Court No.48

Criminal Appeal No. 2834 of 1988

1. Mushtkim @ Pappu

….....Appellant

Vs

State of U.P. ….....Respondent

For Appellant : Sri M.F. Ansari and Sri Ajay Kumar Pandey, Advocates.

For Respondent : Sri Amit Sinha, AGA

Hon'ble Pritinker Diwaker, J.
Hon'ble Raj Beer Singh, J.

Per: Pritinker Diwaker, J

(15.10.2019)

1. This appeal arises out of impugned order and judgment dated 09.12.1988 passed by VIIth Additional Sessions Judge, Meerut in Sessions Trial No. 96 of 1988 convicting the appellant under Section 302 and 498A of IPC and sentencing him to undergo rigorous life imprisonment under Section 302 and one year rigorous imprisonment under Section 498A, with a direction that both the sentences shall run concurrently.

2. In the present case, name of the deceased is Khalida Begum wife of the accused-appellant. Their marriage was solomnised on 01.04.1985 and she died in her matrimonial house on 09.11.1987 after suffering 95% burn injuries. On 31.10.1987 itself, on the basis of written report Ex.Ka-1 lodged

by PW-1, Nisar Ahmad, father of the deceased, FIR Ex.Ka-4 was registered against the accused-appellant and two acquitted accused under Sections 307 and 498A of IPC. On 31.10.1987 itself, dying declaration of the deceased Ex.Ka-3 was recorded by PW-5, Mukesh Kumar Gupta, Executive Magistrate wherein she has categorically stated that she was burnt by the appellant. On 01.11.1987, case diary statement Ex.Ka-14 of the deceased was recorded in which also she named the appellant to be the accused. Likewise, on 02.11.1987, in another diary statement of the deceased Ex.Ka-15, she has stated that she was burnt by the appellant. Deceased also made oral dying declaration before PW-4, Shajda Begum implicating the appellant as the main accused.

3. After the death of the deceased, inquest on her dead body was conducted on 9.11.1987 vide Ex.Ka-16 and the body was sent for post-mortem which was conducted on 10.11.1987 by PW-3, Dr. S.C. Gupta vide Ex.Ka-2.

4. As per Autopsy Surgeon, following ante-mortem injuries were found on the body of deceased:

(I) superficial to deep burn present on whole body except lower part of abdomen, genatal region and a small portion of back i.e. inter scapula region of left side into supra scapula region of left side.

(II) cut open mark present on right leg inner and lower one third.

The cause of death of the deceased was due to shock as a result of extensive burn.

5. While framing charge, the trial judge has framed charge against accused-appellant under Sections 302, 304B and 498A of IPC whereas against two acquitted accused namely Mohd. Mohsin and Smt. Amna, charges were framed under Sections 304B/34 and 498A/34 of IPC.

6. So as to hold accused persons guilty, prosecution has examined nine

witnesses, whereas three defence witnesses have also been examined. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which they pleaded their innocence and false implication.

7. By the impugned judgment, the trial judge has acquitted co-accused Mohsin and Smt. Amna of all the offences, whereas appellant has been convicted under Section 302 and 498A of IPC. Hence this appeal.

8. Learned counsel for the appellant submits:-

(I) that on the same set of evidence, once co-accused has been acquitted, the trial court was not justified in convicting the appellant.

(II) that dying declaration of the deceased Ex.Ka-3 recorded by the Executive Magistrate is not reliable as at the time of making the said statement, the deceased was not in a fit state of mind. Learned counsel submits that endorsement made by the Doctor in dying declaration has been obtained after it was recorded and, therefore, it has no legal sanctity.

(III) that diary statements Ex.Ka-14 and Ex.Ka-15 of the deceased are nothing but concocted piece of evidence.

(IV) that deceased died an accidental death but unfortunately appellant has been made escape goat just because he happens to be the husband of the deceased.

(V) that it is the appellant, who hospitalized the deceased and, therefore, even assuming that any such incident had taken place, case of the appellant would not fall under Section 302 of IPC.

