

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On : 22.09.2009

% Date of decision :25.09.2009

+ Crl.A. No. 207/2009

SUKHDEV SINGH APPELLANT

Through : Mr. K.K. Sud, Sr. Adv. with
Mr. Kunal Malhotra and
Ms. Diya D'Souza,
Advocates.

- V E R S U S -

STATE RESPONDENT

Through : Mr. Pawan Sharma,
Advocate.

A N D

+ Crl.A. No. 220/2009

HARI SINGH RANA & ANR. APPELLANTS

Through : Mr. K.B. Andley, Sr. Adv. with
Mr. M.L. Yadav,
Advocate.

- V E R S U S -

STATE RESPONDENT

Through : Mr. Pawan Sharma,
Advocate.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The digging of the foundation of a plot for construction resulted in an altercation and the aggravation of the same is alleged to have caused the murder of the deceased Surender Nath Pandey.
2. An incident took place in the morning of 20.10.2003 when a fight broke out between the deceased and the appellants. The deceased confronted the appellants for having dug the foundation in the plot. An information vide DD Entry No. 4-A (Ex. PW – 18/A) was received and HC Dharam Parkash was deputed to visit the site and the matter was brought under control at the site and the construction was stopped. But the dispute again erupted at 11 AM when information was received vide DD No. 11-A (Ex. PW – 18/B) resulting in the second visit of HC Dharam Parkash who found that the appellants had again started the activity of digging.
3. It is the case of the prosecution that on the same day, an information was received in the police station about the deceased having been admitted to Safdarjung Hospital with 35 per cent burns. This information was sent by Duty Constable Sunil Kumar, Safdarjung Hospital and recorded at P.S. S.N. Puri as D.D. No. 42B (Ex. PW – 13/A).

4. The MLC (Ex. PW – 14/A) shows the time of admission of the deceased Surender Nath Pandey as 12.10 P.M. The deceased was admitted by his niece Ms. Maya. The MLC records that the burns are stated to be a consequence of a quarrel of the deceased with three persons who poured kerosene oil on the deceased and put him on fire. The condition of the deceased was recorded as critical, conscious and oriented, but dehydration was (+++). SI Youdh Bir Singh reached the hospital and sought permission to record the statement of the deceased as per Ex. PW – 15/A. The doctor opined that the patient was conscious and oriented to give a statement. The statement of the deceased was recorded, which shows that the deceased wanted to give his statement about the incident only after feeling better. This was so stated by the deceased in the presence of his wife and three other relatives including Ms. Maya as he felt that he was not so well. The dying declaration (Ex. PW – 15/D) was recorded on 21.10.2003 by SI Youdh Bir Singh at 9.30 AM. In terms of this statement, the deceased was carrying on a business of dairy while the appellants were his neighbours. It is stated that there had been past disputes between the deceased and the appellants and when on 20.10.2003 the deceased tried to stop the appellants from digging,

the appellants became angry especially as the police had intervened. The appellant Hari Singh Rana is stated to have brought a bottle of kerosene oil on the asking of Sukhdev Singh and poured it over the deceased. The deceased was dragged towards the railway line and a lit match was put to the deceased. On the deceased shouting, the appellants are stated to have run away. On hearing the noise of the deceased, his niece Ms. Maya along with other people reached the spot and extinguished the fire whereafter Ms. Maya rushed the deceased to the hospital. The deceased stated that he had not given the statement earlier because he was under pain. The deceased passed away on 21.10.2003 at 10.40 PM.

5. The FIR No. 421/2003 was registered under Section 307/34 of IPC at Police Station S.N. Puri on 21.10.2003, which was converted into one under Section 302/34 IPC. The charge was framed against the appellants under Section 302 r/w Section 34 of IPC. The appellants pleaded not guilty and claimed trial.
6. The case of the prosecution is resting primarily on this dying declaration and the testimony of PW3 Sh. Parmod Kumar Thakurai (brother of the wife of the deceased) as an eyewitness whose testimony has not been given much credence even by the Trial Court.

It may also be noticed that the niece of the deceased Ms. Maya was not produced in the witness box and according to the prosecution, the reason for the same is that the IO was informed by the wife of the deceased that she had become hostile. The learned Sessions Judge found that there was no reason to disbelieve the dying declaration (Ex. PW – 15/D), which was found to be sufficiently corroborated by the surrounding circumstances and convicted the appellants for offence punishable under Section 302 of IPC vide Judgment dated 03.03.2009 and sentenced them to undergo imprisonment for life and to pay fine of Rs.5,000/- each in default to undergo simple imprisonment for six months in terms of the Order on Sentence dated 12.03.2009, against which the appellants have preferred the present appeal.

