DANDU LAKSHMI REDDY

v.

STATE OF ANDHRA PRADESH

AUGUST 17, 1999

[K.T. THOMAS AND D.P. MOHAPATRA, JJ.]

Criminal Trial:

Dying declaration—Conviction under Sections 302/34 IPC based on such dying declaration—Credibility of—Two dying declarations made by the deceased against the husband and mother-in-law—Material discrepancy between the two dying declarations regarding the context in which deceased caught fire—Evidence of neighbours that two cousins of the deceased brainwashing the deceased in the hospital—Parents of the deceased, deposed that two cousins of the deceased had a score to settle with the appellant on account of a property dispute and were found in confabulation with the deceased at the hospital—Parents also deposing that the deceased was not mentally sound—Held, it would be unsafe to convict any person on the strength of such a fragile and rickety dying declaration—Circumstantial evidence—Evidence Act, 1872—Indian Penal Code, 1860 Sections 302/34.

Code of Criminal Procedure, 1973, Sections 162, 161—Indian Evidence Act, 1872, Section 165—Power of the court to ask question to the witness—Section 162 CrPC interdicts the use of any statement recorded under Section 161 of CrPC except for the limited purpose of contradicting the witness examined in the trial to whom such statement is attributed—Held, it is impermissible for the court to use that statement later even for drawing any adverse inference regarding the evidence of that witness—What is interdicted by the Parliament in direct terms cannot be obviated in any indirect manner—Indian Penal Code, 1860, Sections 302/34.

Appeal—One accused acquitted—Co-accused not preferred appeal—Benefit of decision to be extended to co-accused to avoid miscarriage of justice.

According to the prosecution the appellant caught hold of deceased's hair from behind and mother-in-law of the deceased poured kerosene oil on her and asked the appellant to set her ablaze. Appellant set the deceased on

A fire. On the screams of the deceased, neighbours flapped her in a blanket and extinguished the fire. Parents of the deceased (PW-7 and PW-8) were informed before she was taken to the hospital. On the same day, deceased gave dying declaration (Ext. P-11) to a Judicial Magistrate (PW-12). A Sub-Inspector of Police (PW-19) went to the hospital and recorded the statement of the deceased (Ext. P-14) in which she implicated her husband and mother-in-law. There was a material discrepancy between the two dying declarations regarding the context in which deceased caught fire. Ext. P-14 showed that deceased was set on fire when she was lighting a stove for preparing coffee whereas Ext. P-11 showed that deceased was set on fire when she was still sleeping in the morning on the fateful day. During the trial, appellant adopted the stand that deceased had some mental imbalance and also suicidal tendencies. All neighbours who gave evidence in the case said in one accord that two persons, first cousins of the deceased were brainwashing her at the hospital. The evidence of PW-7 and PW-8, the father and mother of the deceased showed that those two cousins had scores to settle with the appellant on account of a property dispute and that those two were found in confabulation with the deceased. On these facts the appellant and his mother were convicted of an offence punishable under Section 302/34 IPC and were sentenced to imprisonment for life by the trial court. High Court confirmed the conviction and sentence. Hence this appeal.

It was contended by the appellant that the traditional assumption that a dying person would not stop to speak falsehood is now sought to be played down on the premise that it is a pedantic notion as the said assumption is fraught with a danger of insulating even a vengeful statement made by a dying person; that at any rate the dying declaration projected by the prosecution in this case would not stand the test of credibility.

