Padmaben Shamalbhai Patel vs State Of Gujarat on 18 January, 1991

Equivalent citations: 1991 SCR (1) 88, 1991 SCC (1) 744, 1991 AIR SCW 464, 1991 (1) SCC 744, (1991) 1 GUJ LH 125, (1991) 2 HINDULR 71, (1991) IJR 106 (SC), (1991) MADLW(CRI) 237, (1991) MAD LJ(CRI) 307, (1991) 1 CRILC 897, (1991) 1 SCR 88 (SC), 1992 CALCRILR 1, (1991) 1 GUJ LR 557, (1992) MARRILJ 122, (1991) 1 ORISSA LR 239, 1991 CRILR(SC MAH GUJ) 162, (1992) ALLCRIR 130, (1991) 28 ALLCRIC 190, 1991 CHANDLR(CIV&CRI) 335, (1991) 1 CRIMES 349, (1991) 4 OCR 110, (1991) 1 RECCRIR 487, (1991) SC CR R 327, (1991) 2 SIM LC 14, 1991 ALLAPPCAS (CRI) 120, (1991) 1 DMC 471, (1991) 1 CHANDCRIC 75, (1991) 1 ALLCRILR 303, (1991) 1 JT 205 (SC), 1991 SCC (CRI) 275

Author: A.M. Ahmadi

Bench: A.M. Ahmadi, M. Fathima Beevi

PETITIONER:
PADMABEN SHAMALBHAI PATEL

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT18/01/1991

BENCH:
AHMADI, A.M. (J)
BENCH:
AHMADI, A.M. (J)
RAMASWAMI, V. (J) II
FATHIMA BEEVI, M. (J)

CITATION:
1991 SCR (1) 88 1991 SCC (1) 744
JT 1991 (1) 205 1991 SCALE (1)54

ACT:
Indian Evidence Act, 1872: S.32 -Dying declarations-Recorded by medical-men-Not in question-and-answer form-Probative value of-Whether conviction can be based on.
Indian Penal Code, 1860: S. 302-Homicidal death-Deceased set aflame by pouring kerosene-Suffered 90 burns-

Dying declarations made to medical -men-Accused named as tormentor-Acquittal by Sessions Court on benefit of doubt-Appeal against-Conviction- Sentence of life imprisonment awarded-Validity of.

HEADNOTE:

The wife of appellant's brother was found aflame in the early hours of 11.6.1975 in the kitchen of her husband's house. She was taken to hospital and admitted to Burns-ward where the doctor in charge (PW 5) examined her and while taking her case history enquired of the injured as to what happened, to which she replied, "my nanad (sister-in-law) burnt me". She had suffered 90% of burns. The nurse (PW 4) was instructed to give treatment. Later another doctor (PW 2) attended on her. When he asked her as to how she had received the burns, she told him that her husband's sister had burnt her. In reply to his further query, she named the appellant as her tormentor. He made a note of this information by the victim on the police `yadi' which was sent to him to ascertain if the victim was in a fit condition to make a dying declaration. As her condition deteriorated, the victim was not in a position to make any statement to the police. The investigation culminated in the appellant being charged under s. 302, I.P.C. for causing the murder of her brother's wife by pouring kerosene on her person and setting her aflame.

On trial, the Sessions Court held that the deceased had not the requisite mental condition so as to make an acceptable dying declaration, and that her husband was very much near the cot, and hence possibility of tutoring the deceased could not be ruled out. Giving the benefit of doubt it acquitted the appellant.

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In the State's appeal against acquittal, a Division Bench of the High Court re-appreciated the prosecution evidence and after closely examining the reasons given by the Sessions court, held them thoroughly untenable and not supported by the evidence on record. It set aside the order of acquittal, convicted the accused of murder and sentenced her to imprisonment for life.

