IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 2ND DAY OF APRIL 2024 / 13TH CHAITHRA, 1946

CRL.A NO. 139 OF 2017

CRIME NO.76/1997 OF Thirunelly Police Station, Wayanad

AGAINST THE JUDGMENT DATED 16.06.2016 IN SC NO.63 OF 2015 OF SESSIONS COURT, KALPETTA, WAYANAD

APPELLANT/ACCUSED:

EBY @PHILIP NINAN, S/O NINAN, C-576/16, KULANGARA VEEDU THRISELERY, PRESENT ADDRESS; CENTRAL PRISION & CORRECTIONAL HOME, KANNUR.

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV SMT.AMBIKA DEVI S, SPL.PP ATROCITIES AGAINST WOMEN & CHILDREN

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 14.03.2024, THE COURT ON 2.04.2024 DELIVERED THE FOLLOWING:

“C.R.”

J U D G M E N T

Dr. Kauser Edappagath, J.

This is a case of uxoricide.

2. The appellant Eby@Philip Ninan was prosecuted and tried before the Sessions Court, Kalpetta, Wayanad (for short, 'the trial court') for the offence punishable under section 302 of IPC on the allegation that he killed his 24-year-old wife Elsy (for short ‘the victim’) by setting her on fire.

3. The incident took place on 24/7/1997 at 8.00 p.m. at the house bearing No.TP-VIII/1008 of Thrissillery Grama Panchayat situated at Thrissillery, where the appellant and his wife, along with their two babies aged two years and six months, were residing. The prosecution case was that the appellant with the intention of killing the victim poured kerosene on her head and set her ablaze. The victim, who suffered serious burns all over her body, was rushed to District Hospital, Mananthavady

and later transferred to Government Medical College Hospital, Kozhikode. The appellant, who also suffered burns, was admitted at the Medical College Hospital, Kozhikode, till 21/8/1997. The victim succumbed to the injuries while undergoing treatment at Government Medical College Hospital, Kozhikode, on 29/7/1997. The motive behind the crime was alleged to be the refusal by the victim to accede to the request of the appellant to sell the property and house where they were residing.

4. After a full-fledged trial, the trial court found the appellant guilty of the offence punishable under section 302 of IPC, mainly relying on the dying declaration given by the victim while she was undergoing treatment at the Government Medical College Hospital, Kozhikode. The appellant was convicted and sentenced to undergo imprisonment for life and to pay a fine of ₹50,000/-, in default to suffer rigorous imprisonment for one year for the offence punishable under section 302 of IPC. It is challenging the conviction and sentence; the appellant is before us.

5. As the appellant was not represented by his lawyer,

Adv. M.M.Deepa. was appointed as crown counsel to render legal aid to him. We have heard the learned counsel for the appellant as well as Smt. Ambika Devi, the learned Special Public Prosecutor.

6. The oral testimony of PW1 Mariyam and PW2 Vasudevan, immediate neighbours of the appellant and his wife, would show that immediately after the incident, hearing hue and cry from the appellant's house, they rushed to the house where they found the victim lying on the floor of the kitchen with burn injuries all over her body and the appellant was sitting on the steps of the kitchen. PW1 stated that while her husband tried to put off the flames, the victim asked for water, and she gave water to her. PW2 stated that shortly thereafter the victim was taken to a local hospital and from there to the Medical College Hospital, Kozhikode. He deposed that he accompanied the victim to both the hospitals. It has come out in evidence that on 29/7/1997 the victim breathed her last while undergoing treatment at Government Medical College Hospital, Kozhikode. The evidence of PW8 Dr.Prasannan K., who conducted the

autopsy on the body of the victim would show that she had more than 90% burns and the death was caused due to those burns. Even the appellant did not dispute that the victim sustained burn injuries at the time and place of the incident. But his case is that those injuries were not sustained to the victim in the manner and fashion alleged by the prosecution, and he was not at all responsible for the injuries. According to the appellant, it was a case of self-immolation by the victim. It was contended that the victim sustained burn injuries when she attempted to set herself ablaze by pouring kerosene on her body following an exchange of words between her and the appellant regarding the rift between him and PW4. While he attempted to save her, he also suffered burn injuries which was reported to be 15%.