7. The appellants in their defence had produced three witnesses who have deposed that there was a fight between the wife of the deceased and the deceased, which resulted in the deceased pouring kerosene oil on himself at about 11.30 AM whereafter he lit the match stick and put himself on fire. Thus, the defence of the appellants is that though the deceased suffered burns, the same were on account of kerosene oil being poured on the deceased by the deceased himself on account of acrimony between

him and his wife and blame was sought to be put on the appellants.

8. The prosecution in order to establish the dispute, which occurred on 20.10.2003 examined HC Dharam Parkash as PW – 1. The other material witness is the wife of the deceased Smt. Satyabhama who appeared in the witness box as PW – 2. She deposed about the earlier dispute whereafter she went to the local MLA seeking his intervention in view of the advice of the deceased as according to her the appellants had threatened her husband. She, however, admitted that there was no prior quarrel with the appellant / accused Mr. Ramjani @ Ramjan Mohd. nor was there any altercation with him. The other material witness is PW – 3, Mr. Parmod Kumar Thakurai, who is stated to be an eyewitness and is the brother of PW – 2. He claimed there were past quarrels between the deceased and the appellants though he could not tell the number of such instances, which had taken place between November, 2002 and January, 2003. In para 40 of the impugned judgment, it has been noticed that the evidence brought on record established the existence of a prior dispute between the deceased and the appellants. A perusal of the record shows that except the testimony of PW – 2, no other evidence has been brought on record to prove the

existence of the prior civil dispute. Even PW – 2 in her testimony stated that there existed a prior civil dispute between the deceased and appellant Hari Singh Rana.

9. The important aspect to be examined in the present appeals is whether PW – 3 can be stated to be an eyewitness and whether his testimony would stand scrutiny. The said witness has stated that he was living with the deceased for the last 14-15 years and knew all the three appellants. He claimed to be present at the house of the deceased on 20.10.2003 when the dispute arose. He admitted in the cross examination that he was busy in giving bath to his buffaloes at a distance of 20 to 25 feet from the place where kerosene oil is alleged to have been poured on the deceased and rushed to save the deceased only when he heard the alarm that the deceased had been set on fire. There were about 2–3 turns from the place where he was giving bath to his buffaloes and the place of incident.
10. The testimony of this witness has been challenged on the ground it would be unnatural that the brother-in-law of the deceased did not rush the deceased to the hospital if he was present there while niece of the deceased took the deceased to the hospital. No statement of PW – 3 was recorded at the time of the

incident though he claimed to be present at the time of cremation. His statement was recorded 21 days later. The explanation given by this witness in this regard is that he had gone to his village to perform the last rites of the deceased. The Trial Court has noticed that from the admission of the said witness, it is reflected that he cannot be actually present at the time of the incident and may have arrived subsequently to the recording of the dying declaration, but the dying declaration is sufficiently corroborated by surrounding circumstances.

11. On examination of testimony of this witness, we are unable to give any credence to what has been stated by PW – 3. He is the real brother-in-law of the deceased being the brother of the wife of the deceased. He claimed to be at a short distance from the place of incident yet did not intervene at the beginning of the incident but claims to have arrived there on hearing the shouts of the deceased having been set on fire. The said witness did not rush the deceased to the hospital, but let niece of the deceased do the needful. He did not even subsequently arrive at the hospital over the two days when the deceased was admitted nor his statement was recorded. He disappeared after the cremation for about three weeks whereafter his statement was

recorded. The conduct of PW – 3 is contrary to the natural conduct of a man who was closely associated by relationship with the deceased. This factor coupled with the delay in recording the statement of this witness and his deposition make the testimony of this witness untrustworthy and unreliable. The deceased in the dying declaration (Ex. PW – 15/D) has mentioned about his niece rushing him to the hospital, but does not name PW – 3 as a person who attended to him. This seals the fate insofar as the testimony of PW – 3 is concerned coupled with other circumstances mentioned hereinabove.

12. The prosecution seems to have compounded its problems by not producing the niece of the deceased Ms. Maya. The reason for non-production of Ms. Maya is stated to be the information received from the wife of the deceased that Ms. Maya had turned hostile. The question of her turning hostile would have arisen only when she had entered the witness box and the prosecution would have had the benefit of cross-examining her. She was the person who had rushed the deceased to the hospital after the incident and was the first person to attend to the deceased. The decision of the prosecution not to produce Ms. Maya has thus caused prejudice to the defence of the appellant.

