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KAMALAVVA & ANR.

v.

STATE OF KARNATAKA

(Criminal Appeal No. 1136 of 2002)

JULY 29, 2009

B

[DALVEER BHANDARI AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860: s.302 r.w. s.34 – Conviction under, C *challenged on the ground of delay in lodging FIR and absence of certificate of doctor to the effect that deceased was in fit condition to make the dying declaration – On facts, Held: Delay in lodging FIR was explained by prosecution – Dying declaration was recoded by the magistrate in the presence of* D *doctor – Magistrate deposed that while making statement, deceased was conscious and in fit condition to make such a statement – No reason to interfere with the order of conviction.*

Prosecution case was that the deceased was tortured by her mother in law and sister in law and was E **burnt to death. Charges were framed against the accused under Section 302 r.w. Section 34 and Section 498A IPC. Trial Court acquitted both the accused. High Court partly allowed the appeal of State and convicted the accused under Section 302 r.w. Section 34 IPC. The two accused** F **filed present appeal.**

The question before this Court was whether there was delay in lodging the FIR which had adverse effect on the prosecution case and whether the dying declaration G **relied upon by the High Court was reliable, trustworthy and could be acted upon.**

Dismissing the appeal, the Court

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HELD: 1. On 09.04.1995, information was received about the incident of burning at the police outpost and requisition was sent for recording the dying declaration. Pursuant to this, the dying declaration was recorded on 09.04.1995. On 10.04.1995, a statement was taken from the deceased by the police officer himself. Consequently, it is established that the formal FIR came to be recorded on 12.04.1995 although the incident was reported on 09.04.1995 on the basis of which the police started the investigation by sending a requisition to the Taluka Executive Magistrate which was followed up by recording of the statement of the deceased by the police. Delay, therefore, in recording the formal FIR is explained. [Para 10] [506-F, G]

2.1. There is no requirement of law that the dying declaration must necessarily contain a certification by the doctor that the patient was in a fit state of mind especially when the dying declaration was recorded by a Magistrate. It is the testimony of the Magistrate that the declarant was fit to make statement gains the importance and reliance can be placed upon declaration even in the absence of the doctor's certificate provided the court ultimately holds the same to be voluntary and truthful. [Para 18] [510-E]

Laxman v. State of Maharashtra (2002) 6 SCC 710, relied on.

2.2. PW-17 (Tahsildar) had stated that he was asked by the police to record the dying declaration of the deceased who was undergoing treatment in the hospital. He proceeded to the hospital and recorded the statement in the presence of doctor (PW-18). The said statement was recorded in the form of questions and answers. From the nature of the answers the deceased gave, it cannot be said that she did not understand the questions and did not give proper answers. Therefore, it is not

A difficult to conclude that the mental capacity of the deceased was sound and she was capable of giving answers to the questions put forth by PW-17. The dying declaration was recorded by PW-17 in the presence of PW-18 who is a doctor attached to the same hospital. He B categorically stated in his evidence that the doctor gave the certificate to the effect that the injured was in a position to give the declaration. P.W. 18 also signed Ext. P. 17 (Dying Declaration). The thumb impression of the deceased was also taken on Ext. P.17. The doctor (PW- C 18) who was present at the time of recording the dying declaration also attached a certificate to the effect that the said dying declaration was recorded in his presence. PW-17 categorically stated that the deceased while making the statement was conscious and in a fit mental condition D to make such a statement. PW-17 was a Public Officer. There is no reason to hold that he would falsely implicate a person. Accordingly, the said dying declaration could be relied upon as the same was truthfully recorded and the said statement gave a vivid account of the manner in which the incident had taken place. The same also E corroborated in all respect with the statement given by the deceased to the police on 10.04.1995. The said statement was also recorded by the police officer of the rank of ASI and the deceased also put her LTI in it. The dying declaration was reliable and trustworthy and gave F an accurate version of the manner in which the incident had taken place. [Para 20 and 22] [510-G-H; 511-A-C; 511-G-H; 512-A]