Allowing the appeal, the Court

HELD: 1.1. There can be a presumption that testimony of a competent witness given on oath is true, as the opposite party can use the weapon of cross-examination, *inter alia,* for rebutting the presumption. But a dying declaration is not a deposition in court. It is neither made on oath nor in the presence of an accused. Its credence cannot be tested by cross-examination. Those inherent weaknesses attached to the dying declaration would not justify any initial presumption to be drawn that the dying declaration contains only the truth. [539-D-E]

Tapinder Singh v. *State of Punjab,* [1971] 1 SCR 599 and *Kushal Rao*

v. *State of Bombay,* [1958] SCR 582, referred to. A

1.2. Of the two dying declarations (Ext. P-14 and Ext. P-11), Ext. P-14 shows that the deceased was set on fire when she was lighting a stove for preparing coffee whereas in Ext. P-11 shows that she set on fire when she was still sleeping in the morning on the ill-fated day at the same time. [541-B-C] B

1.3. The High Court has sidelined such a noticeable discrepancy looming large as between the two different statements made by the same person. When the sphere of scrutiny of dying declaration is a restricted area, the court cannot afford to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course. [542-F-H] C D

1.4. The most important circumstance which warrants soft peddling of the dying declarations in Ext. P-11 and Ext. P-14, is the testimony of parents of the deceased (PW-7 and PW-8). Both of them deposed that their daughter told them at first instance itself, when they saw her in charred flakes of her skin that she caught fire while cooking milk. Public Prosecutor did not think it necessary to disown their evidence, and hence no attempt was made to put leading questions to those witnesses. At any rate the prosecution cannot disown the testimony of PW-7 and PW-8 now. But the High Court made an approach, which is seemingly violative of legal sanction. [543-B-D] E

2.1. Section 162 of Code of Criminal Procedure interdicts the use of any statement recorded under Section 161 CrPC except for the limited purpose of contradicting the witness examined in the trial to whom such statement is attributed and the power of the court to put questions to the witness as envisaged in Section 165 of the Evidence Act would be untrammelled by the interdict contained in Section 162 CrPC. It must now be remembered that the said procedure can be followed only when a witness is in the box. Barring these two modes, a statement recorded under Section 161 CrPC can only remain fastened up at all stages of the trial in respect of the that offence. In other words, if the court had put no question to the witness with reference to his statement recorded under Section 161 CrPC, *it is* impermissible for the court to use that statement later even for drawing any adverse impression regarding the evidence of that witness. What is interdicted F G H

A **by the Parliament in direct terms cannot be obviated in any indirect manner. [543-G-H; 544-A-D]**

Raghunandan **v.** *State of U.P.,* **AIR (1974) SC 463, relied on.**

2.2. The High Court sidestepped the crucial evidence of PW-7 and PW-
B **8, father and mother of deceased, which diametrically went against the version of the deceased in Ext. P-11 and Ext. P-14. [544-D-E]**

3. Yet another circumstance which is capable of dissuading from giving any credence to the version of the deceased is that her father (PW-7) and mother (PW-8) have said that deceased was not mentally sound. A criminal
C **court cannot ignore the said evidence of the parents of the deceased. If the court has even a slight doubt about the mental soundness of the author of the dying declaration it would be unsafe to convict any person on the strength of such a fragile and rickety dying declaration, and therefore, this court is unable to sustain the conviction of the appellant. He is entitled to benefit of**
D **doubt. [544-E-H; 545-A]**

4. The mother of the appellant is languishing in jail at present pursuant to the conviction and sentence awarded to her in this case. Of course her conviction is not before this Court as she did not file any special leave petition. But this Court has set up a judicious precedent for the purpose of
E **averting miscarriage of justice in similar situations. On the evaluation of a case if this Court reaches the conclusion that no conviction of any accused is possible the benefit of that decision must be extended to his co-accused also though he has not challenged the order by means of an appeal petition to this Court. [545-A-B]**

F *Raja Ram and Ors.* **v.** *State of M.P.,* **[1994] 2 SCC 568, relied on.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1110 of 1997.

From the Judgment and Order dated 26.3.97 of the Andhra Pradesh High
G Court in Crl.A. No. 115 of 1996.

Mrs. D.V. Padma Priya, (A.C.) for the Appellant.

Guntur Prabhakar and Ms. T. Anamika for the Respondent.

