REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.228 OF 2008

Kaliya ...Appellant

Versus

State of Madhya Pradesh ...Respondent

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. This appeal has been preferred against the judgment and order dated 6.12.2005, passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Appeal No.23 of 1992, affirming the judgment and order dated 10.1.1992 passed by Additional Sessions Judge, Morena in Sessions Trial No.5 of 1985. By this order the appellant had been convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and sentenced to life

imprisonment and a fine of Rs.500/- had also been imposed, and in default of payment of fine to undergo RI for three months.

2. Facts and circumstances giving rise to this appeal are:

A. That on 18.6.1984, Guddi, daughter-in-law of the present appellant Smt. Kaliya was admitted to J.A. Hospital, Gwalior in a burnt condition. Her dying declaration was recorded and she died of the burn injuries on the same day. Information from hospital was given to Police Station, Jhansi Road, Gwalior. Her dead body was sent for post-mortem and all formalities were properly completed.

B. An FIR was lodged and after the completion of the investigation, a chargesheet was filed against the appellant alongwith her husband and son under Section 498-A IPC, the appellant was additionally charged under Section 302 IPC.

C. The prosecution examined a large number of witnesses including Dr. Nirmal Kumar Gupta (PW.18) who recorded the dying declaration, Merry Kutti Michael (PW.5), the staff Nurse who was present at the time of recording the dying declaration. After the conclusion of the trial, the appellant was convicted under Section 302 IPC and sentenced as mentioned hereinabove, though, other co-accused Amar Singh (son of the appellant) and Bheema (husband of

the appellant) stood convicted under Section 498-A IPC and sentenced to undergo RI for 3 years.

D. The appellant as well as the other co-accused filed Criminal Appeal Nos. 23 and 17 of 1992, respectively before the Madhya Pradesh High Court. The High Court dismissed the appeal of the present appellant vide impugned judgment and order dated 6.12.2005 but allowed the appeal of the other co-accused acquitting them of the said charges.

Hence, this appeal.

3. We have heard Shri S.K. Dubey, learned Senior counsel for the appellant and Ms. Vibha Datta Makhija, learned counsel for the respondent-State.

4. The Trial Court as well as the High Court relied mainly upon the dying declaration made by Guddi, deceased wherein she had stated that she was subjected to harassment by her mother-in-law, present appellant, her father-in-law and her husband. So far as the incident dated 18.6.1984 was concerned, Guddi suffered 100 per cent burn injuries at her house. After hearing commotion, some neighbours reached the place of occurrence and extinguished the fire by pouring

SUPREME COURT OF INDIA
॥ यतो धर्मस्ततो जयः ॥
JUDGMENT

water on her body and took her to the hospital. In the hospital her dying declaration was recorded wherein she had specifically stated "I was lying on the cot then my mother-in-law by pouring kerosene oil and setting fire in my silk saree ran away". Dr. (Miss.) Bharti Kanned who was on duty and Merry Kutti Michael, Staff Nurse (PW.5) were witnesses to the dying declaration recorded by Dr. Nirmal Kumar Gupta (PW.18). In the FIR there is a full reference of the dying declaration recorded by Dr. Nirmal Kumar Gupta (PW.18). After the death, the post-mortem was conducted wherein it was opined that she died of burn injuries. If she had been admitted in the hospital with 100% burns she would not be in a state to get her dying declaration recorded. The whole emphasis before the courts below as well as before this Court has been that the dying declaration cannot be relied upon since the original of the same had not been filed by the prosecution and the carbon copy could not have been exhibited and taken on record. It has been further contended that even if the carbon copy could be relied upon it may have been tampered with as is evident from many interpolations and cuttings.

5. There is ample evidence on record particularly, the statement of Dr. B.L. Jain (PW.16) and F.A. Khan (PW.17) to the effect that

SUPREME COURT OF INDIA
यतो धर्मस्ततो जयः
JUDGMENT

Guddi, deceased was admitted to J.A. Hospital on 18.6.1984. However, her case sheet could not be deposited by the Clerk working in the hospital. Dr. Nirmal Kumar Gupta (PW.18) supported the case of the prosecution with respect to the admission of Guddi in the hospital and further that he recorded her dying declaration wherein she had stated that when she was lying on the bed, her mother-in-law poured kerosene oil on her and set her on fire and ran away. He further deposed that Guddi appended her thumb impression on the dying declaration. He also deposed that before recording her dying declaration, Guddi was in a fit mental condition. His statement stands fully corroborated by the evidence of Merry Kutty Michael, the staff nurse, (PW.5) who was present at the time of recording her dying declaration. The testimony of both these witnesses, namely, Dr. Nirmal Kumar Gupta (PW.18) and Merry Kutty Michael (PW.5) remained unimpeached. Dr. Nirmal Kumar Gupta (PW.18) in his cross-examination explained that Ex.P.4 was the carbon copy of the original. Dr. B.L. Jain (PW.16) and F.A. Khan (PW.17) clearly deposed that even after conducting an extensive search, the original dying declaration could not be traced.