The appellant-accused appealed to this Court challenging in aforesaid conviction and sentence on the ground that the High Court erred in law in holding the view taken by the trial court as less probable. It was contended that the deceased having suffered 90% of burns and her general condition being poor, she was not in a fit mental state to make the dying declaration; that the dying declarations were not in question-and-answer form; and that the possibility of tutoring the deceased could not be ruled out.

Dismissing the appeal, this Court,

HELD: 1. A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premiss that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premiss which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross-examined by the person who is sought to be implicated. [94H; 95A-B]

2.1 Being an independent piece of evidence like any other piece of evidence-Neither extra strong nor weak-a dying declaration can be acted upon without corroboration if it is found to be otherwise true and reliable, and in order to form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of indentifying the person implicated and is thoroughly reliable and free from blemish.[95d; 95B]

2.2 If it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. [95C]

3.1 In the instant case, since the incident occurred in the early hours of the day, there was possibility of a family member being involved; and as the incident took place in broad day light, there could be no doubt that the deceased had an opportunity to see her tormentor. The deceased told the doctor (PW 5) that her `nanad' had set her on fire. Since the appellant was the only sister of her husband, there remained no doubt about the identity of the `nanad' (husband's sister or sister-in-law). Doubt, if any, was removed by another doctor's evidence (PW 2) to whom she disclosed the name of the appellant. [95D, 94D, 95F-G]

3.2 The mere fact that the deceased had suffered 90% burns and her general condition was poor, was no reason to discard the testimony of both the medical men when they said that she was in a fit state of mind and was able to make the dying declarations in question. Both the doctors were conscious of her condition and would not have attached any importance to her statement if they had any doubt about her mental capacity. Besides the oral evidence of the two medical men, there were contemporaneous documents showing that the deceased made the statements in question. [96E; 95G; 94G]

Suresh v. State of M.P., [1987] 2 SCC 32, relied on.

3.3 The doctors (PW 2 and PW 5) merely questioned the victim for the limited purpose of recording the case history. Having regard to her condition, they could not

have questioned her in detail. In the circumstances, the fact of the statements being cryptic was understandable; and the failure on their part to record her statements in question-and-answer form could in no manner affect the probative value to be attached to their evidence. [97A-B; 96G]

Bankey lal v. State of U.P., [1971] 3 SCC 184, relied on and Rabi Chandra Padhan & Ors. v. State of Orissa, [1980] 1 SCC 240, held inapplicable.

4. Being conscious of the fact that while dealing with an acquittal appeal, the court should give due weight to the views of the trial court on the question of credibility of the prosecution evidence and should not lightly interfere with its appreciation, the High Court carefully scrutinised the evidence, particularly in regard to the two oral dying declarations, and rightly concluded that there was no possibility of tutoring nor was the deceased mentally unfit to make the said dying declarations. [93C-E]

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Balak Ram & Anr. v. State of U.P., [1975] 1 SCR 153 and Lallubhai v. State of Gujrat, [1971] 3 SCC 767, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 326 of 1979.

From the Judgement and Order dated 4.5.1979 of the Gujarat High Court in Criminal Appeal No. 389 of 1976.

T.U. Mehta, P.H. Parekh and Ms. Geetanjali Mathrani for the Appellant.

D.A. Dave, Anip Sachthey and B.R. Jad for the Respondent.

The following Order of the Court was delivered. The appellant was charged under Section 302 I.P.C. for causing murder of Gangaben, her brother's wife , in the early hours of 11th June, 1975 by pouring kerosene on her person and setting her aflame. The marriage had taken place with Jayantilal, the brother of the appellant, hardly three months before the incident in question. On the date of the incident the deceased was in the husband's house when the unfortunate incident took place. On hearing the cries a neighbor Prahladbhai went to the house and found that the deceased was inside the kitchen. He pushed opened the door and saw the deceased aflame. The said Prahladbhai, Bhanubhai, the brother of the appellant, and others took her to Shardaben Hospital for treatment. They reached the casualty department at about 6.45 a.m. and thereafter she was admitted to the Burns-Ward as an indoor patient at about 6.50 a.m. Within five minutes thereafter PW 5 Dr. Kritikumar Solanki examined her. While taking her case-history he enquired of the injured as to what had happened. The injured replied "my nanad (sister-in-law) burnt me". He prescribed certain medicines, noted the case-history and thereafter instructed the nurse. PW 4 Pankajben, to give the