3. Taking an overall view of all the facts and G circumstances of the case and also the evidence on record, there is no ground to interfere with the order of conviction and sentence recorded by the High Court holding the appellants guilty of the offence under Section 302 read with Section 34 of IPC. The order of conviction H and sentence recorded against the appellants by the

High Court is, therefore, upheld. [Para 23] [512-C, D] A

Koli Chunilal Savji v. State of Gujarat **(1998) 9 SCC 303;** *Vikas and Others v. State of Maharashtra* **(2008) 2 SCC 516;** *Khushal Rao v. State of Gujarat* **AIR 1958 SC 22;** *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, A.P.* **AIR 2008 SC 19, relied on.** B

Case Law Reference:

(2002) 6 SCC 710	**relied on**	**Paras 12, 18**
(1998) 9 SCC 303	**relied on**	**Para 14**
(2008) 2 SCC 516	**relied on**	**Para 15**
AIR 1958 SC 22	**relied on**	**Para 16**
AIR 2008 SC 19	**relied on**	**Para 17**

C D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1136 of 2002.

From the Judgment & Order dated 30.8.2002 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 533 of 1998. E

Kiran Suri and Aparna Bhat for the Appellants.

Sanjay R. Hegde and Rohen Singh for the Respondents. F

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The present appeal arises out of the judgment and final order passed by the High Court of Karnataka at Bangalore whereby and whereunder the High Court set aside the judgment and order of acquittal passed by the I Addl. Sessions Judge, Belgaum under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC'). However, the High Court maintained the order of acquittal passed by the trial court under Section 498-A IPC. G H

A 2. In order to appreciate the contentions advanced by the parties and legal issues involved, it is necessary to state brief facts of the case :

Deceased Shoba was the daughter of the sister of B Somappa Irappa Hunji (PW-1). As the mother of the deceased Shoba was suffering from typhoid fever after six months of the birth of Shoba, Shoba was being maintained and looked after by PW-1. Shoba studied upto VII standard. Subsequently, PW-1 arranged the marriage of deceased Shoba with one Prakash (PW-5) as per their customs when she was 18 years old. PW C – 1 gave certain articles and Rs. 5,000/- at the time of her marriage. For about 6 months after the marriage both Shoba and her husband were living happily. Thereafter, Kamalavva (A-1) who is the mother-in-law of the deceased Shoba and Siddawwa (A-2) who is the sister-in-law of A-1 started illtreating D Shoba by asking her to bring more money as dowry and also by alleging that Shoba was not attending the household work etc.

3. On 09.04.1995 at about 6.00 p.m. a person from E Hannikeri village where Shoba was then residing with her husband informed PW-1 that Shoba had sustained burn injuries and was admitted to Civil Hospital at Belgaum. On receipt of this information, PW-1 along with his wife Tangewwa (PW-2), his son Ishwar (PW-3), and others went to the hospital at about F 10.30 p.m. and found that Shoba had sustained burn injuries and then they came to know from Shoba that A-1 had poured petrol over her and A-2 had set fire to her as a result of which she had sustained burn injuries. The neighbours came to the spot and put off the fire and she was taken to the hospital by G her husband Prakash (PW-5). While admitting her at the hospital, the Resident Medical Officer sent a requisition to the outpost of APMC Police Station, Belgaum located at Civil Hospital, Belgaum on 09.04.1995 at about 4.00 p.m. to the effect that the Shoba had been admitted to the hospital with burn injuries and her condition was serious and, therefore, her

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dying declaration should be recorded. On receiving the said request PW-15 sent a requistition to the Tehsildar requesting him for recording the dying declaration of the deceased Shoba. The said Tehsildar, who is also the Taluk Executive Magistrate, recorded the dying declaration of the deceased Shoba on 09.04.1995 at the District Hospital, Belgaum. The said Taluk Executive Magistrate was also examined in the trial as PW-17 who has deposed extensively on the recording of the aforesaid dying declaration. The said dying declaration was in the question-answer form. The following question was put to the deceased Shoba as question No. 5 to which the answer was given by the deceased in the following manner :

"Question – 5Who is responsible for the assault on you or for your present condition ?

Answer In the afternoon, my mother-in-law and sister-in-law poured Petrol on me and have lit fire."

