Supreme Court of India
Kusa & Ors vs State Of Orissa on 17 January, 1980
Equivalent citations: 1980 AIR 559, 1980 SCR (2) 801
Author: S M Fazalali
Bench: Fazalali, Syed Murtaza

PETITIONER:
KUSA & ORS.

Vs.

RESPONDENT:
STATE OF ORISSA

DATE OF JUDGMENT17/01/1980

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
KOSHAL, A.D.

CITATION:
1980 AIR 559 1980 SCR (2) 801
1980 SCC (2) 207
CITATOR INFO :
R 1987 SC 98 (7)

ACT:
Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970, S. 2 (a)-Scope.
Indian Evidence Act 1872, S. 32(1).
Dying declaration-Evidentiary value of-Eye-witnesses account inconsistent with dying declaration-Dying declaration if could be relied upon.
Dying declaration-Evidence of doctor that deceased was in a state of shock-Inability of deceased to answer the last question of doctor-Whether invalidates the dying declaration.
Dying declaration-Deceased naming some other persons than accused-Such persons not challaned-Validity of dying declaration.

HEADNOTE:
The appellants along with other accused persons were tried under section 302/149 I.P.C. for causing murder of two persons. While one of the deceased died on the spot the other who was removed to hospital, gave a dying declaration to the doctor before dying. The Sessions Judge finding that none of the eye-witnesses examined was reliable and as the

accused could not be convicted on the basis of their testimony acquitted all the accused. He further held that the evidence of the eye-witnesses was rendered improbable and was in fact falsified by the dying declaration Ex. 9. On appeal by the State, the High Court held that the dying declaration Ex. 9 was absolutely true and reliable and was sufficient to establish the prosecution case. It accordingly convicted and sentenced the appellants to imprisonment for life.

In the appeal to this Court, it was contended on behalf of the appellants that (1) as the deceased was in a state of shock, it was unsafe to rely on the dying declaration, (2) as the dying declaration was incomplete it could not be acted upon, and (3) as the deceased had implicated some persons other than the accused, the dying declaration could not be said to be true.

Dismissing the appeal,

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HELD: 1. The High Court was right in holding that even excluding the evidence of the eye-witnesses the dying declaration is true and reliable and sufficient to found the conviction of the appellants. [808 F]

2. The Sessions Judge committed an error in law in rejecting the dying declaration because if the evidence of the eye-witnesses was to be rejected on the ground that it was inconsistent with the dying declaration, it would not necessarily follow that the dying declaration was also unreliable and unworthy of credence. [804 C]

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3. (a) This Court has held that whenever a particular view taken by authors of Medical Jurisprudence, is adumbrated, the same must be put to the doctor to assess how far the view taken by the experts apply to the facts of the particular case. [805 G]

In the instant case though the doctor who had recorded the dying declaration had stated that the deceased was in a state of shock because he had received a serious injury in the abdomen which had to be stitched, he was however not crossed-examined as to the fact whether or not despite the shock, the deceased had retained his mental faculties. On the other hand, the last certificate given by the doctor towards the end of the dying declaration that the patient became semi-conscious clearly shows that the deceased was fully conscious when he started making the dying declaration before the doctor. [804 H, 805 G]

(b) A perusal of the entire dying declaration clearly shows that the doctor had asked all the necessary questions that could be asked from the deceased and the last question "what more you want to say" was merely in the nature of a formality. Having narrated the full story, there was nothing more that the deceased could add. The dying declaration was therefore not incomplete one. [806 B]

Cyril Waugh v. The King, 54 CWN 503, distinguished.

(c) Merely because some other persons named in the dying declaration were not challaned would not by itself prove the falsity of the dying declaration. It may be that these, persons were left out from the category of accused in the F.I.R. or the challan due to ulterior motives. [806 E, 805 C]

4. A person on the verge of death is most unlikely to make an untrue statement unless prompted or tutored by his friends or relatives. The shadow of immediate death is the best guarantee of the truth of the statement by a dying person regarding the causes or circumstances leading to his death which are absolutely fresh in his mind and is untainted or discoloured by any other consideration except speaking the truth. It is for these reasons that the Statute (The Evidence Act) attaches a special sanctity to a dying declaration. [808 B-C]

5. It is well established that although a dying declaration should be carefully scrutinised if after perusal the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a dying declaration even if there is no corroboration. [808 D-E]

Khushal Rao v. The State of Bombay [1958] SCR 552,; Tarachand Damu Sutar v. The State of Maharashtra [1962] 2 SCR 775; Mannu Raja & Anr. v. State of M.P. [1976] 3 SCC 104 referred to.

Ram Nath Madhoprasad & Ors. v. State of M.P. AIR 1953 SC 420, overruled.

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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 53 of 1974.

From the Judgment and Order dated 2-11-1973 of the Orissa High Court in Govt. Appeal No. 10/1971.