treatment. Dr. Solanki was incharge of the Burns-Ward at the relevant time as PW 2. Dr. Suresh Ambvani, was absent. Dr. Ambvani arrived at about 8.30 a.m. in the ward and examined the patient. After noting her pulse, etc., he asked her how she had received the burns. She told him that she had been burnt. On further questioning she stated that her husband's sister and burnt her. Dr. Ambvani thereupon asked her the name of her husband's sister which she disclosed as Padma, the appellant before us. Dr. Ambvani later made a note about the information divulged by the victim on the police `yadi' which was received.

at about 2.45 p.m. to ascertain if the victim was in a fit condition to make a dying declaration.

After the victim was brought to the hospital a telephone message was sent to Madhupura Police Station. The investigating officer in the course of investigation recorded the panchnama of the scene of occurrence at about 10.15 a.m. The panchnama shows that the residence of the victim was on the first floor. In the outer room pieces of burnt clothes and a peeled skin piece were found. To the south thereof was the kitchen which was smelling of kerosene. Pieces of burnt clothes were also lying in that kitchen. There was a primus with a burner and broken match box soiled with water lying alongside certain garments,namely, two blouses, two petti-coats and two half burnt sarees. There was water on the floor.

Inspector Nagori claims to have interrogated the accused on the same day but arrested her on the next day at about 5.00 p.m. The investigation thereafter proceeded in usual course and ultimately the appellant came to be charged as stated above.

The prosecution mainly relies on the evidence of the two medical men PW 2 Dr. Ambvani and PW 5 Dr. Solanki. In addition thereto reliance is placed on the evidence of the two nurses PW 3 Rukshmaniben and PW 4 Pankajben. The neighbor PW 7 Prahladbhai was also examined but he turned hostile. On an appreciation of the evidence of these witnesses the learned City Session Judge, Ahmedabad, came to the conclusion that this was a case of homicidal death. That conclusion has been confirmed by the High Court and has not been contested before us. With regard to the evidence of the two medical men the trial judge concluded that there was no reason to doubt their testimony since the same was corroborated by the contemporaneous entries made by them in the case paper and the police `yadi'. Taking note of the evidence of PW 1 Dr. Purohit who performed the post-mortem a nd the evidence of PW 5 Dr. Solanki, he came to the conclusion that the victim was in a position to speak. having regard to the fact that she had 90% of burns, her pulse was 130, respiration was 20 and her general condition was not good, he concluded, relying on the decisions of this Court in Balak Ram & Anr. v. State of U.P., [1975] 1 SCR 753 (1975 Crl. Appeals Reporter 39) and Lallubhai v. State of Gujarat, [1971] 3 SCC 767 (1972 Crl. L.J.. 628) that the deceased could not be in a fit state of mind when she made the dying declaration. He thought it unsafe to place implicit reliance on the said evidence particularly because it was the appellant's contention that she was not on good terms with her brother i.e. the husband of the deceased. The learned trial Judge also thought that the possibility of torturing could not be ruled out. In this view, that he took, he gave the benefit of doubt to the appellant and acquitted her.

The State feeling aggrieved, filed an appeal, being Criminal Appeal No. 389 of 1976, which was heard and decided by a Division Bench of the High Court of Gujarat on 4th may 1979. The High Court on a re-appreciation of the prosecution evidence concluded that the view taken by the learned Sessions Judge was thoroughly untenable. The High Court pointed out that two main reasons which weighed with the learned Sessions Judge for acquitting the appellant were-

> "(1) that the deceased had not the requisite mental condition so as to make acceptable dying declaration: and
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> (ii) that her husband was very much near the cot of the deceased, and hence, the possibility of tutoring the deceased cannot be ruled out". The High Court closely examined both these reasons and concluded that they could not be supported by the evidence on record. Being conscious of the fact that while dealing with an acquittal appeal, the High Court should give due weight to the views of the trail court on the question of credibility of the prosecution evidence and should not lightly interfere with its appreciation, it carefully scrutinized the evidence, particularly in regard to the two oral dying declarations, and concluded that there was no possibility of tutoring nor was the deceased mentally unfit to make the dying declarations. In that view of the matter it reversed the order of acquittal, convicted the appellant of murder and sentenced her to life imprisonment.