In response to another question, she had correctly given the names and addresses of her mother-in-law (A-1) and sister-in-law of her mother-in-law (A-2) who had poured petrol on her and lit the fire. Subsequently, Shoba died on 11.04.1995 at 7.00 p.m. Thereafter, the police converted the case which was registered against both the Accused Nos. 1 and 2 to a case for the offences punishable under Section 498-A, 302 read with Section 34 IPC. Thereafter, Piroji Jotiba Ghatagennavar, DSP (PW-20) took up further investigation and after completing the investigation filed a charge sheet against the accused persons. As the offences alleged against the accused persons were exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions at Belgaum in S.C. No. 4/96 on the file of the I Addl. Sessions Judge, Belgaum.

4. The learned Sessions Judge framed charges against the accused persons for the offences punishable under Section 498-A, 302 read with Section 34 IPC. The accused persons

A denied the allegations made against them and claimed to be tried. During the trial, the prosecution examined in all 20 witnesses and documents produced were exhibited as Exs. P-1 to P-24 and M.Os. 1 to 4. The accused persons did not lead any evidence in their defence. After examining the witnesses B and hearing rival arguments, the learned Sessions Judge by his judgment dated 20.02.1998 acquitted both the accused persons holding that the prosecution had failed to establish the charges against the accused persons.

5. Aggrieved by the judgment and order of the trial court C the State of Karnataka preferred the appeal being Criminal Appeal No. 533 of 1998 in the High Court of Karnataka at Bangalore. The High Court by its impugned judgment and order dated 20.08.2002 allowed the appeal and partly set aside the judgment of the trial court. By the said judgment both the D accused persons were convicted under Section 302 read with Section 34 of IPC and sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs. 500/- each in default to undergo rigorous imprisonment for two months. However, the High Court maintained the order of acquittal under E Section 498-A of IPC.

6. The learned counsel appearing for the appellants forcefully submitted that the High Court committed an error of fact and also of law in convicting the appellants for offence F punishable under Section 302 read with Section 34 of IPC. It was submitted that there was inordinate delay in lodging the FIR and there is no proper explanation for the same. The LTI of the deceased was also not attested and the person recording the same did not come forward to give evidence. It was further submitted that as the upper limb of the deceased G was burnt, the possibility of her putting LTI was highly improbable.

7. It was contended that the dying declaration although was a recorded dying declaration but it suffers from many infirmities H and therefore the same should not have been acted upon and

should have been rejected as not reliable by the courts below. A
It was submitted that the dying declaration was not properly recorded as the PW-17 who recorded the dying declaration was not the regular Taluka Executive Magistrate of Belgaum, and he was only in-charge and that the signature of the deceased was also not attested. It was further contended that as the said B dying declaration did not have any certificate of the doctor attached to it certifying that the deceased was in a fit condition to make a statement, the aforesaid dying declaration should have been discarded. It was also submitted that there was a long delay in recording the FIR by the police having jurisdiction C to record such statement and to investigate.

8. On the other hand, learned counsel appearing for the State refuted the above submissions and supported the judgment of the High Court.

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9. In the light of the aforesaid submissions of the counsel appearing for the parties, the main issues that arise for our consideration are twofold; (i) Delay, if any in lodging the FIR and its effect on the prosecution case and (ii) Whether the dying declaration referred to and relied upon by the High Court is E reliable, trustworthy and could be acted upon ?

10. So far as the first issue with regard to the delay in filing the FIR is concerned, true and correct position that emerges on a careful reading of the entire evidence on record before F the Court is that immediately after admission of the patient (the deceased) into the hospital, the Resident Medical Officer of the Civil Hospital, Belgaum sent a requisition to the police outpost located at the hospital itself requesting for getting the dying declaration of the patient recorded as her condition was G serious. The police in the outpost in terms of the said request sent a requisition to the Taluka Executive Magistrate who in terms of the request got the dying declaration recorded on 09.04.1995 itself at the District Hospital, Belgaum. On 10.04.1995, the statement of the patient (the deceased) was H recorded at the District Hospital, Belgaum by the police wherein