Y. S. Chitle, and U. P. Singh for the Appellant. D. Mookherjee and B. P. Parthasarthi for the Respondent.

The Judgment of the Court was delivered by FAZAL ALI J.-This appeal under s. 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970 is directed against the judgment of the High Court of Orissa dated 2-11-1973 convicting the appellants u/s. 302/149 of Indian Penal Code and sentencing them to imprisonment for life.

The appellants along with other accused person were tried before the Sessions Judge under s. 302/149 for causing murder of two persons namely Ghansham and his brother Antarjami. The Trial

Court after considering the evidence acquitted all the accused of the charges framed against them. Thereafter the State of Orissa filed an appeal before the High Court against the order of acquittal passed by the Sessions Judge and in the said appeal the High Court reversed the judgment of the Sessions Judge so far as the appellants were concerned and convicted and sentenced them as indicated above. Hence this appeal before us.

The facts of the case are detailed in the judgment of the High Court and it is not necessary for us to repeat them. It appears that shortly before the date of occurrence, there was a partition suit between the parties in respect of certain properties enjoyed by accused Banshi and Ghana. On 2-12-1968, according to the prosecution, the accused persons armed with lathis, Bhusas and valies came to the house of the deceased Ghansham and called him out. When Ghansham opened the door, the accused Banshi stabbed Ghansham on the chest as a result of which Ghansham fell down and died. On hearing the alarm, the other deceased Antarjami who was brother of Ghansham went to the spot and he was also assaulted by the accused persons. This occurrence had taken place near about 7.00 a.m. F. I. R. was sent to Bramhagiri Police Station where it was lodged and a case was registered. After the usual investigation, police submitted charge-sheet against all the accused persons who were tried by the Sessions Judge with the result mentioned above.

It appears that the Trial Court after considering the evidence of the eye witness examined before it came to a clear finding that none of the eye witnesses were reliable and hence the accused could not be convicted on the basis of their testimony. One of the main considerations which swayed with the trial Court in coming to this conclusion was that in view of the dying declaration-Ex. 9 made by Antarjami, the evidence of the eye witnesses becomes improbable, and is in fact falsified. The learned Sessions Judge also disbelieved the dying declaration as it was inconsistent with the oral evidence. We might mention here that the Sessions Judge committed an error of law in rejecting the dying declaration because if the evidence of the eye witnesses was to be rejected on the ground that it was inconsistent with the dying declaration then it would in the circumstances not necessarily follow that the dying declaration was also unreliable and unworthy of credence.

The High Court while endorsing the findings of the Trial Court that no reliance could be placed on the eye witnesses appears to have founded the conviction of the appellants mainly on the basis of the dying declaration-Ex. 9 recorded by Dr. Mohanty on 3-12-1968 at the hospital. The High Court has given cogent reasons for holding that the dying declaration is absolutely true and reliable and was sufficient to establish the prosecution case against the appellants. We have also gone through the entire dying declaration-Ex. 9 very carefully and we find that the statement made by Antarjami is straight-forward, rational, consistent and absolutely coherent. There appears to be a ring of truth in the statement made by Antarjami. Counsel for the appellant has fairly conceded that there is no evidence whatsoever to indicate that there was any possibility of prompting the deceased to make a tainted statement. The dying declaration was attacked by the counsel for the appellant on three grounds. In the first place, it was submitted that as the deceased Antarjami was in a state of shock, it was unsafe to rely on the dying declaration; secondly it was contended that as the dying declaration was incomplete, it should not be acted upon and thirdly it was pointed out that Antarjami had implicated some persons other than the accused also in the assault on him and his brother, therefore the dying declaration could not be said to be true.

So far as the first contention is concerned; namely whether the deceased was in a state of shock, it is true that the doctor who had recorded the dying declaration had stated that the deceased was in a state of shock because he had received a serious injury in the abdomen which has to be stitched. The doctor was however not cross-examined as to the fact whether or not despite the shock, the deceased had retained his mental faculties. On the other hand; a bare perusal of the dying declaration and the coherent and consistent statement made by Antarjami clearly reveals the fact that the deceased was fully conscious and was not suffering from any confusion or hallucination. The deceased has clearly stated the motive for the occurrence namely dispute about the partition. He has also named the four appellants and stated that he and his brother were assaulted by valies and lathis and it is not disputed by the prosecution that the appellants were armed with these weapons. It is true that while naming the appellants, the deceased has also named some other persons but the mere fact that those persons were not challaned does not detract from the value of the dying declaration because it may well be that what the deceased was saying was true and the persons who were left out from the category of accused in the F.I.R. or the challan may be due to ulterior motives.

Dr. Chitale however relied on a passage in Taylor's 'Principles and Practice of Medical Jurisprudence'-Twelfth Edition particularly on the following passage:

> 'Assess very carefully the mental condition of the patient. When shock ensues upon violence, especially when severe loss of blood or some grievous head injury is leading to death, the intellect of the dying person becomes confused. If the doctor observes any wandering or want of clearness in the mind of the patient, he must mention it in connection with his evidence; but this does not absolve him from his duty, although it should make him particularly careful when interpreting his notes."