Mr. Mehta, the learned counsel for the appellant, has taken us through the entire evidence as well the case law on which the learned trial Judge has based his order of acquittal. He also invited our attention to a number of decisions of this Court in support of his contention that the High Court ought not to have interfered with the order of acquittal. According to him the High Court should have given due regard to the appreciation of evidence by the trial court and should not have lightly brushed aside its conclusion on facts. Counsel submitted that an order of acquittal strengthens the presumption of innocence which should not be dislodged unless the appellate court comes to the conclusion that the trial court has committed a manifest error of judgement resulting in miscarriage of justice. His submission was that this Court should approach the question by inquiring if the High Court had adhered to the well- settled principle that if two views are possible and the trial court accepts one view which the High Court considers less probable, the High Court will not reverse the trial court. Lastly he contented that although a conviction can be based solely on a dying declaration, courts should be slow to accept a dying declaration as true where it is not recorded in question and answer from and is cryptic in nature, since it is a piece of evidence not tested by cross-examination. The weight to be attached to a dying declaration must largely depend on whether or not the deceased was a fit state of mind to make it and since in the present case the trial court had ruled against the prosecution, the High Court was not justified inreversing the trial court, more so because if was doubtful if she could speak at all having regard to the burns on her lips and tongue. In support of his submission he cited a host of decisions of this Court but it is unnecessary to refer to them as on principle there can be no dispute with the propositions of law stated by the appellant's counsel. We have given given our anxious considerations to these submissions but we are afraid we cannot accede to them because in the facts of the present case we are satisfied that the High Court would have failed in its duty if it had not reversed the decision of the trial court.

The evidence on record shows that the marriage had taken place hardly three months before the incident. Even on the appellant's own showing her relations with the deceased were not strained. The appellant is the only sister of the husband of the deceased. The word 'nanad' means the husband's sister. Therefore, when the deceased told PW 5 Dr. Solanki that her 'nanad' had set her on the fire, she meant the appellant and none else. The evidence of nurse PW 4 Pankajben corroborates the evidence of Dr. Solanki. Both these witness have deposed that the deceased was in a fit state of mind and was able to speak, elbeit with difficulty. If there was any doubt on the question of identity it was cleared by PW 2, Dr. Suresh Ambvani to whom the deceased gave the name of her tormentor as padma. The learned Sessions Judge, also came to the conclusion that notwithstanding the extensive burns the patient was conscious and was able to speak at the time she made the dying declarations. Her condition soon deteriorated and by 2.45 p.m. she was not in a position to make any statement to the police as recorded by PW 2 Dr. Ambvani on the police 'yadi'. Dr. Ambvani had,however, recorded what the patient had told him. Therefore, besides the oral evidence of two medical-men there are contemporaneous documents which go to show that the deceased made the statements in question. Even the learned Sessions Judge did not doubt the correctness of truth of what both the medical-men deposed but in his view the deceased was not mentally fit when she named the appellant.