7. The evidence of PW4 Mary, the mother of the deceased Elsy, and PW13 Balan Kurungot, the IO, would show that the victim gave Ext. P3 FI statement to CW21 Thankachan, SHO of Thirunelli Police Station, on 26/7/1997 at 7 p.m. at ward 26 of the Government Medical College Hospital, Kozhikode and based on it, CW22 Sreedharan, ASI of Thirunelli police station,

registered Ext.P3(a) FIR on 27/7/1997. CWs21 and 22 could not be examined as they were no more. Their signatures in Exts. P3 and P3 (a) were identified by PW13. Since the victim was having burns all over her body including her palm and fingers, she did not put signature or affix thumb impression in Ext.P3. PW4 subscribed signature in Ext. P3 on her behalf. PW4 identified her signature in Ext. P3. In Ext.P3, the victim stated that it was the appellant who set her ablaze after pouring kerosene. PW4 gave evidence that as and when she reached the hospital on the night of the date of the incident, the victim told her that it was the appellant who set her on fire. These two statements were heavily relied on by the prosecution as dying declarations falling under section 32(1) of the Evidence Act to prove its case and to fix the culpability on the appellant in the absence of any direct evidence to prove the incident. In fact, these two dying declarations are the bedrock on which the edifice of the prosecution case is built. The trial court accepted Ext.P3 as being the dying declaration of the victim and convicted the appellant essentially on its basis. The evidentiary value and the reliability of the said dying

declaration have been strongly assailed by the appellant before us.

8. The learned counsel appearing for the appellant vehemently argued that the so-called dying declarations cannot, by any stretch of imagination, be considered to be dying declarations in the sense it is understood in law especially in the absence of acceptable legal evidence to prove that the deceased was in a fit state of mind to make the statements and thus the conviction could not have been based thereupon. Per contra, the learned Special Public Prosecutor submitted that the prosecution case stood established by the two dying declarations which are wholly reliable apart from other proved circumstances and the conviction of the appellant on that basis calls for no interference. The learned Prosecutor further submitted that the materials on record indicated that the victim was conscious and capable of giving the statement, and the dying declarations cannot be discarded merely for the reason that there was no independent medical evidence to prove the state of mind of the victim.

9. Section 32 of the Evidence Act deals with the cases in

which statement of relevant fact by person who is dead or cannot be found etc. is relevant. The general rule is that all oral evidence must be direct, i.e., if it refers to a fact which could be seen, it must be the evidence of witness who says he saw it, if it refers to a fact which would be heard, it must be the evidence of a witness who says he heard it, and if it refers to a fact which could be perceived by any other sense, it must be the evidence of a witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in section 60. The eight clauses of section 32 are exceptions to the general rule against hearsay evidence. Clause (1) of section 32 makes relevant what is generally described as dying declaration. It essentially means a statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in this death. The statement becomes admissible in cases in which the cause of that person's death comes into question. It is immaterial whether the person who makes it was or was not under the expectation of death at the time of declaration. This is where Indian law differs

from English law where, for its admissibility, the declarant should have been in actual danger of death and should be expecting an imminent death. A dying declaration can be oral or in writing. Any adequate method of communication, whether by words or by signs or otherwise, will also suffice provided the indication is positive and definite. The justification for the sanctity attached to a dying declaration is twofold: (i) ethically and religiously it is presumed that a person while at the brink of death will not lie (ii) from a public policy perspective it is to tackle a situation where the only witness to the crime is not available[1].