9. On the other hand, supporting the impugned judgment, it has been argued by the State Counsel:

(I) that conviction of the appellant is in accordance with law and there is no infirmity in the same.

(II) that there is no reason for this Court to disbelieve the dying declaration Ex.Ka-3 of the deceased recorded by PW-5, Mukesh Kumar Gupta, Executive Magistrate. He submits that 161 Cr.P.C. statements of the deceased Ex.Ka-14 and Ex.Ka-15 are to be treated as her dying declaration after her death.

(III) that the oral dying declaration was also made by the deceased before PW-4, Shajda Begum and that also supports the prosecution case.

(IV) that the mere fact that the appellant hospitalized the deceased, will not give him any leniency because after the incident, the appellant may have felt fear in his mind of being punished by the police and that is why, he hospitalized the deceased. In any case, the heinous act of the appellant cannot be diluted just because he hospitalized the deceased.

10. We have heard learned counsel for the parties and perused the record.

11. PW-1, Nisar Ahmad is a father of the deceased and the informant, has stated that marriage of the deceased was solemnized with the appellant on 01.04.1985 and in the marriage, sufficient dowry was given by him. Since beginning, accused persons used to harass the deceased for demand of various articles like fridge and motorcycle. On 31.12.1987, he came to know about the incident and then he lodged the report.

12. PW-2, Bharat Singh, Constable, took the body for postmortem.

13. PW-3, Dr. S.C. Gupta, conducted postmortem on the body of the deceased and noticed 90% to 95% burn injuries on the body of the deceased.

14. PW-4, Shajda Begum, is the mother of the deceased, states that since the date of marriage, the deceased was subjected to cruelty for demand of dowry and various articles were given to her. She further states that the deceased made oral dying declaration before her as to the manner in which she was burnt. In cross-examination, this witness was subjected to various questions including tricky ones but she remained firm and has reiterated as

to the manner in which the deceased discloses her about the incident and the ill-treatment meted to her.

15. PW-5, Mukesh Kumar Gupta, is the Executive Magistrate, who recorded the dying declaration of the deceased. He has stated that before recording the dying declaration of the deceased, he obtained medical certificate of the deceased from the Doctor and only after due certification, he recorded the statement in which the deceased had disclosed that she was burnt by the accused-appellant. He has duly proved the dying declaration Ex. Ka-3.

16. PW-6, Bhagat Singh Visth, has recorded the FIR.

17. PW-7, Ahsan Ilahi, is a maternal uncle of the deceased, has stated that he saw accused-appellant burning the deceased and that after the incident deceased was crying and shouting by saying that she was burnt by other two accused persons.

18. PW-8, G.S. Verma, is an Investigating Officer. He also recorded the diary statement of the deceased Ex.Ka-14 and Ex.Ka-15, wherein deceased has stated as to the manner in which she was burnt by the appellant.

19. PW-9, Dr. V.P. Goel, medically examined the deceased when she was first admitted in Chaurasiya Nursing Home and he has also proved the injury report of the deceased Ex.Ka-25. This witness has also proved the fitness certificate of the deceased given by him at the time of recording the dying declaration by the Executive Magistrate.

20. DW-1, Hafizuddin, has stated that in the marriage of appellant and the deceased, no dowry was settled and that the couple was living happily.

21. DW-2, Matin has stated that it is the appellant, who extinguish the fire.

22. DW-3, Dr. S.K. Singh, has stated that after injecting pathedrin and calmpose, patient would be semi-conscious. He, however, has stated that even in the case of 100% burn injury, at times, patient can speak and can

also keep quiet.

23. Before we appreciate the evidence adduced by the prosecution, we feel it appropriate to refer certain judgments of the Apex Court governing the law of the dying declaration.

