

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: August 26 , 2009
Judgment delivered on : September 07, 2009

+ **CRIMINAL APPEAL NO.327/2009**

KAMLESH

..... Appellant

Through: Mr. A.J. Bhambhani, Advocate with
Ms. Nisha Bhambhani, Ms. Lakshita and
Ms. Ranjita, Advocates

Versus

STATE

..... Respondent

Through: Mr. M.N. Dudeja, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. Appellant Kamlesh has been convicted under Section 302 IPC and sentenced to undergo imprisonment for life, also to pay fine of Rs.5000/-, in default of payment of fine to undergo simple

imprisonment for six months, for having committed murder of his wife Mithlesh by setting her ablaze after pouring kerosene oil.

2. Briefly stated, case of the prosecution is that on 16.05.2004, ASI Jal Singh(PW10) was on duty at the PCR van in the area of Mundka along with Constable Surya Kant (PW11) and driver Constable Satbir. Around 9.20 PM, he received a call from someone informing that his wife had set herself ablaze with kerosene oil at Mangal Bazar Road, Swarn Park, Delhi. He immediately proceeded to the spot of occurrence and also conveyed the information to the Police Station, on basis of which, DD No.36B is stated to have been recorded at Police Station Nangloi at 9.25 PM.

3. DD No.36B was entrusted to SI Jagminder Singh (PW15) for verification. He proceeded to the spot of occurrence along with Constable Sandeep. On reaching there, he came to know that the injured lady had already been taken to Sanjay Gandhi Memorial Hospital (for short "SGM") by the PCR van. No eye witness met him at the spot of occurrence. He found a can of kerosene oil, some burnt clothes and one match box lying in the room of the injured. No person was found present in the room. He left Constable Sandeep at the spot to preserve the scene of occurrence and proceeded to the hospital. At the hospital, he obtained MLC of Mithlesh who was declared unfit for statement. No eye witness was available at the Hospital.

4. SI Jagminder Singh summoned ASI Jal Singh (PW10) and recorded his statement Ex.PW10/A. ASI Jal Singh in his statement Ex.PW10/A narrated that on reaching near Kakkar General Store, Mangal Bazar, he saw injured Mithlesh running around in the burnt condition on the road. He immediately transferred her to the PCR van and took her to SGM Hospital. On the way when he enquired about the cause of the burn injuries, the injured told that she had been set on fire by her husband and when he asked for the reason as to why her husband had done so, she stated she will tell the reason after gaining consciousness. SI Jagminder Singh endorsed the statement Ex.PW10/A of ASI Jal Singh and sent it to the Police Station for registration of the case under Sections 498A/307IPC. FIR was, accordingly, registered by the Duty Officer.

5. Investigating Officer, SI Jagminder Singh seized the exhibits, i.e., the burnt clothes, can of the kerosene oil and the match box from the spot of occurrence. He prepared the site plan and recorded the statements of the witnesses. Subsequently, on the receipt of information of death of injured Mithlesh, the offence under Section 307 IPC was converted into the offence punishable under Section 302 IPC. Inquest proceedings were conducted by the SDM, Punjabi Bagh. Intimation was sent to the relatives of the deceased. Post mortem examination was got done. The accused was arrested on 18.06.2004 from his native place being Village Makul Pura, District Bhind, Madhya

Pradesh. On completion of investigation, charge sheet under Section 498A/302 IPC was filed against the accused.

6. Accused was charged for offences punishable under Sections 498A and 302 IPC. He pleaded not guilty and claimed to be tried.

7. On conclusion of trial, appellant was acquitted of the charge under Section 498A IPC because the witnesses examined to prove that charge did not support the case of prosecution. The learned Additional Sessions Judge, however, accepted the evidence of oral dying declaration made by the deceased to PW10 ASI Jal Singh and convicted the appellant under Section 302 IPC.

8. Learned counsel for the appellant has challenged the impugned judgment of conviction on several counts.

9. His first challenge to the impugned judgment is that oral dying declaration of the deceased has not been proved on record. He has submitted that prosecution has sought to prove the so-called dying declaration Ex.PW10/A, which was recorded by SI Jagminder Singh, who was not even present when the purported dying declaration was allegedly made by the deceased, therefore, it is hearsay of the dying declaration. Not only this the so-called dying declaration was recorded by PW15 about two hours after the same was supposed to have been made by the deceased. Therefore, it could not have been treated as a dying declaration.