13. The result of the aforesaid is that the sole basis of the case of the prosecution rests on the dying declaration (Ex. PW – 15/D).
14. The counsel for the appellants have contended that the dying declaration recorded by the IO is not a reliable piece of evidence to convict the appellants as the courts have frowned upon the IO recording a dying declaration. It has further been pointed out that though the doctor had opined on 20.10.2003 at 4.10 PM that the deceased was oriented and in a position to give statement, the deceased himself expressed his helplessness to make such a statement as he was under pain. The presence of the wife of the deceased, the niece of the deceased and the other relations is recorded in the said statement, which shows that there was always the possibility of influencing the mind of the deceased. It was submitted that this also casts a doubt on the certificate given by the doctor that the deceased was in a fit condition to make a statement. Insofar as Ex. PW – 15/D is concerned, it was contended that no fresh certification was taken from the doctor about the medical condition of the deceased to make a statement. The certificate given earlier on 20.10.2003 at 4.10 PM could not be utilized to record the statement on 21.10.2003 at 9.30 AM during which

period of time admittedly the medicines including sedatives had been given to the deceased. The fact that the deceased had suffered only 35 per cent burns and yet passed away on 21.10.2003 shows that the condition of the deceased deteriorated within a short period of less than two days.

15. Learned counsel for the appellants emphasized that the first dying declaration in the form of MLC (Ex. PW – 14/A) does not name any persons though the appellants were known to the deceased. Learned counsel submitted that the stand of PW – 15 that he had verbally enquired from the doctor about the state of the deceased before recording his statement is falsified by the testimony of PW – 17, Dr. Abhishekh Sharma to the effect that the IO did not contact him after obtaining certificate Ex. PW – 17/A. That certificate was issued on 20.10.2003 on the application moved by the IO which is Ex. PW – 15/A. PW – 17 further deposed that he did not accompany the IO while recording the statement nor did he direct any medical staff to be present at the time of recording the statement of the deceased. He was also unaware as to whether permission in respect of witness was sought from any other source.
16. The testimony of PW – 15 had been referred to contend that no Magistrate was called when the

statement of the deceased was recorded nor did the witness remember who was the doctor on duty. He did not even remember the number of DD entry made on his departure from the police station nor was it mentioned in the list of documents. After having stated that he had verbally obtained the permission, the witness stated that one day earlier i.e. on 20.10.2003 the doctor had given his written report that the deceased was conscious and oriented. There is no attesting witness to the dying declaration.

17. Insofar as testimony of PW – 2, Smt. Satyabhama is concerned, learned counsel for the appellants contended that even she was examined belatedly on 10.11.2003 and was not a witness to the occurrence. Learned counsel for the appellants referred to the judgment of the Apex Court in Ganesh Bhavan Patel and Another v. State of Maharashtra; (1978) 4 SCC 371 to contend that delay in examining an eyewitness by the IO amounts to serious infirmities in the prosecution case. Learned counsel also submitted that it cannot be lost sight that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence. The dying declaration has to be analyzed keeping in mind

the capacity of a man to remember facts stated and to ensure that whether the same had not been impaired by circumstances beyond his control. The dying declaration has to be subjected to close scrutiny keeping in view the fact that the statement had been made in the absence of accused who had no opportunity of testing the veracity of the statement by cross-examination. The IO is alleged to have not followed the norm of getting the dying declaration recorded by a Judicial Magistrate and further did not obtain a certificate in respect of fitness of the declarant to make a statement on 21.10.2003.

18. Learned counsel specifically referred to Chapter 13–A, Volume–III of Delhi High Court Rules to the following effect:

“1. Statements made by a person as to the cause of his death or as any of the circumstances of the transaction which resulted in his death are themselves relevant facts and admissible in evidence under Section 32(1) of the Indian Evidence Act in cases in which the cause of the person’s death comes into question. A statement commonly known “dying declaration” constitutes such an important evidence in criminals that their Lordships of the Supreme Court ruled in *Khushal v. State of Bombay* (AIR 1958 SC 22), which was followed in *Singh v. The State* (AIR 1962 SC 439) that it could form the sole basis of conviction. It is thus necessary that a Court trying the case should have before it a correct and faithful record of the statement made by the dead person. As far as possible the dying declaration should be recorded in the manner hereinafter prescribed, and in

the event of death of the person making it, should be submitted at the enquiry or trial.