24. In **State of Gujarat v. Jayrajbhai Punjabhai Varu**[1], the Supreme Court held as under:

> *"15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross- examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. 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 the dying declaration.*
>
> *16. In the case on hand, there are two sets of evidence, one is the statement/declaration made before the police officer and the Executive Magistrate and the other is the oral dying declaration made by the deceased before her father who was examined as PW-1. On a careful scrutiny of the materials on record, it cannot be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent herein in the commission of the offence and in such circumstances, one set of evidence which is more consistent and reliable, which in the present case being one in favour of the respondent herein, requires to be accepted and conviction could not be placed on the sole testimony of PW-1.*

1 (2016) 14 SCC 151

17. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

18. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

19. On appreciation of evidence on record, we are of the considered view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent herein in the commission of offence. From a perusal of the statement recorded by Bhiku Karsanbhai, P.S.O., the thumb impression of Rekhaben (since deceased) which had been identified by her father-Sri Vala Jaskubhai

Suragbhai as also his cross-examination in which he admitted that police had already come there and he had identified her thumb impression and Mamlatdar had gone inside to record statement, there is no reason as to why Rekhaben would give names of her husband and her in- laws in the alleged statement given to her father. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. 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 tutoring, prompting or a product 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 base its 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.

20. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted."

25. In **Gaffar Badshaha Pathan v. State of Maharashtra**[2],it was held as

2 (2004) 10 SCC 589

under:

> *"5. Dr. A.U. Masurkar was the Chief Medical Officer of the hospital at the relevant time. The High Court has held that the recording of the dying declaration and story stated therein apparently appears to be false and concocted for the various reasons noticed in the impugned judgment. It has to be borne in mind that the fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted. The fact that the statement of the deceased was recorded at about 9.00 p.m. by the Head Constable cannot be doubted though an attempt to the contrary seems to have been made by the prosecution. The statements of the prosecution witnesses (PW 5 and PW 11) also show that the statement was recorded by the Head Constable. According to PW 5, it was only a show made by the Head Constable of recording statement, since according to the said witness, the deceased was not in a position to speak at that time. Even PW 11, a doctor in the hospital, has deposed about the recording of the statement by the Head Constable though he has not formally proved the dying declaration but has certified the correctness of the endorsement of Dr. A.U. Masurkar on the dying declaration. PW 11 was shown the dying declaration. He has deposed that the certificate recorded on the dying declaration is in the handwriting of Dr. Masurkar, Chief Medical Officer of the hospital. He has further deposed that Dr. Masurkar is in the hospital since the last 12 to 15 years and that he had degree in MS and was estimated to be an honest and expert surgeon of the area. One of the reasons which had strongly weighed with the High Court in rejecting the dying declaration is that the endorsement of the doctor is only about*

the deceased lady being conscious and not that she was in a fit condition to make the statement. The High Court went into distinction between consciousness and fitness to make statement. On the facts of the present case, we are unable to sustain the approach adopted by the High Court. It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. Under these circumstances, the dying declaration could not have been rejected on the ground that it does not contain the endorsement of the doctor of the fitness of the lady to make the statement as the certificate of the doctor only shows that she was in a conscious state. The endorsement of the doctor aforequoted is not only about the conscious state of the lady but is that she made the statement in a conscious state."

26. In **P. Mani v State of Tamilnadu**[3], while considering the suspicious dying declaration, it has been held by the Apex Court that the conviction can be based solely on the basis of dying declaration alone, but the same must be wholly reliable and trustworthy. Para 14 of the said judgment reads thus:

"14. Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regard the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on records suggests that such dying declaration does not reveal the entire truth, it may be

3 2006 (3) SCC 161

> *considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on records clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the Appellant has been charged under Section 302 of the Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused."*

27. In **Lakhan v. State of MP**[4], the Supreme Court after discussing number of judgments on the point of dying declarations summarized the law in this regard, as under:

> *"20. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and*

4 (2010) 8 SCC 514

there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

28. In **Shudhakar v. State of MP**[5], the Supreme Court held as under:

"18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

> *"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with.*

5 (2012) 7 SCC 569

Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man

> *about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. 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."*

29. In **Ramakant Mishra v. State of UP**[6], the Supreme Court observed as under:

> *"9. Definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:*
>
> *"Dying Declarations - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged*

6 (2015) 8 SCC 299

or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. Shepard v. U.S., Kan., 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196.

Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. Fed. Evid.R. 804 (b) (2).