A she specifically stated that her mother-in-law took the petrol that had been kept in the house for the purpose of putting to the engine used for sprinkling medicine and also lit the fire on her. She also stated that the sister-in-law of the mother-in-law instigated her to kill her i.e. the deceased Shoba. The patient B died on 11.04.1995. PW-13 who was initially the investigating officer being the SHO at Nesargi Police Station was examined in this connection, who stated that on 12.04.1995 he received a Crime bearing No. 31 of 1995 from APMC Police Station which was registered as an offence punishable under Section C 498-A, 109 read with Section 34 IPC. He also stated that since the said patient namely, the deceased Shoba later on died he registered the same on 12.04.1995 in Crime No. 33 of 1995 for offence under Section 498-A, 302, 109 and 34 IPC. He was also cross-examined and he stated that as per the FIR of APMC D the said case was registered on 10.04.1995 at 1.00 p.m. He also stated that all the papers were handed over on 12.04.1995. In view of the aforesaid evidence, a submission was made that there was a delay in filing the FIR in as much as although the alleged incident of burning had taken place on 09.04.1995 the same came to be recorded in the form of a formal FIR only on E 12.04.1995. On going through the records and its proper examination we are unable to accept the said contention for the simple reason that information was received about the incident of burning at the police outpost of APMC Police Station located in the hospital itself on 09.04.1995 when requisition was F sent for recording the dying declaration pursuant to which the dying declaration was recorded on 09.04.1995. On 10.04.1995, a statement was taken from the deceased by the police officer himself. Consequently, it is established that the formal FIR came to be recorded on 12.04.1995 although the incident was G reported on 09.04.1995 on the basis of which the police started the investigation by sending a requisition to the Taluka Executive Magistrate which was followed up by recording of the statement of the deceased by the police. Delay, therefore, in recording the formal FIR stands explained.

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11. The next and the most vital issue which was raised is regarding the admissibility of the dying declaration stated to have been made by the deceased before her death. Before dealing with the factual aspect of the dying declaration, it would be necessary to know the exact legal position which has been laid down and reiterated by this Court time and again.

12. The question as to admissibility of a dying declaration came up before this Court in several cases. In *Laxman v. State of Maharashtra* (2002) 6 SCC 710, wherein also a question regarding the admissibility of the dying declaration was raised. The Constitution Bench held that the Court must decide that the declarant was in a fit state of mind to make the declaration, but where the eye witnesses' evidence including the evidence of a Magistrate who had recorded the dying declaration to that effect was available, mere absence of doctor's certification as to the fitness of the declarant's state of mind, would not ipso facto render the dying declaration unacceptable. It was further held that the evidentiary value of such dying declaration would depend upon the facts and circumstances of the each particular case.

13. In paragraph 3 of the said judgment, this Court discussed the juristic theory regarding acceptability of a dying declaration in the following manner:-

> "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 deathed is so solemn and serene, is the reason in law to accept the veracity of his statement....."

A 14. The Constitution Bench in that case also referred to an earlier decision of this Court in *Koli Chunilal Savji v . State of Gujarat* (1998) 9 SCC 303, wherein it was held that the ultimate test with regard to the admissibility of a dying declaration is whether the dying declaration can be held to be B a truthful one and voluntarily given. In the said decision it was also held that before recording the declaration, the officer concerned must find that the declarant was in a fit condition to make the statement. The aforesaid ratio of the said decision was affirmed by the Constitution Bench in *Laxman* case C (supra).

15. In *Vikas and Others v. State of Maharashtra* reported in (2008) 2 SCC 516 wherein this Court elaborately discussed the previous relevant decision governing the legality of dying declaration and observed in para 45 as follows :

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> "**45.** The Court, referring to earlier case law, summed up principles governing dying declaration as under: (*Paniben* case[4], SCC pp. 480-81, para 18)
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> E *"18. (i)* There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.
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> *(ii)* If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without F corroboration.
>
> *(iii)* This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased G had opportunity to observe and identify the assailants and was in a fit state to make the declaration.
>
> *(iv)* Where dying declaration is suspicious it should not be acted upon without corroborative evidence.
>
> H *(v)* Where the deceased was unconscious and could

never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally 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 eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."

