly.

23. Now, the next dying declaration Ex.P-15 in shape of dehati nalishi recorded by Yoddha Prasad Deshmukh (PW-8) – Head Constable remains for consideration.

24. It is appropriate to mention here that dying declaration of the deceased was recorded by the Executive Magistrate – B.K. Verma (PW-9) vide Ex.P-17 on 24-7-2012 at 3:30 p.m. on the request of the investigating agency and thereafter, all of a sudden, on the same day at 4:45 p.m., dying declaration was recorded by Yoddha Prasad Deshmukh (PW-8) – Head Constable in the form of dehati nalishi Ex.P-15. Since dying declaration was already recorded by the Executive Magistrate on 24-7-2012 few hours prior to recording of dehati nalishi, we fail to understand what persuaded the Head Constable to record the statement of the injured victim without having any certificate from any doctor qua her fitness and without







there being any necessity to record the dying declaration once having been recorded by the competent authority authorised to record the dying declaration.

25. At this stage, it would be beneficial to take note of the decision of the Supreme Court in the matter of **Dalip Singh and others v. State of Punjab**<sup>7</sup> in which their Lordships of the Supreme Court have dealt with the admissibility of dying declaration recorded by police officer during investigation and held as under: -

“Although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor.

The practice of Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. It is not that such dying declarations are always untrustworthy, but better and more reliable methods of recording dying declarations of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.”

26. In that view of the matter, we hereby hold that the dying declaration Ex.P-15 was totally unnecessary and uncalled for in light of the decision of the Supreme Court in **Dalip Singh** (supra).
27. In view of the aforesaid discussion, we are unable to sustain the conviction of the appellants under Sections 302 read with Section 34 & 498A of the IPC, as the conviction is not well merited. As

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<sup>7</sup> (1979) 4 SCC 332



such, conviction and sentences imposed upon the appellants under Sections 302 read with Section 34 & 498A of the IPC are liable to be set-aside and are hereby set-aside. The appellants are acquitted of the said charges. Since they are in jail, we direct that they be set at liberty forthwith if not required to be detained under any other process of law.

28. The appeal is allowed accordingly.

Sd/-  
(Sanjay K. Agrawal)  
Judge

Sd/-  
(Radhakishan Agrawal)  
Judge

Soma





Head Note

In case, the Executive Magistrate records the dying declaration of the declarant, it would not be appropriate for police officer to re-record the dying declaration of the declarant at any subsequent point of time.

कार्यपालक मजिस्ट्रेट द्वारा घोषणाकर्ता के मृत्युकालिक कथन को अभिलिखित कर लिये जाने पर, पुलिस अधिकारी के लिये यह समुचित नहीं होगा कि वह घोषणाकर्ता के मृत्युकालिक कथन को किसी पश्चात्कर्ती समय पर पुनः अभिलिखित करें।