10. The principles governing the admissibility, reliability, and evidentiary value of dying declaration are no longer *res integra*. It is trite that though a dying declaration is entitled to great weight, it should be of such a nature as to inspire full confidence of the court in its correctness. The court must be satisfied that the statement of the deceased was not because of either tutoring or prompting or a product of imagination. The court must be further satisfied that at the time of making such a

1 Irfan alias Naka v. State of U.P, 2023 SCC OnLine SC 1060

statement, the deceased was in a fit state of mind[2]. If the court finds that the dying declaration brings out the truthful position, particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made was established, and the other evidence supports its contents, it can be acted upon[3]. It is equally settled that a dying declaration can be the sole basis of the conviction without any further corroboration if it is found to be voluntary, reliable, made in a fit mental state and inspires the full confidence of the court[4]. However, where there is any suspicion over the veracity of the dying declaration, it will only be considered as a piece of evidence but cannot be the basis for conviction[5]. In such cases, it is unsafe to rest the conviction based on declaration alone without further corroboration[6].

11. Coming to the merits of the case, as stated already, the prosecution relied on two dying declarations; oral declaration

2 Manjunath and Others v. State of Karnataka, 2023 LiveLaw SC 961

3 Jagbir Singh v. State (NCT of Delhi), (2019) 8 SCC 779

4 Amol Singh v. State of MP, (2008) 5 SCC 468

5 Rasheed Beg and Others v. State of Madhya Pradesh, (1974) 4 SCC 264, Irfan alias Naka v. State of U.P, 2023 SCC OnLine SC 1060

6 Thurukanni Pompiah v State of Mysore, AIR 1965 SC 939

made to PW4 and Ext.P3 made to CW21. The trial court relied on Ext.P3 declaration and convicted the appellant solely on its basis. Ext. P3 given by the victim and recorded by CW21 was in the form of a first information statement and not as a dying declaration. The law does not say who should record dying declaration nor is there any prescribed format or procedure for the same. The first information statement given by the victim could be treated as a dying declaration falling under section 32(1) when after making the statement the victim dies provided the statement relates to the cause of his/her death or any of the circumstances of the transaction which resulted in his/her death. After making the statement before CW21, the victim succumbed to her injuries and therefore the statement (Ext.P3) can be treated as a dying declaration. But the crucial question is whether these two dying declarations inspire the full confidence of the court to form the sole basis of conviction.

12. As discussed above, the 'fit state of mind' of the declarant at the time of making the statement is an essential

prerequisite for the admissibility of a dying declaration[7]. It is for the court to determine, from the evidence available on record, whether the state of mind is fit or not. The appellant specifically challenged the mental fitness of the victim at the time of making the declarations. PW7, the assistant surgeon at the District Hospital, Mananthavady, who initially treated the victim gave evidence that on examination he found 100% burns on her body. Ext.P7 Postmortem Certificate shows that superficial to deep burns were present all over the body of the victim. PW8, Lecturer, Forensic Medicine, Medical College Hospital, Kozhikode, who conducted the autopsy and issued Ext.P7 deposed that the victim had suffered burn injuries almost all over the body – 90% above. The percentage and degree of burns would not, by itself, be decisive of the credibility of the dying declaration; the decisive factor would be the quality of evidence about the fit and conscious state of mind of the declarant to make the statement. The provision of section 32(1) being in the nature of exception, the onus of establishing circumstances that would bring the

7 Shama v. State of Haryana, (2017) 11 SCC 535

statement within the exception lies clearly upon the party who wants to rely upon the statement, i.e., on the prosecution. Let us examine whether the prosecution has proved mental and physical fitness of the deceased so as to give dying declarations in question.

13. In medical science, consciousness and a fit state of mind are distinct and are not synonymous. Orientation and consciousness are different from mental and physical fitness to give a dying declaration, especially in a case where the patient sustained burn injury all over the body. One may be conscious, but not necessarily be in a fit state of mind. Generally, the fit state of mind ought to correspond to an alert, oriented and meaningfully communicative mental condition of the declarant, instead of being simply conscious. To determine the state of mind of the person making the dying declaration, the court ordinarily relies on medical evidence. However, equally, it has been held that if witnesses present, while the statement is being made, state that the deceased while making the statement was in a fit state of mind, such statement would prevail over the medical

evidence. In ***Laxman***[8], the Constitution Bench of the Supreme Court held that though 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, where the eye witness state that the deceased was in a fit and conscious state to make the declaration, the dying declaration can be accepted and acted upon even in the absence of the certificate of the doctor as to the fitness of mind of the declarant provided it is proved by the testimony of the person who recorded the statement (in that case, the Magistrate) that the declarant was fit to make the statement. This position had been once again recognised in ***Surendra Bangali***[9] and recently in ***Manjunath***[10].