H The Judgment of the Court was delivered by

THOMAS, J. On the fact situation of a case such as this, a judicial mind would tend to wobble between two equally plausible hypotheses-was it suicide, or was it homicide? If the dying declaration projected by the prosecution gets credence the alternative hypothesis of suicide can be eliminated justifiably. For that purpose a scrutiny of the dying declaration with meticulous circumspection is called for. It must be saved through the judicial calendar and if it passes through gauzes it can be made the basis of a conviction, otherwise not.

The traditional assumption that a dying person would not stoop to speak falsehood is now sought to be played down by the counsel for the appellant on the premise that it is a pedantic notion as the said assumption is fraught with the danger of insulating even a vengeful statement made by a dying person. Learned counsel submitted that at any rate the dying declaration projected by the prosecution in this case would not stand the test of credibility.

There can be a presumption that testimony of a competent witness given on oath is true, as the opposite party can use the weapon of cross-examination, inter alia, for rebutting the presumption. But a dying declaration is not a deposition in court. It is neither made on oath nor in the presence of an accused. Its credence cannot be tested by cross-examination. Those inherent weaknesses attached to a dying declaration would not justify any initial presumption to be drawn that the dying declaration contains only the truth.

In *Tapinder Singh* v. *State of Punjab,* [1971] 1 SCR 599 this Court, by following an earlier decision in *Kushal Rao* v. *State of Bombay,* [1958] SCR 582 has reminded the courts that a dying declaration should be subjected to very close scrutiny. Following observations were also made by this Court:

> "The dying declaration is a statement 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 and it becomes relevant under S.32(1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of

A necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, imposing on it an obligation to closely scrutinise all the relevant attendant circumstances."

Appellant in this case (Dandu Lakshmi Reddy) and his mother B Narayanamma (who is now reported to be aged above 70) were convicted under Section 302 read with Section 34 of the Indian Penal Code only on the strength of dying declarations given by Lakshmi Devi (the deceased) on 7th October, 1997. Both the accused were sentenced to imprisonment for life. They together approached the High Court of Andhra Pradesh challenging the C conviction and sentence but in vain. Appellants mother Narayanamma, in her old age, preferred to surrender to her fate by languishing in jail without approaching this Court, but her son the appellant - did not lose heart and he filed this appeal by special leave.

Lakshmi Devi, the deceased, was given in marriage to the appellant D about 8 years before her death. But they had no children. Prosecution case is the following:

The husband and mother-in-law of the deceased were ill-disposed to her as she was unable to give birth to a child. She was subjected to harassment and threats. They used to scare her by saying that one day she would be E put in a well or a canal and thereafter the appellant would be free to remarry. On the morning of the ill-fated day (7.10.1974) appellant caught hold of her hair from behind, her mother-in-law doused kerosene on her and asked the appellant to set her ablaze. Appellant obeyed by lighting a match stick and she caught fire. When she screamed out the assailants took to their heels. F But the neighbours, including her relatives, rushed to the scene and in the rescue operations flapped her in a blanket and extinguished the fire. Parents of the deceased were informed about the mishap. When they arrived at the house they too were told by Lakshmi Devi of all what happened. She was then removed to a Government hospital.

G On the same day by about 12 noon, PW-12 - a Judicial Magistrate of 1st Class, recorded Lakshmi Devi's dying declaration which he reduced to writing (Ext.P-11). The Sub Inspector of police (PW-19) went to the hospital and recorded her statement (Ext. P-14). In both the dying declarations she attributed to the appellant and his mother for the cause of her devastating H burns.

During trial appellant adopted the stand that Lakshmi Devi had some mental imbalance and also suicidal tendencies. On an earlier occasion, it was elicited, she made an attempt to electrocute herself but the imminent calamity was averted by the timely intervention of others who switched off the power supply. According to the defence, on the date of occurrence she would have either committed the act by herself or she would have caught fire accidentally while cooking food articles. The defence also alleged that two of her cousins Narayana Reddy and Anki Reddy were at loggerheads with the appellant and they had tutored Lakshmi Devi to speak against the accused to the authorities.