10. When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration."

24. In the present case, the dying declaration of the deceased Ex.Ka-3 recorded by PW-5, Executive Magistrate reads as under:-

" थानाध्यक्ष कोतवाली की सूचना पर मैं मुकेश कुमार गुप्ता सिटी मजिस्ट्रेट मेरठ चौरसिया नर्सिगं होम पर रोगी श्रीमती खालिदा का बयान लेने पहुॅचा। मौके पर

उपस्थित डा0 की राय पर कि रोगी बयान देने में मानसिक व शारीरिक रूप से स्वस्थ है रोगी का बयान लेना प्रारम्भ किया। रोगी से प्रश्न पूछे गये जिसके उत्तर निम्न हैं।

प्रश्न 1– मैं मजिस्ट्रेट बयान लेने आया हूँ क्या आप समझ रही हैं।

उत्तर– हॉ

प्रश्न – आपके साथ क्या घटना घटित हुई ?

उत्तर– आज करीब 1 1/2 –2 बजे जब मेरे घर पर मेरे आदमी के अलावा कोई नहीं था, मेरे पति ने मेरे उपर मिट्टी का तेल छिड़क दिया तथा आग लगा दी। आग लगाने के बाद मैनें शोर मचाया, मौहल्ले वाले लोग आ गये। उसके उपरान्त मेरे पति ही मुझे इस नर्सिंग होम में लाये।

प्रश्न – आप अपना बयान सोच समझकर दे रही हो?

उत्तर– मैं बयान सोच समझकर दे रही हूँ। मेरे पति ने ही मुझे जलाया है।

प्रश्न– पति ने तुम्हें क्यों जलाया ?

उत्तर– मैं खर्चे के लिए पैसे मांगती थी। इसी कारण से मेरे पति ने मुझे जला दिया। 7:15

ह0 अपठनीय

31.10.87

City Magistrate

Meerut "

25. The above dying declaration has been recorded by the PW-5, Mukesh Kumar Gupta, Executive Magistrate and has been duly endorsed by PW-9, Dr. V.P. Goel. In the Court, PW-5, Executive Magistrate has categorically stated that it is he, who recorded the dying declaration after obtaining the certificate from the Doctor and likewise PW-9, V.P. Goel, who gave the certificate, has also affirmed this fact that after his certificate, dying declaration was recorded by the Executive Magistrate. Considering the evidence available on record, we have absolutely no doubt about the authenticity of the dying declaration recorded by PW-5, Mukesh Kumar Gupta, Executive Magistrate.

26. From the contents of the dying declaration, it is apparent that it is the appellant who burnt the deceased after pouring kerosene oil on her. Apart from the above dying declaration, the investigating officer recorded two diary statements of the deceased on 1.11.1987 and 2.11.1987 vide Ex. Ka-14 and Ex.Ka-15. These two documents have been duly proved by the investigating officer. It is a settled proposition of law that after the death of the deceased, her statement recorded under Section 161 Cr.P.C. can be treated as her dying declaration.

In the present case, diary statements of the deceased were recorded on 01.11.1987 and 2.11.1987 and she died on 09.11.1987. After the death of the deceased, these two statements made by the deceased becomes her dying declaration. Law in this respect is well settled.

30. In **Rafique alias Rauf and Ors. Vs. State of Uttar Pradesh**[7]**,** the Apex Court held as under:

> *"16. The important question for consideration, therefore, is whether the said statement made by the deceased can be taken as a dying declaration and reliance can be placed upon the same.*
>
> *17. The High Court while relying upon the said statement has noted certain circumstances, namely, the evidence of P.W.6, Investigating Officer, who deposed that the deceased was fully conscious when he was brought to the police station with injuries on his face, chest and other parts of the body and that he recorded his statement. It was also noted that after recording his statement the Investigating Officer referred him to the hospital for medical examination and treatment. The High Court, thereafter, noted the evidence of P.W.5 the postmortem doctor who categorically stated in his cross-examination that the injured was also in a position to speak and that it was not necessary that in all cases after sustaining injury in the brain a person cannot retain his conscience or will not be in a position to speak. The High Court noted the further statement of the doctor that it is not necessary that in every such case the patient would immediately go to a coma stage.*
>
> *18. The High Court, therefore, reached a conclusion that the deceased Zahiruddin, was in a position to speak and that the*

7 (2013) 12 SCC 121

statement under Ext.Ka-9 was given by him who expired on the next day evening. It further stated that since it was the last statement of the deceased to the Investigating Officer it can very well be treated as a dying declaration. The High Court was conscious of the fact that the trial Court did not place any reliance on the said statement which in the opinion of the High Court was erroneous.