It is well-settled by a catena of cases that a dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premises that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premiss which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross- examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence--neither extra strong nor weak--and can be acted upon without corroboration if it is found to be otherwise true and reliable. In the present case there can be no doubt that the deceased had an opportunity to see her tormentor as the incident happened in broad day light. Since the incident occurred in the early hours of the day there was the possibility of a family member being involved. There being no dispute that death was homicidal, the question is who did it? As no relative from the side of her parents was present, the possibility of tutoring by them must be ruled out. The theory that her husband prompted her to name the appellant because his relations with the appellant were strained must be brushed aside as devoid of merit. Except the appellant's statement in this behalf, there is no other evidence--no such foundation was laid in the cross-examination of the investigating officers. Since it is conceded that the appellant's relations with the deceased were not bad, it is difficult to understand why the latter should falsely involved her, assuming her husband did prompt her, and allow her real tormentor to escape. Since the appellant is the only sister of her

husband, there remains no doubt about the identity of the 'nanad' (husband's sister or sister-in-law). Doubt, if any, is removed by PW 2 Dr. Ambvani's evidence to whom she disclosed the name `Padma'. Both the medical-men were conscious about her condition and, therefore, they would not have attached any importance to her statement if they had any doubt about her mental capacity. Even Mr. Mehta had to concede that he was not in a position to say that the two medical-men were motivated in giving false evidence.

Mr. Mehta, however,contented that apart from the fact that the appellant had 90% burns, her pulse rate was high and she had respiratory difficulty, the evidence of PW 5 Dr. Solanki shows that he had prescribed morphine injection and, therefore, by the time PW 2 Dr. Ambvani examined her she could not be in a conscious state to make the dying declaration to him. In this connection he relied on the statement of PW 4 Pankajben who stated that she had given the treatment prescribed by Dr. Solanki. Mr. Mehta, however, overlooks PW 4 Pankajben's categorical statement that she had not given any injection to the victim. On the other hand the other nurse PW 2 Rukshmaniben deposed that she had given the morphine injection intravenously after Dr. Ambvani left the ward. Therefore, the submission has no merit.

Mr. Mehta then submitted that having regard to the fact that the victim had 90% burns and her general condition was poor, it would be hazardous to hold that her statements to the two medical-men were true. He also argued that she had burns on her lips and her tongue was swollen making it doubtful if she could talk. We do not think there is any merit in this submission. In Suresh v. State of M.P., [1987] 2 SCC 32 this Court was required to deal with a more or less similar situation. In that case the victim had sustained 100% burns of the second degree and her dying declaration was recorded by Dr. Bhargava in the hospital. Dr. Bhargava had deposed that the victim was in a fit state of health. The evidence, however,disclosed that while Dr. Bhargave was recording her statement the victim had started going into a coma. Yet this Court accepted the dying declaration made by the victim to Dr. Bhargava. Therefore, the mere fact that she had suffered 90% burns and her general condition was poor is no reason to discard the testimony of both of medical-men when they say that she was in a fit state of mind and was able to make the dying declaration in question.

Lastly, the contention that since the dying declarations were not in question and answer from they must be discarded altogether is not correct. Dr. Solanki had merely asked the patient how she was burnt to record the history of her case. The victim answered by stating that her 'nanad' (husband' sister) had burnt her. Dr. Ambvani too had merely tried to ascertain from the deceased how she was burnt and it was only after she stated that she was burnt by her sister-in-law that he tried to find the name of her tormentor. In these circumstances we do not think that the failure on the part of the medical-men to record her statement in question and answer from can in any manner affect the probative value to be attached to their evidence. In Rabi Chandra Padhan & Ors. v. State of Orissa, [1980] 1 SCC 240 at p. 244 this Court merely stated that dying declaration should preferably be in the question and answer form. That would be so when the statement of the victim is sought to be recorded as a dying declaration. But in the instant case as seen from the evidence of both the medical-men they merely questioned her for the limited purpose of stating they history of the case. Even otherwise having regard to her condition they could not have questioned her in detail. In such

circumstances the fact of the statements being cryptic is understandable. See Bankey Lal v. State of U.P. [1971] 3 SCC 184 We, therefore, do not think that it would be reasonable to discard the prosecution evidence in regard to the dying declaration on such slender grounds.

In the result we see no merit in this appeal and dismiss the same. The appellant will submit to her bail within fifteen days from today. Bail bond will stand canceled.

R.P. Appeal dismissed.