2. Dying declarations to be recorded by Judicial Magistrates—(i) Where a person whose evidence is essential to the prosecution of a criminal charge or to the proper investigation of an alleged crime, is in danger of dying before the enquiry proceedings or the trial of the case commences, his statement, if possible, be got recorded by a Judicial Magistrate. When the police officer concerned with the investigation of the case or the medical officer attending upon such person apprehends that such person is in the danger of dying before the case is put in Court, he may apply to the Chief Judicial Magistrate, and, in his absence, to the seniormost Judicial Magistrate present at the headquarters, for recording the dying declaration.

(ii) On receiving such application, the Judicial Magistrate shall at once either himself proceed, or depute some other stipendiary Judicial Magistrate to record the dying declaration.

3. Fitness of the declarant to make the statement should be got examined—Before proceeding to record the dying declaration, the Judicial Magistrate shall satisfy himself that the declarant is in a fit condition to make a statement, and if the medical officer is present, or his attendance can be secured without loss of time, his certificate as to the fitness of the declarant to make a statement should be obtained. If, however, the circumstances do not permit waiting or the attendance of the Medical Officer, the Judicial Magistrate may in such cases proceed forthwith to record the dying declaration but he should note down why he considered it impracticable or inadvisable to wait for a doctor's attendance.

... ..

7. Recording of a Dying declaration by a Police Officer or Medical Officer—Where a dying declaration is recorded by a Police Officer or a Medical Officer, it shall, so far as possible, be got attested by one or

more of the persons who happen to be present at the time.

8. Fitness of the Declarant to make a statement to be certified by the Judicial Magistrate or other officer concerned— The Judicial Magistrate or other officer recording a dying declaration shall at the conclusion of the dying declaration certify that the declarant was fit to make a statement and it contained a correct and faithful record of the statement made by him as well as of the questions, if any, that were put to him by the justice recording the statement. If the accused or his counsel happens to be present at the time the dying declaration is recorded, his presence and objection, if any, raised by him shall be noted by the Judicial Magistrate or the officer recording the dying declaration, but the accused or his counsel shall not be entitled to cross-examine the declarant.”

19. Learned counsel submitted that in the present case, there was breach of all the aforesaid rules.
20. The appellants sought to draw strength from the observations of the Division Bench in Raj Bahadur v. State; 45 (1991) DLT 144 (DB) to advance the plea that once injections or sedatives are given, normal awareness of the deceased can be impaired.
21. Further, a Division Bench judgment of Karnataka High Court in State of Karnataka v. Aslam alias Aslam Pasha; 2000 Cri.L.J. 1167 was relied upon where it was observed in para 3 as under:

“3. The learned State Public Prosecutor vehemently submitted that an exception can be made provided the Court is fully satisfied from the oral evidence and the rest of the record that the deponent was in a sound, physical and mental condition good enough to make a cogent and true dying

declaration and that where the rest of the record is generally satisfactory, the Court should not outright reject the dying declaration on this ground itself. We do not propose to recount the very sound reasons why the Court insists on the Certificate being superscribed on the dying declaration itself, the most important of them being that it represents to the Court some guarantee of the fact that at the relevant time, the doctor in-charge of the case has applied his mind and has certified about the capacity of the patient to make a correct dying declaration. This requirement is well-known and despite this, the present one is not the only case in which we find this error having been committed. It is something that is fatal to the prosecution and therefore, we consider it equally necessary to once again reiterate that the concerned department must specifically bring it to the notice of all the public hospitals in the State and the doctors manning them that in each and every case where a dying declaration is required to be recorded that it must be done at the earliest point of time and secondly, that the doctor must correctly and carefully evaluate the physical and mental condition of the patient and certify on the dying declaration itself, if in the opinion of the doctor the patient is in a sound condition to make the statement. The evaluation will include the elementary factors such as consciousness of the patient and mental condition of the patient having regard to the pain, shock etc. as also the condition of the patient in the light of whatever drugs or pain killers that must have been administered. The Certificate is not to be mechanically issued but must be done on the basis of a careful and thorough evaluation. This is necessary because a dying declaration is a very strong piece of evidence and a hundred percent valid dying declaration could form the basis of a conviction whereas on the other hand the accused will have no opportunity to test its correctness as the deponent has already died. We desire that hereinafter steps be taken to ensure that no lapses or errors take place even in a single case and if it does, for reasons of negligence or dishonesty, stringent disciplinary action will follow.