14. The only piece of evidence adduced by the prosecution to prove the mental state of the victim at the time of giving dying declarations was that of PW4, the mother of the victim. The victim sustained burn injuries on 24/7/1997. According to PW4, the oral dying declaration was given to her by the victim on the

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

9 Surendra Bangali @ Surendra Singh Routele v. State of Jharkhand Criminal Appeal No. 1078 of 2010)

10 (supra)

very same night. Ext. P3 was recorded on 26/7/1997 at 7 p.m. The victim died on 29/7/1997 due to the burn injuries. The prosecution neither seized nor produced any medical records relating to this period to prove the physical or mental condition of the victim or the nature of treatment administered. To a specific question, PW10, IO, deposed that he did not even question the doctor who treated the victim at the medical college. In Ext. P6 wound certificate, it was stated that the 'patient was conscious'. PW7 who issued Ext.P6 reiterated it in evidence. However, he admitted that he did not treat the victim. He did not state about the physical condition or mental state of the victim. In *Chacko*[11], the Supreme Court declined to accept the prosecution case based on the dying declaration where seventy-year-old deceased had suffered 80 per cent burns. It was held that it would be difficult to accept that the injured could make a detailed dying declaration after a lapse of about eight to nine hours of the burning, giving minute details as to the motive and the way she had suffered the injuries. That was a case where the doctor therein had recorded

11 Chacko v. State of Kerala, (2003) 1 SCC 112

'patient conscious, talking' in the wound certificate. The court observed that even though such an endorsement was there in the wound certificate, that fact by itself would not further the case of the prosecution as to the condition of the patient making the dying declaration, nor would the oral evidence of the doctor or the investigating officer, made before the court for the first time, in any manner improve the prosecution case.

15. PW4 only deposed that at the time when the victim gave her the first oral dying declaration, the victim was conscious. She did not depose that the victim was mentally and physically fit to give the dying declaration. She stated that the victim was very weak at that time. In Ext.P3, nothing was stated about the physical or mental condition of the victim. It does not say that the victim was in a fit state of mind to give the declaration. No question was put by CW 21 who recorded Ext.P3 to ascertain her mental state. There is no certificate by a competent doctor as to the mental and physical condition of the victim to make the dying declarations. The doctor who treated the victim was not examined or even questioned. We are

conscious of the decision of the Constitution Bench of the Supreme Court in *Laxman*[12] that even in the absence of certification by a doctor as to the fitness of mind of the declarant, the declaration can be acted upon. But then in the absence of any such certification, the court should be satisfied from the material on record that it is safe to place reliance on such uncertified declaration[13]. The person who recorded the dying declaration must ensure that the declarant was in a fit state of mind to give the declaration. CW 21 who recorded Ext.P3 was not available to speak about the physical condition and mental state of the victim as he was no more. PW4 who was examined to prove Ext. P3 did not speak anything about the physical or mental state of the victim at the time of recording Ext.P3. That apart, given the extent of burn injuries suffered by the victim on all vital parts of the body, there is every possibility that she might have been administered sedative pain killers. In a case where the declarant suffered 98% burn injuries, the Supreme Court declined

12 (supra)

13 Ram Bai v. State of Chhattisgarh (2002) 8 SCC 83

to act upon the dying declaration holding that owing to the burn injuries suffered by the victim on all vital parts of the body, it can be legitimately inferred that she was reeling in great pain and agony, and once a sedative had been injected, the possibility of her being in a state of delusion could not be completely ruled out[14]. The Court adopted a cautious approach and opined that there were serious doubts as to whether the victim was in a fit state of mind to make the statement. Thus, the evidence tendered by the prosecution to establish the state of mind of the victim is hardly sufficient to prove that the victim was in a fit state of mind at the time of making the declarations.

