CASE NO.:
Appeal (crl.) 608 of 2001

PETITIONER:
LAXMAN

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT: 27/08/2002

BENCH:
G.B. PATTANAIK & M.B. SHAH & DORAISWAMY RAJU & S.N. VARIAVA & D.M. DHARMADHIKARI

JUDGMENT:
JUDGMENT

2002 (1) Suppl. SCR 697

The Judgment of the Court was delivered by

PATTANAIK, J. In this Criminal Appeal, the conviction of the accused appellant is based upon the dying declaration of the deceased which was recorded by the judicial magistrate (P.W.4). The learned sessions Judge as well as the High Court held the dying declaration made by the deceased to be truthful, voluntary and trustworthy. The magistrate in his evidence had stated that he had contacted the patient through the medical officer on duty and after putting some questions to the patient to find out whether she was able to make the statement; whether she was set on fire; whether she was conscious and able to make the statement and on being satisfied he recorded the statement of the deceased. There was a certificate of the doctor which indicates that the patient was conscious. The high Court on consideration of the evidence of the magistrate as well as on the certificate of the doctor on the dying declaration recorded by the magistrate together with other circumstances on record came to the conclusion that the deceased Chandrakala was physically and mentally fit and as such the dying declaration can be relied upon. When the appeal against the judgment of the Aurangabad bench of the Bombay High Court was placed before a three Judges bench of this court, the counsel for the appellant relied upon the decision of this court in the case of Paparambaka Rosamma and Ors. v. State of Andhra Pradesh, [1999] 7 SCC 695 and contended that since the certification of the doctor was not to the effect that the patient was in a fit state of mind to make the statement, the dying declaration could not have been accepted by the court to form the sole basis of conviction. On behalf of the counsel appearing for the State another three Judges bench decision of this court in the case of Koli Chunilal Savji and Anr. v. State of Gujarat, [1999] 9 SCC 562 was relied upon wherein this court has held that if the materials on record indicate that the deceased was fully conscious and was capable of making a statement, the dying declaration of the deceased thus recorded cannot be ignored merely because the doctor had not made the endorsement that the deceased was in a fit state of mind to make the statement in question. Since the two aforesaid decisions expressed by two benches of three learned Judges was somewhat contradictory the bench by order dated 27.7.2002 referred the question to the Constitution Bench.

At the outset we make it clear that we are only resolving the so-called conflict between the aforesaid three Judges bench decision of this court, where-after the criminal appeal will be placed before the bench presided over by Justice M.B. Shah who had referred the matter to the Constitution Bench. We are, therefore, refraining from examining the evidence on record to come to a conclusion one way or the other and we are restricting our considerations to the correctness of the two decisions referred to supra.

The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

Bearing in mind the aforesaid principle, let us now examine the two decisions of the court which persuaded the bench to make the reference to the Constitution Bench. In Paparambaka Rosamma and Ors. v. State of Andhra Pradesh, [1999] 7 SCC 695 the dying declaration in question had been recorded by a judicial magistrate and the magistrate had made a note that on the basis of answers elicited from the declarant to the questions put he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. Doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law the court also had found serious lacunae and ultimately did not accept the dying declaration recorded by the magistrate. In the latter decision of this court in Koli Chunilal Savji and Anr. v. State of Gujarat, [1999] 9 SCC 562 it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given.

It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. The court relied upon the earlier decision. In Ravi Chander v. State of Punjab, [1998] 9 SCC 303 wherein it had been observed that for not examining by the doctor the dying declaration recorded by the executive magistrate and the dying declaration orally made need not be doubted. The magistrate being a disinterested witness and is a responsible officer and there being no circumstances or material to suspect that the magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the magistrate does not arise.

The court also in the aforesaid case relied upon the decision of this court in Harjeet Kaur v. State of Punjab, [1999] 6 SCC 545 case wherein the magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in Paparambaka Rosamma and Ors. v. State of Andhra Pradesh, [1999] 7 SCC 695 to the effect that "in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind where-after he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma and Ors. v. State of Andhra Pradesh, [1999] 7 SCC 695 must be held to be not correctly decided and we affirm the law laid down by this court in Koli Chunilal Savji and Anr. v. State of Gujarat, [1999] 9 SCC 562 case.

The records of the Criminal Appeal may now be placed before the bench presided over by Shah, J from which court the reference has been made.