10. The submission of learned counsel is mis-conceived because Ex.PW10/A is not the dying declaration of the deceased, actually it is only the statement of PW10 Jal Singh ASI wherein he has narrated the details of the oral dying declaration made by the deceased in response to his query while she was being transported in PCR van to the hospital. The dying declaration actually has been proved by PW10 ASI Jal Singh who has deposed in the court that on the way to hospital, he enquired from the deceased about the cause for her burn injuries and she responded by stating that she had been set on fire by her husband. The version of PW10 also finds corroboration in the testimony of PW11 Constable Surya Kant, who was accompanying the deceased and PW10 ASI Jal Singh in the PCR van, and who has also stated that on being asked by ASI Jal Singh, injured lady told that it was her husband who had set her on fire. There is no reason to disbelieve the aforesaid witnesses, therefore, we are of the view that oral dying declaration of the deceased has been rightly taken to be proved by the learned trial Judge.

11. Next submission of the learned counsel for the appellant is that the so-called dying declaration of the deceased purportedly made before PW10 and PW11 ought not have been relied upon because of following infirmities: it is not in the exact words of the deceased – it was not contemporaneously recorded as spoken by the deceased – it is not established that the deceased was actually in position to make a

statement when the dying declaration is purported to have been made – the deceased as per the evidence was not in expectation of death.

12. We have carefully considered the evidence on record. PW10 ASI Jal Singh has stated that *“on the way to the hospital he asked the burnt lady about the cause of burning and she told them that she had been set on fire by her husband and she was requesting to take her to the hospital at the earliest and told them that she would tell rest of the facts in the hospital”*. His version stands corroborated by PW11 Constable Surya Kant when he deposed *“on the way ASI Jal Singh had made inquiries from the lady about the cause of burning and she told them that it was her husband who had set her on fire”*. From the aforesaid evidence, it is established on record that the deceased told PW10 in presence of PW11 that she had been set on fire by her husband. We find no reason to disbelieve the aforesaid version of the witnesses.

13. PW10 ASI Jal Singh has also deposed that on the fateful night at about 9.20 PM on receiving a call about a lady having been burnt, he immediately proceeded to the spot where he noticed Mithlesh, the injured, in a totally burnt condition. In the cross-examination, he has given the time of his arrival on the spot as 9.24 PM. He has also stated that he did not make inquiries from the public persons present and straight away took the injured to the hospital. His aforesaid version also finds corroboration from the testimony of PW3 Satinder who has

stated that after putting off the fire by wrapping a blanket around the deceased, he rushed to inform the landlord from a nearby STD booth and when he returned from the STD booth, he saw the PCR officials removing injured Mithlesh in their zipsy to take her to the hospital. From the aforesaid evidence, it is obvious that on reaching the spot, ASI Jal Singh did not talk to any one and straight away took the injured to the hospital. This means that he had no occasion to know how the incident happened and who was responsible for the burn injury to the deceased. Further, there was no reason for him to concoct the dying declaration of the deceased as he was neither the Investigating Officer nor he had any animus or motive to falsely implicate the appellant. When the injured was admitted in the hospital, PW10 ASI Jal Singh could not even have known whether the injured has committed suicide or someone else had set her on fire. Therefore, without having any background information about the occurrence, he could not have given the history mentioned in the MLC Ex.PW16/A as "burns sustained due to kerosene thrown over her by husband and setting her on fire". Not only this, PW10 has given consistent version in his statement Ex.PW10/A to the Investigating Officer, which leaves no scope to doubt the testimony of PW10 about oral dying declaration of the deceased, which is fully corroborated by PW11.