16. No effort was made by the Investigating Officers to avail the service of the Magistrate to record the dying declaration of the victim. PW10 deposed that he found the burn injuries on the body of the victim to be very fatal, still, he did not feel like getting the dying declaration recorded by a Magistrate. He added that there was no reason to call for the Magistrate. PW13

---

14 Sampat Babso Kale and Another v. State of Maharashtra, (2019) 4 SCC 739

deposed that there was no impediment to call for the Magistrate to record the dying declaration. True, the law does not compulsorily require the presence of a Judicial or Executive Magistrate to record a dying declaration or that a dying declaration cannot be relied upon unless recorded by a Judicial or Executive Magistrate. However, prudence demands that dying declaration is preferably recorded by such officers inasmuch as they are judicially trained to record dying declarations after complying with all the mandatory prerequisites, including certification or endorsement from the Medical Officer that the victim was in a fit state of mind to make a statement. In *Jayamma*[15], the Supreme Court discarded the dying declaration of the victim, who sustained 80% burn injuries, recorded by the police officer at the hospital in the presence of the doctor ignoring the evidence given by the doctor and the police officer that the deceased was in a fit state of mind to give the statement holding that Judicial/Executive Magistrate was not called for to record the dying declaration despite having sufficient time.

15 Jayamma and Another v. State of Karnataka, AIR 2021 SC 2399

17. The learned Special Public Prosecutor highlighted the evidence given by PW4, the mother of the victim, that on one occasion when she met the victim at her house, she told her that the 'appellant would kill her' as one falling under section 32(1) of the Evidence Act. It appears that such a plea was not taken at the trial court. However, we will consider whether such a statement would come under the ambit of section 32(1).

18. Section 32(1) refers to two kinds of statements: (a) when the statement is made by a person as to the cause of his death: or (b) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. Where a direct or organic relationship between the death and circumstances of the transaction which resulted in death is established, the second part of section 32(1) can be taken recourse to. In other words, the statement of the deceased relating to the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. Even if the evidence of PW4 that the victim told her that the appellant would kill her when she visited her is

believed, by no stretch of imagination, can it be said that the said circumstance is in any way closely or sufficiently connected with the actual occurrence. It was only an apprehension entertained by the victim. The basis or reason for the said apprehension is not before us. The circumstances which do not form part of the transaction resulted in the death of the deceased would not fall within the scope of section 32(1). Hence, we are of the view that the said statement cannot be relied on with the aid of section 32(1).

The upshot of the above discussion is that none of the dying declarations relied on by the prosecution pass through the test of its acceptability and reliability inasmuch as there is no convincing evidence to prove that the victim was in a fit state of mind when those declarations were made. The evidence relating to the dying declaration given by PW4 can only be termed as hearsay which is inadmissible. Hence, the trial court ought not to have relied on Ext.P3 dying declaration to form the sole basis of conviction. The other circumstances highlighted by the prosecution from the remaining part of the evidence of PW4 and also from the evidence

of PW1 and PW2 are not at all sufficient to prove the guilt of the appellant on analysing the said evidence noticing the principles that have to guide us in appreciating the circumstantial evidence. It is settled that if the court entertains a reasonable doubt regarding the guilt of the accused, the benefit of that doubt must go to the accused. Mere suspicion, however strong or probable it may be, is no effective substitute for the legal proof required to substantiate the charge of commission of a crime[16]. Taking all the circumstances into account, we conclude that it is a fit case where the benefit of doubt must be extended to the appellant. We, therefore, allow this appeal, set aside the impugned conviction and sentence and acquit the appellant of the charge levelled against him. He will be set at liberty forthwith.

Sd/-

DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
DR. KAUSER EDAPPAGATH
JUDGE

Rp

16 Ashish Batham v. State of M.P., (2002) 7 SCC 317