Except the Judicial Magistrate and the Sub Inspector of Police all the other witnesses examined by the prosecution to depose to what Lakshmi Devi told them, have said in one accord that she narrated to them that her clothes caught fire while cooking milk. Even her father and mother, when examined in court, said like that.

Trial Court and the High Court dealt with the contentions that deceased would not have been in a position to give a dying declaration as she sustained extensive burns. Defence counsel in the two courts below have raised such contentions to make an onslaught on Ext.P-11 and Ext.P-14 dying declarations. But those contentions were repelled by the courts on valid grounds.

We would proceed on the assumption that Ext.P-11 and Ext.P-14 contained what Lakshmi Devi had told the scribes of those two documents. The pivotal question is whether the said version of Lakshmi Devi is credible and reliable, or is there room for entertaining any doubt about the truthfulness of her version.

In view of the impossibility of conducting the test on the said version with the touchstone of cross-examination we have to adopt other tests in order to satisfy our judicial conscience that those two dying declarations contain nothing but truth.

First among such tests is to scrutinise whether there are inherent improbabilities in that version. We are unable to detect any such improbability inherent therein. The next test is whether there is any inherent contradiction therein. In that scrutiny we came across one material contradiction as between the two dying declarations regarding the context in which deceased caught fire. Ext.P-14 shows that she was set fire to when she was lighting a stove for preparing the coffee. The relevant portion of Ext.P14 is extracted herein below:

A "Today morning i.e. 07.10.74 when I was lighting the stove in the kitchen and preparing coffee at about 6.00 a.m. my mother-in-law and husband came from behind. After entering the kitchen, my husband caught hold of my hair and I was unable to move. My mother-in-law Narayanamma sprinkled kerosene on my body and clothes. She asked her son to set fire, my husband lit the match-stick and threw on my clothes. When my clothes caught fire I started shouting with fear. My mother-in-law Narayanamma and my husband Laxmi Reddy ran away from there.

In Ext.P-11 (which is a dying declaration given to the Judicial Magistrate C of 1st class) the context stated by the declarant was altogether different. The relevant portion is extracted below:

"My mother-in-law's name is Narayanamma, my husband's name is Dandu Lakshmi Reddy. In the morning at 6.00 a.m. when I was sweeping, my mother-in- law Narayanamma and my husband Laxmi D Reddy both poured kerosene on me, lit the match-stick and set me to fire."

The above material divergence between two dying declarations pertaining to the occasion for launching the murderous attack on the deceased E did not create any impression in the minds of the learned Judges of the High Court, as they have observed thus:

"Though there is a difference in the version of the deceased as to what she was doing at the relevant point of time the fact remains that A-1 and A-2 poured kerosene and lit fire to her. These aspects are F mentioned in Exts. P.11 and P.14. Therefore, we are unable to agree with the contention of the learned counsel for the accused appellants."

Thus the High Court has sidelined such a noticeable discrepancy looming large as between the two different statements made by the same G person. When the sphere of scrutiny of dying declaration is a restricted area, the court cannot afford to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal H case is not a feasible course.

One important facet of the case is that all the neighbours who gave evidence have said in one accord that two persons (Narayana Reddy and Anki Reddy-her cousins in the first degree) were brainwashing her at the hospital. The defence had persisted with the said line during cross-examination of the witnesses right from beginning. Her own parents have submitted that those two cousins had scores to settle with the appellant on account of a property dispute and that those two were found in confabulation with Lakshmi Devi at the hospital.

The more important circumstance which warrants soft-peddling of the dying declarations in Ext.P-11 and Ext.P-14 is the testimony of Lakshmi Devi's parents (PW-7 Bali Reddy and PW-8 Thiru Palamma). Both of them deposed in the trial court that their daughter told them at the first instance itself, when they saw her in charred flakes of her skin, that she caught fire while cooking milk. Public Prosecutor did not think it necessary to disown their evidence and hence no attempt was made to put leading questions to those witnesses. Even that apart, what is the effect of the testimony of PW-7 and PW-8? At any rate the prosecution cannot disown it now. But the High Court made an approach which is seemingly violation of legal sanction. The following are the lines by which the High Court has circumvented the evidence of the parents of Lakshmi Devi which is binding on the prosecution:

> "It is unfortunate that the public prosecutor has not cross-examined PWs.7 and 8. But we have perused the statements of PWs 7 and 8 recorded under Section 161 Cr.P.C. The version therein is quite different. We are not taking them into consideration, but we have looked into them only to find out the actual version of PWs.7 and 8. We are of the opinion that PWs.7 and 8 have entirely accommodated the accused appellants. Merely because PWs.7 and 8 have stated that deceased told them that she received burn injuries due to the accident, the dying declaration Ex.P.11, recorded by Magistrate, and the evidence of P.W.19 cannot be thrown out."

Section 162 of the Code of Criminal Procedure (for short "the Code") interdicts the use of any statement recorded under Section 161 of the Code except for the limited purpose of contradicting the witness examined in the trial to whom such statement is attributed. Of course, this Court has said in *Raghunandan* v. *State of U.P.*, AIR (1974) SC 463 that power of the court to put questions to the witness as envisaged in Section 165 of the Evidence Act would be untrammeled by the interdict contained in Section 162 of the Code. The following observations in the aforesaid decision, in recognition of the

A aforesaid power of the court, would be useful in this context:

> "We are inclined to accept the argument of the appellant that the language of Section 162 Criminal Procedure Code, though wide, is not explicit or specific enough to extend the prohibition to the use of the wide and special powers of the Court to question a witness, expressly
B and explicitly given by Section 165 of the Indian Evidence Act in order to secure the ends of justice. .....Therefore, we hold that Section 162 Criminal Procedure Code does not impair the special powers of the Court under Sec. 165 Indian Evidence Act."

C It must now be remembered that the said procedure can be followed only when a witness is in the box. Barring the above two modes, a statement recorded under Section 161 of the Code can only remain fastened up at all stages of the trial in respect of that offence. In other words, if the court has not put any question to the witness with reference to his statement recorded under Section 161 of the Code, it is impermissible for the court to use that
D statement later even for drawing any adverse impression regarding the evidence of that witness. What is interdicted by the Parliament in direct terms cannot be obviated in any indirect manner.

We are unable to concur with the manner in which the Division Bench of the High Court sidestepped the crucial evidence of PW-7 Bali Reddy and
E PW-8 Thiru Palamma (father and mother of deceased Lakshmi Devi) which diametrically went against the version of the deceased in Ext.P-11 and Ext.P-14.

Yet another circumstance which is capable of dissuading us from giving any credence to the version of the deceased is that her father (PW-7) and
F mother (PW-8) have said that Lakshmi Devi was not mentally sound. A criminal court cannot ignore the said evidence of the parents of the deceased. If the court has even a slight doubt about the mental soundness of the author of the dying declaration it would be unsafe to base a conviction on such a statement, albeit its inadmissibility under Section 32 of the Evidence Act.

G As the dying declaration is tested thus on the touchstones available in evidence and permitted by law, it does not stand scrutiny. It will be unsafe to convict any person on the strength of such a fragile and rickety dying declaration.

H We are, therefore, unable to sustain the conviction of the appellant. He

is entitled to benefit of doubt. A

The mother of the appellant Narayanamma is languishing in jail at present pursuant to the conviction and sentence awarded to her in this case. Of course her conviction is not before us as she did not file any special leave petition. But this Court has set up a judicious precedent for the purpose of averting miscarriage of justice in similar situations. On the evaluation of a B case, if this Court reaches the conclusion that no conviction of any accused is possible the benefit of that decision must be extended to his co-accused also though he has not challenged the order by means of an appeal petition to this Court, vide *Raja Ram and Ors.* v. *State of M.P.*, [1994] 2 SCC 568.

Resultantly we set aside the conviction and sentence passed on the C appellant and his mother Narayanamma. We acquit them both and they are directed to be set free unless they are required in any other case.

R.K.S. Appeal allowed.