16. After referring to the decision of this Court in *Khushal Rao v. State of Gujarat* reported in AIR 1958 SC 22, this Court in *Vikas & Ors.* (supra) reiterated the legal position that where a dying declaration is recorded by a competent Magistrate, it would stand on a much higher footing inasmuch as a competent Magistrate has no axe to grind against the person named in the dying declaration of the victim and in absence of circumstances showing anything to the contrary, he should not be disbelieved by the court.

17. In the case of *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, A.P.* reported in AIR 2008 SC 19, in paragraph 18 it was stated thus;

A "18. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration in as much as there could be any number B of circumstances which may affect the truth. This Court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the C deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion."

18. In the aforesaid decision this Court while referring to D the decision of the Constitution Bench in Laxman case reiterated that there is no requirement of law that the dying declaration must necessarily contain a certification by the doctor that the patient was in a fit state of mind specially when the dying declaration was recorded by a Magistrate. It was also held in E the said decision that it is the testimony of the Magistrate that the declarant was fit to make statement gains the importance and reliance can be placed upon declaration even in the absence of the doctor's certificate provided the court ultimately holds the same to be voluntary and truthful.

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19. In the backdrop of the aforesaid legal principles laid down by this Court, we will now examine the admissibility of the dying declaration in the case in hand.

20. PW-17 (Tahsildar) has stated that he was asked by the G police to record the dying declaration of the deceased Shoba who was undergoing treatment in the hospital. He proceeded to the hospital and recorded the statement in the presence of Dr. M.S. Sangolli (PW-18) which was marked as Ext. P.17. The aforesaid statement was recorded in the form of questions H and answers. From the nature of the answers the deceased

has given, it cannot be said that she has not understood the questions and has not given proper answers. Therefore, it is not difficult to conclude that the mental capacity of the deceased was sound and she was capable of giving answers to the questions put forth by PW-17. The aforesaid dying declaration was recorded by PW-17 in the presence of PW-18 who is a doctor attached to the same hospital. He has categorically stated in his evidence that the doctor had given the certificate to the effect that the injured was in a position to give the declaration. P.W. 18 also signed Ext. P. 17 (Dying Declaration). The thumb impression of the deceased Shoba was also taken on Ext. P.17. The doctor (PW-18) who was present at the time of recording the dying declaration has also attached a certificate to the effect that the said dying declaration was recorded in his presence.

21. In view of the aforesaid clear and unambiguous factual position we are of the considered opinion that the High Court was totally justified in relying upon the dying declaration recorded by the Taluka Executive Magistrate (PW-17) The technical objection raised by the counsel for the appellant regarding the unavailability of doctor's certification and endorsement as to mental fitness of the deceased, is liable to be rejected in as much as the same has been held by this Court in numerous decisions as a mere rule of prudence and not the ultimate test as to whether or not the said dying declaration was truthful or voluntary.

22. PW-17, who recorded the dying declaration had in his deposition categorically stated that the deceased while making the aforesaid statement was conscious and in a fit mental condition to make such a statement. PW-17 being a Public Officer, we find no reason as to why he will implicate a person falsely. Accordingly, the aforesaid dying declaration could be relied upon as the same was truthfully recorded and the said statement gave a vivid account of the manner in which the incident had taken place. The same also corroborates in all

A respect with the statement given by the deceased to the police on 10.04.1995. The said statement was also recorded by the police officer of the rank of ASI and the deceased also put her LTI in it. In our considered opinion, the dying declaration is reliable and trustworthy and gives an accurate version of the B manner in which the incident had taken place.

23. In view of the aforesaid discussion and taking an overall view of all the facts and circumstances of the case and also the evidence on record, we find no ground to interfere with the order of conviction and sentence recorded by the High Court C holding the appellants guilty of the offence under Section 302 read with Section 34 of IPC. The present appeal therefore deserves to be dismissed which we hereby do. The order of conviction and sentence recorded against the appellants by the High Court is, therefore, upheld.

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D.G. Appeal dismissed.