In view of the provisions of Sections 63 and 65 of the Indian Evidence Act 1872 (hereinafter referred to as the 'Act 1872'), such a course of action is permissible.

6. The original record reveal that as the original dying declaration was not traceable/available, the prosecution was permitted to adduce secondary evidence. In this regard, the Trial Court passed several orders from time to time as is evident from the orders dated 4.9.1990, 15.10.1990, 7.11.1990, 8.12.1990, 26.12.1990, 25.2.1991 and 14.3.1991. And ultimately, on 13.4.1991, on being satisfied that the original dying declaration was not traceable, the Trial Court granted permission to the prosecution for adducing the secondary evidence.

7. This Court has examined the issue of putting a thumb impression on the dying declaration by 100% burnt person in **State of Madhya Pradesh v. Dal Singh & Ors.** AIR 2013 SC 2059, and after considering a large number of cases including **Mafabhai Nagarbhai Raval v. State of Gujarat**, AIR 1992 SC 2186; **Laxmi v. Om Prakash & Ors.**, AIR 2001 SC 2383; and **Govindappa & Ors. v. State of Karnataka**, (2010) 6 SCC 533 came to the conclusion as under:-

"The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact."

SUPREME COURT OF INDIA
JUDGMENT

8. In **State of Rajasthan v. Kishore**, AIR 1996 SC 3035, in an identical case, this Court placed reliance on the dying declaration and upheld the conviction.

9. Shri S.K. Dubey has placed much reliance on the judgment of this Court in **Narain Singh & Anr. v. State of Haryana**, AIR 2004

SC 1616, wherein the court acquitted the accused persons only on the ground that the dying declaration itself was not proved and, therefore the question of acting on it could not arise. The ratio of the said judgment has no application in the instant case as mentioned hereinabove. In the instant case, the Trial Court had granted permission to lead secondary evidence and the same had been adduced strictly in accordance with law and accepted by the courts below.

10. Section 65(c) of the Act 1872 provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The court is obliged to examine the probative value of documents produced in court or their contents and decide the question of admissibility of a document in secondary evidence. (Vide: **H. Siddiqui** (dead) by Lrs. **v. A. Ramalingam,** AIR 2011 SC 1492; and **Rasiklal Manikchand Dhariwal & Anr. v. M.S.S. Food Products,** (2012) 2 SCC 196). However, the secondary evidence of an ordinary document is

SUPREME COURT OF INDIA
JUDGMENT

admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor, mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law. (Vide: **The Roman Catholic Mission v. The State of Madras**, AIR 1966 SC 1457; **Marwari Khumhar & Ors. v. Bhagwanpuri Guru Ganeshpuri & Anr.**, AIR 2000 SC 2629; **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple & Anr.**, AIR 2003 SC 4548; **Smt. Dayamathi Bai v. K.M. Shaffi,** AIR 2004

SC 4082; and **Life Insurance Corporation of India & Anr. v. Rampal Singh Bisen**, (2010) 4 SCC 491).

11. In **M. Chandra v. M. Thangamuthu & Anr.**, (2010) 9 SCC 712, this Court considered this aspect in detail and held as under:

> *"We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."*

SUPREME COURT OF INDIA
JUDGMENT

A similar view has been re-iterated in **J. Yashoda v. K. Shobha Rani**, AIR 2007 SC 1721.

12. Dr. Nirmal Kumar Gupta (PW.18), deposed that 100% burnt patient can also be in a fit mental and physical condition to give statement. Dr. V.K. Deewan (PW.14), who performed the post-mortem of deceased Guddi, deposed that she was completely burnt

and the burn injuries were anti-mortem. She had died due to Asphyxia, due to burn injuries, her death was homicidal.

In view thereof, both the courts below were of the considered opinion that the appellant was responsible for causing the death of Guddi, deceased.

13. The defence taken by the appellant that she had gone out of her house to provide water to the buffalo has been disbelieved by the Court. As the incident occurred in the house of the appellant, and she was present therein at the relevant time, she could have furnished the explanation as to how and under what circumstances Guddi died. The matter was within her special knowledge.

14. In view of the above, the appeal lacks merit and is accordingly dismissed.

SUPREME COURT OF INDIA
यतो धर्मस्ततो जयः
JUDGMENT

…..…………………….........J.
(Dr. B.S. CHAUHAN)

…………………………..........J.
(S.A. BOBDE)

New Delhi,
July 23, 2013

SUPREME COURT OF INDIA

JUDGMENT