19. In this context when we make reference to the statutory provisions concerning the extent of reliance that can be placed upon the dying declaration and also the implication of Section 162(2) Cr.P.C. vis-à-vis Section 32(1) of the Evidence Act, 1872, we feel that it will be appropriate to make a reference to the decision of this Court reported in Khushal Rao vs. State of Bombay - AIR 1958 SC 22. Justice Sinha speaking for the Bench after making further reference to a Full Bench decision of the High Court of Madras headed by Sir Lionel Leach, C.J., a decision of the Judicial Committee of the Privy Council and 'Phipson on Evidence' – 9th Ed., formulated certain principles to be applied to place any reliance upon such statements. We feel that the substance of the principles stated in the Full Bench decision and the Judicial Committee of the Privy Council and the author Phipson's view point on accepting a statement as dying declaration can also be noted in order to understand the principles ultimately laid down by this Court in paragraph 16.

20. The Full Bench of the Madras High Court in Guruswami Tevar - AIR 1940 Mad 196 in its unanimous opinion stated that no hard-and-fast rule can be laid down as to when a dying declaration should be accepted, except stating that each case must be decided in the light of its own facts and other circumstances. What all the Court has to ultimately conclude is whether the Court is convinced of the truthfulness of the statement, notwithstanding that there was no corroboration in the true sense. The thrust was to the position that the Court must be fully convinced of the truth of the statement and that it should not give any scope for suspicion as to its credibility. This Court noted that the High Court of Patna and Nagpur also expressed the same view in the decisions reported in Mohd. Arif v. Emperor – AIR 1941 Pat. 409 and Gulabrao Krishnajee v. Emperor – AIR 1945 Nag. 153.

26. In a recent decision of this Court reported in Sri Bhagwan v. State of U.P. – (2013) 12 SCC 137, to which one of us was a party, the Court dealt with more or less an identical situation and held as under in paras 21 and 22:

> *"21. As far as the implication of 162(2) CrPC is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned Senior Counsel for the respondent, once the said statement though recorded under Section 161 CrPC assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32(1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 CrPC. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.*

Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162(2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to

discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected."….....

27. Apart from the above three dying declarations, the deceased also made oral dying declaration before PW-4 and the said witness has also proved the oral dying declaration.

28. Taking the cumulative effect of the evidence, we have no reason to disbelieve the dying declarations of the deceased which have been duly proved by the witnesses. The mere fact that certain medicines were given to treat the deceased does not mean that she was not in a fit state of mind to make the dying declaration. There is enough evidence on record to suggest that from 31.10.1987 to 09.11.1987, deceased was in a position to speak and at least she was in a fit state of mind on 31.10.1987, 01.11.1987 and 02.11.1987 to make her statement.

29. Considering all these aspects of the case, the complicity of the appellant in committing the murder of the deceased, has been duly proved.

30. We find no substance in the argument of the defence that as the appellant hospitalized the deceased, some leniency be shown to him. The appellant might have hospitalized the deceased because of fear in his mind but that does not entitle him for any leniency. The trial court was fully justified in convicting the appellant.

31. The appeal has no substance and the same is, accordingly, dismissed.

32. Accused-appellant is reported to be on bail. His bail bond stands cancelled and he be taken into custody immediately for serving the remaining sentence.

33. We appreciate the assistance rendered by Sri Ajay, Amicus and we

direct the State Government to pay Rs. 5,000/- towards his remuneration.

Date: 15.10.2019

AKK/Vikram

(Raj Beer Singh, J) (Pritinker Diwaker, J)