14. The case of the prosecution is that said dying declaration was made by the deceased while she was being transported in the PCR van to the hospital. This explains as to why the dying declaration was not

recorded contemporaneously by ASI Jal Singh. However, immediately on reaching the hospital, PW10 ASI Jal Singh had narrated about the dying declaration made by the deceased while giving the history of the burns suffered by the deceased to the Doctor concerned. That recording, to our mind, is as good as the contemporaneous recording of dying declaration. Purpose of insisting on contemporaneously recording of oral dying declaration is only to ensure that the exact words used by the deceased should be placed before the Court so as to enable the Court to come at the right conclusion. But, if the circumstances under which oral dying declaration was made were such that it was not practically possible to simultaneously prepare contemporaneous record of the oral dying declaration, it cannot be taken as a ground to reject the dying declaration. In this case also, since the deceased gave her dying declaration while being transported to the hospital, there was no scope for making contemporaneous record of dying declaration.

15. The next contention of the learned counsel for the appellant is that the evidence relating to the oral dying declaration is not reliable because it is not probable that, after having suffered hundred per cent burn injuries, the deceased was able to speak and give a statement regarding the cause of her injuries which eventually resulted in her death. In support of this contention, learned counsel for the appellant has referred to the MLC of the deceased Ex.PW16/A as also her post mortem report Ex.PW24/A which indicate that the deceased had

suffered hundred per cent burns covering the total body and the face area.

16. The deceased had suffered 100 per cent burns do not, by itself show that she was not fit to speak or make the statement. Whether a person after suffering extensive burn injuries would be able to speak or not would depend upon the physical constitution of the person and the gravity of injury. Perusal of the MLC Ex.PW16/A shows that the deceased was admitted in the hospital by PW10 Jal Singh and in the MLC her name is mentioned as Mithlesh. Admittedly, no relation or friend of the deceased had accompanied her to the hospital and even no complaint implicating the appellant was made to the police by that time. Therefore, only person who could have given the name of the patient was injured herself or ASI Jal Singh, PW10 who took her to the hospital. If PW10 had given her name as Mithlesh then also his source of information about the name of the deceased could only be the deceased herself as she was not known to him. Not only this, PW3 Satinder, who is a hostile witness and has not supported the case of the prosecution, has stated that after the fire was put off, the deceased was saying *"Mai AA Rrahi Hu – Mai AA Rahi Hu"*, which is sufficient assurance that the deceased was able to speak. From the evidence, it is apparent that the PCR van reached at the spot within few minutes and the deceased was immediately put in the van and transported to the hospital. She is stated to have given dying declaration on way to the hospital which, in our considered view, is not improbable. Thus, in

view of the categoric testimony of PW10 ASI Jal Singh, which stands corroborated by the testimony of PW11 Constable Surya Kant, we are of the view that the learned Trial Court has rightly concluded that the deceased had made oral dying declaration.

17. The learned counsel for the appellant has also submitted that the aforesaid oral dying declaration of the deceased is not reliable because having suffered hundred per cent burns all over the body, she could not be expected to be in a fit state of mind to give clear and rational statement regarding the cause of injuries suffered by her.

18. The patient had suffered hundred per cent burns do not by itself show that she was not fit for making statement. The MLC Ex.PW16/A, which was prepared after the dying declaration, shows that the patient was still conscious and her BP was more or less normal 110/70 and the pulse rate was 110/min. This implies that the patient was conscious on the way and could have narrated the cause of her injury to the witnesses PW10 and PW11. Medical jurisprudence guides us that a patient suffering from burns starts losing consciousness when bilateral crepts start occurring due to loss of body fluids. The MLC of the deceased does not record the onset of bilateral crepts. We see no reason why PW10 ASI Jal Singh and PW11 Constable Surya Kant would collude to concoct a false story of oral dying declaration by the deceased on her way to the hospital. Otherwise also, the oral dying declaration is clear and categoric leaving no scope to doubt that the

deceased was not in a fit mental state to make the statement. Since no family member or friend was accompanying the deceased, there was no possibility of the dying declaration being tutored.

19. The learned counsel for the appellant has further submitted that the appellant has been acquitted on the charge under Section 498A which implies that it is not a case of dowry demand or harassment. He has pointed out that PW6 Kanshi Ram, father of the deceased and PW5 Preeti, the niece of the deceased have given almost a clean chit to the appellant by saying that the deceased and appellant were living peacefully and there was nothing wrong in their relationship. Thus, according to the learned counsel for the appellant, there was no motive on the part of the appellant to set the deceased on fire. He has also submitted that absence of motive coupled with the fact that PW3 Satinder in his testimony has stated that when they opened the shutter of the room, they found deceased Mithlesh ablaze and there was nobody else present in the room which provides an alibi to the appellant and makes the story of oral dying declaration suspect.