We are unable to place any reliance on these observations in absence of any question put to the doctor by the accused in his cross-examination regarding the view expressed by the author regarding the state of mind of the deceased. It has been held by this Court in several cases that whenever a particular view taken by authors of medical jurisprudence is adumbrated, the same must be put to the doctor to assess how far the view taken by the experts apply to the facts of the particular case. On the other hand, the last certificate given by the doctor towards the end of the dying declaration that the patient became semi-unconscious clearly shows that the deceased was, fully conscious when he started making the dying declaration before the doctor. For these reasons therefore, the first ground taken by the appellant fails and is not tenable. As to the second ground, namely that the dying declaration was incomplete, we are unable to accept this contention because we find that the deceased Antarjami could not answer the last question which was "what more you want to say" because he became semi-unconscious and was unable to answer any further question. A perusal of the entire dying declaration would clearly show that the doctor had asked all the necessary questions that could be asked from the deceased and the last question was merely in the nature of a formality. It is obvious that having narrated the full story there was nothing more that the deceased could add. We are therefore unable to hold that the present dying declaration is an incomplete one. Reliance was placed by the counsel for the appellant in the case of Cyril Waugh v. The King,(1)wherein it was held that no reliance could be placed where a dying declaration was incomplete. Reference to the facts of the case would show that the statement made by the deceased

was really incomplete in as much as the deceased was unable to complete the main sentence where he was trying to describe the genesis and motive of the occurrence. The deceased in that case stated as "when he fired the short, he missed the other man. The man has an old grudge for me simply because.. ". It is clear from the statement of the deceased in that case that the deceased wanted to give the motive for the occurrence and other relevant facts which he could not say before the dying declaration was closed. This case therefore would have no application to the facts of the case.

As regards the last contention that the deceased had implicated some other persons also show that it was not true, we have already pointed out that merely because some other persons were named and not challaned would not by itself prove the falsity of the dying declaration. Finally on the question of law, it was argued that a dying declaration unless corroborated should not be acted upon. Reliance was placed on a decision of this Court in Ram Nath Madhoprasad & Ors. v. State of M.P.(2). This decision, no doubt, supports the contention of the appellant but since then this Court has departed from the view taken in the case referred to above and has held that if the dying declaration is believed, it can be relied upon for convicting the accused even if there is no corroboration.

In Khushal Rao v. The State of Bombay,(3) it was pointed out that s. 32(1) of the Evidence Act attaches special sanctity to a dying declaration and unless such a dying declaration can be shown to be unreliable, it will not affect its admissibility. It was further held that although a dying declaration has to be closely scrutinised, once the Court comes to the conclusion that it is true, no question of corroboration arises. In this connection, the Court made the following observations:-

> "The Legislature in its wisdom has enacted in s. 32(1) of the Evidence Act that "When the statement is made 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, in cases in which the cause of that person's death comes into question", such a statement written or verbal made by a person who is dead (omitting the unnecessary words) it self a relevant fact. This provision has been made by the Legislature, advisedly, as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that evidence, which has not been tested by cross-examination, is not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the Legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death has been accorded by the Legislature a special sanctity which should, on first principles, be respected.
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> ... ...
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> But in our opinion, there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other

independent evidence, is not fit to be acted upon, and made the basis of a conviction."

In this case this Court did not approve of the law laid down in the earlier decision which is reported in A.I.R. 1953, p. 420. To the same effect is a later decision of this Court in the case of Tarachand Damu Sutar v. The State of Maharashtra(1) which is a decision rendered by five Judges of this Court which has also taken the view that once a dying declaration is found to be true, it can be acted upon without any corroboration. Thus, the view taken by this Court by the three judges in A.I.R. 1953, p. 420 stands overruled by this decision. Same view was taken by this Court in the case of Mannu Raja & Anr. v. State of M.P.(1) which has been relied upon by Mr. D. Mookherjee, counsel for the State.

There are a number of later decision of this Court also to the same effect but it is unnecessary to multiply authorities. It is thus manifest that a person on the verge of death is most unlikely to make an untrue statement unless prompted or tutored by his friends or relatives. In fact the shadow of immediate death is the best guarantee of the truth of the statement made by a dying person regarding the causes or circumstances leading to his death which are absolutely fresh in his mind and is untainted or discoloured by any other consideration except speaking the truth. It is for these reasons that the Statute (The Evidence Act) attaches a special sanctity to a dying declaration. Thus, if the statement of a dying person passes the test of careful scrutiny applied by the Courts, it becomes a most reliable piece of evidence which does not require any corroboration. Suffice it to say that it is now well established by a long course of decisions of this Court that although a dying declaration should be carefully scrutinised but if after perusal of the same, the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a dying declaration even if there is no corroboration.

For these reasons, therefore, we find ourselves in complete agreement with the opinion of the High Court that even excluding the evidence of the eye witnesses, the dying declaration is true and reliable and sufficient to found the conviction of the appellant.

For these reasons therefore the appeal fails and is accordingly dismissed.

N.V.K. Appeal dismissed.