The learned State Public Prosecutor to forward a copy of this order to the Director of Health Services and the Secretary to the Government, Department of Health with a request that the guidelines be communicated in writing to all Govt. hospitals and doctors in the State in order to ensure that such errors do not take place in future.”

22. The Full Bench judgment of the Supreme Court in Tarachand Damu Sutar v. The State of Maharashtra; AIR 1962 SC 130 was referred to contend that a dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed if there are no grounds for doubting it at all.
23. Learned counsel for the State on the other hand has supported the impugned judgment by contending that there is no ground whatsoever to doubt the dying declaration.
24. We find from a reading of the impugned judgment that the learned Trial Court appears to have been weighed by the fact that undoubtedly the deceased died due to burns caused on account of kerosene oil being poured on him and a lit match being put on him. If the appellants did not do so who could have done it? Thus, considerable emphasis has been laid by referring to various judgments on the proposition that justice system would break down and lose credibility if the principle that a thousand guilty men

may go scot free, but one innocent person shall not suffer is taken to its extreme.

25. It is also not in doubt that the dying declaration made by a person on the verge on the death has a special sanctity as the person is most unlikely to make any untrue statements in the shadow of impending death. This is the reason why a dying declaration is given special weightage as per Section 32 of the Indian Evidence Act, 1872 as '*truth sits on the lips of a dying man*'. Simultaneously, it cannot be lost sight of that, in case of a dying declaration, the accused does not have an opportunity to cross-examine the witness. The dying declaration can be the sole basis of conviction if it inspires full confidence of the court and the rule of corroboration is merely a rule of prudence as observed in Muthu Kutty and Anr. v.State; (2005) 9 SCC 113. In the facts of the case, the doctor had not certified the condition of the declarant but the testimony of the doctor who was present when the dying declaration was recorded came to the assistance of the prosecution.
26. We find force in the contention of learned counsel for the appellants the dying declaration is not free from doubt. The certificate given by the doctor for recording the dying declaration, the patient being conscious and oriented, was on 20.10.2003 at 4.10

PM. Despite this fact, the deceased did not find it feasible to narrate his side of the story as he was under pain. The deceased did give a 7–8 line statement stating his condition and that an incident had occurred on 20.10.2003, but stated that he would give details when he felt better. The name of the appellants was not taken as the persons who carried the heinous act. The MLC (Ex. PW – 14/A) recorded that the deceased was brought to the hospital by the niece of the deceased Ms. Maya only talks about three persons but does not refer to the appellants even though they were the neighbours of the deceased and known persons. The dying declaration (Ex. PW – 15/D) was recorded on 21.10.2003 at 9.30 AM without obtaining a certification from the doctor or in the presence of a doctor. The IO claimed that he alone was present. The IO did not take care to obtain the presence of a SDM or a Magistrate to record the statement of the deceased since generally recording of a dying declaration by IO is to be discouraged unless the facts are such that delay can be fatal. The deceased was administered various medicines including sedatives. As to what would be the mental state of the deceased when the statement was being recorded remains a question mark. The IO claims to have obtained a verbal consent of the doctor, but in

the same breath stated that the written consent was obtained on the previous day. PW – 17, the doctor, has denied that he was ever asked about the medical state of the deceased before recording the statement on 21.10.2003. The deceased passed away on 21.10.2003 at 10.40 P.M. The deceased having only 35 per cent burns succumbed to the injuries within two days and thus obviously his condition was not good and deteriorated. The MLC itself records that his condition was critical and dehydration was (+++). In such a situation, to rely on the dying declaration recorded by the IO without any medical certificate or presence of witness as the sole piece of evidence to convict the appellants would not be free from doubt.

27. We feel the present case is one where the investigation has been botched by the IO. The infirmities in the case of the prosecution could easily have been taken care by recording the dying declaration in a proper manner and ensuring that the testimony of eye-witnesses was recorded promptly. There was no reason not to produce Ms. Maya, niece of the deceased, who reached the spot and rushed the deceased to the hospital merely on an information received from the wife of the deceased that she has turned hostile. This deprived the prosecution of the opportunity to confront Ms. Maya even if she would

have turned hostile. The appellants are getting the benefit only because of the manner in which the prosecution has proceeded with the case and we strongly deprecate the conduct of the IO of the case. We have no option but to allow the appeal and set aside the conviction and sentence giving benefit of doubt to the appellants.

28. The appellants are directed to be released forthwith if not wanted in any other case.

SANJAY KISHAN KAUL, J.

September 25, 2009
dm

AJIT BHARIHOKE, J.