20. We are not impressed with the argument. Charge under Section 498A has failed because PW6 Kanshi Ram, father of the deceased, turned hostile and did not support his earlier version in statement Ex.PW6/B recorded by the SDM during inquest. Similarly, PW3 Satinder is also a hostile witness who resiled from his earlier statement made under Section 161 Cr.P.C. during investigation. This, by itself,

cannot be taken as a circumstance to disbelieve the testimony of PW10 ASI Jal Singh and PW11 Constable Surya Kant regarding oral dying declaration made by the deceased, particularly when they had no reason whatsoever to falsely implicate the appellant by concocting a story of dying declaration. It would be seen from the record that the stand of PW10 ASI Jal Singh is throughout consistent with his testimony regarding the oral dying declaration as he has given same version while giving the history of the injuries suffered by the deceased at the time of her admission in the hospital and also in his statement Ex.PW10/A recorded by the Investigating Officer which is basis of registration of the case. Thus, we do not find any reason to suspect the credibility of the dying declaration.

21. The learned counsel for the appellant has submitted that though the deceased died five hours after the occurrence at 2.15 AM, no effort whatsoever was made to get her dying declaration recorded either by the Magistrate or the Doctor. Therefore, he has urged us to extend benefit of doubt to the appellant. In support of his contention, he has relied upon the judgment in the matter of **Dalip Singh and Others Vs. State of Punjab** (1979) 4SCC 332.

22. The aforesaid judgment is of no help to the appellant. In the aforesaid case, while considering the evidentiary value of a oral dying declaration made to a Police officer, Hon'ble Supreme Court, inter alia, observed thus:

“8. We may also add that although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a magistrate or by a doctor. As observed by this Court in *Munnu Raja V. State of M.P.* the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We do not mean to suggest that such dying declarations are always untrustworthy, but what we want to emphasize is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.

9. There is a dying declaration of Teja Singh Ex.P/FF recorded by Harcharan Singh, PW10. He was the Head Constable of the Police Post Chheharta. At the direction of the Assistant Sub-Inspector of Police, PW 28 he recorded the statement of Teja Singh at the spot. This dying declaration has been relied upon by the High Court. It could not be rejected on the ground that it was recorded by a police officer as he was in a critical condition and no other person could be available in the village to record the dying declaration of Teja Singh.....”

23. From the above position of law, enunciated by the Hon’ble Supreme Court, it is apparent that there is no bar under law to rely upon oral dying declaration made to a Police officer. However, before acting upon the oral dying declaration, the Court is required to satisfy itself as to why it was not recorded by a Magistrate or a Doctor.

24. In the instant case also the deceased was in critical condition. A perusal of MLC Ex.PW16/A show that the deceased on examination at the hospital was found unfit for statement. There is nothing on the record to suggest that at any stage, after admission in the hospital, the deceased became fit for making statement. This explains as to why

the dying declaration of the deceased was not recorded either by a Magistrate or a Doctor. Thus, even as per the judgment relied upon by the learned counsel for the appellant, there was no bar on acting upon the dying declaration of the deceased Mithlesh.

25. Looking from another angle, the deceased could have poured sufficient quantity of kerosene oil on herself but, in that event also to commit suicide, the deceased must have picked up match box and lit the match stick to set herself ablaze. Had this happened, kerosene being a highly combustible liquid, the match box would have flared up in her hand and reduced to ashes, when she ignited herself. But, the match box was found near the can of kerosene by the Investigating Officer at the place of occurrence. The existence of match box at the place of occurrence, therefore, rules out the possibility of suicide having been committed by the deceased.

26. In view of the discussion above, we find truth and credibility in the oral dying declaration of Mithlesh and find no embellishment therein. We find no infirmity in the impugned judgment, thus we dismiss the appeal.

AJIT BHARIHOKE, J.

SEPTEMBER 07, 2009
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SANJAY KISHAN KAUL, J.