

R-93

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

% Date of Decision: 23rd February, 2010

+ **CRL.APPEAL NO.1033-34/2006**

RAJENDER SINGH & ANR. Appellants
Through: Mr.Raman Sahney, Advocate

versus

STATE Respondent
Through: Ms.Richa Kapoor, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned judgment and order dated 26.9.2006 appellants Rajender Singh and his wife Smt.Bala have been convicted for the offence punishable under Section 302/34 IPC.

2. The deceased is Smt.Geeta wife of Satnam Singh.

3. Appellant Rajender is the younger brother of Satnam Singh and Bala is the wife of Rajender Singh.

4. According to the prosecution deceased Geeta and her husband Satnam Singh as also the accused used to reside

in the same house and had a common kitchen. On 24.7.2004 the appellants poured kerosene oil on Bala and set her on fire. After doing the dastardly act, both fled.

5. Bala was removed to Sanjay Gandhi Memorial Hospital where she was treated by Dr.Anu Vijyant PW-8. He prepared her MLC Ex.PW-8/A and pertaining to the history of the burns, recorded that the history was given by the patient herself and as told him her brother-in-law had burnt her by pouring kerosene oil over her.

6. The police was informed who in turn informed the Sub-Divisional Magistrate Harish Kumar Ahuja PW-6.

7. As deposed to by Harish Kumar Ahuja he reached LNJP Hospital for the reason Geeta was transferred to said hospital from Sanjay Gandhi Memorial Hospital. He reached there at about 2:50 PM and started recording the statement Ex.PW-6/B of Geeta at 3:05 PM.

8. The statement Ex.PW-6/A is in question answer form and is in Devnagri script.

9. Pertaining to the cause of her death, Geeta told the learned SDM that she was residing with her husband, her father-in-law, mother-in-law and her devar and devrani in the same house. That she was married on 28.2.1999. She informed that she had no problems with her husband or her in-

laws but on account of common kitchen she used to have problems with her devar and devrani.

10. Pertaining to how she suffered burns she disclosed that in the morning, between 11-12 she have gone to the house of her sister Seema in L Block, Mangol Puri to obtain some money on loan from her as she had to pay a debt. Her sister told her to come the next day. She returned. Even yesterday her husband had a quarrel with her on account of her going out of the house. She and her husband had a quarrel and her devar intervened. She objected to his intervention at which her devar got angry and started abusing. In anger her devar walked out of the room. Even her husband walked out of the room. All of a sudden her devar and devrani returned and sprinkled kerosene oil on her. Her devrani lit a matchstick and set her on fire. She shrieked. Her husband doused flames by pouring water. Her devar and his wife ran away with their children.

11. As deposed to by PW-6 he obtained the right thumb impression of Smt.Geeta at two places on her dying declaration.

12. Needless to state, at the trial the prosecution sought to nail the guilt of the appellants with reference to her dying declaration as recorded on the MLC and her statement

Ex.PW-6/A.

13. We note that as per PW-6 he did not bother to obtain any certification from any doctor pertaining to the fitness of Geeta for the reason there already existed one such certification at 1:10 PM.

14. We note that on the MLC of the deceased, a certification has been recorded at 1:10 PM by Dr.Saurabh PW-10 that Geeta was fit for statement. Dr.Saurabh PW-10 has proved the said endorsement. But, we cannot lose sight of the fact that the SDM has recorded the dying declaration of Geeta at 3:05 PM. There is a time lag of 1 hour and 55 minutes between the time when Geeta was certified fit for statement and the time when the learned SDM claims to have commenced regarding the statement Ex.PW-6/A of Geeta.

15. It is urged by learned counsel for the State that Geeta died after 6 days of the incident and this proves her consciousness when the SDM recorded her dying declaration.

16. We are afraid, this process of deductive analysis is not contemplated by law. In any case, we note that on the same night when Geeta was admitted i.e. the intervening night of 25th and 26th July 2004, recording the time at 3:00 AM, there exists an endorsement that the patient is unstable and hence unfit for a statement. What we intend to say is that merely

because somebody has lived on for a few days cannot be treated as a factor wherefrom consciousness of a person can be gathered at a particular point of time.

17. A dying declaration is an exception to the rule of hearsay and is based on the doctrine of necessity. The history of the debate pertaining to dying declarations being made admissible shows that the antagonists against admissibility had argued that the same causes great prejudice to the accused for the reason the maker of the statement is not available for being cross-examined. The antagonists had argued that cross-examination is an effective and probably the only tool in the hands of the accused pertaining to the oral evidence.

18. As against that, the protagonists of the view had argued that dying declarations should be made admissible because what can you do if the maker of the statement is dead. In other words, necessity was pressed into aid.

19. To balance the competing claims, as the law evolved, it was held that before acting upon a dying declaration its proof must come with utmost purity and it must be shown that the maker of the statement was fit for statement.

20. Consciousness and being fit for statement are two

different facets. A person in extreme pain and suffering may be conscious but may not be mentally fit to make a statement.

21. In the instant case, the learned SDM has not bothered to take note of the fact that he had reached the hospital around 3:00 PM and the certification pertaining to the fact of Geeta being fit for statement related to 1:10 PM. We see no reason why the learned SDM chose not to call the doctor on duty and get re-certified at 3:00 PM that Geeta was fit for statement. There is no evidence that Geeta was fit for statement at 3:05 PM.

22. Any blemish in a dying declaration or the fitness of the maker of the statement would render it unsafe to sustain a conviction on a dying declaration.

23. Learned counsel for the appellant has further brought to our notice that as recorded on the MLC by Dr. Anu Vijyant PW-8, at the first available opportunity, Geeta only inculpated her brother-in-law. Learned counsel highlights that in the statement Ex.PW-6/A not only the brother-in-law but even the wife of the brother-in-law has been inculpated. In other words, learned counsel points out a variation in the two statements allegedly made by the deceased. Counsel further points out that there are traces of a motive for the reason sharing common kitchen with the appellants appears to be a

problem with the deceased. That the deceased was in debt and had gone to her sister Seema, who has appeared as PW-3 and confirm said fact has also to be factored pertaining to the mental condition of Geeta. Further, learned counsel points out that the burnt clothes which were lifted from the house and all other exhibits which were lifted were not detected with any residue of kerosene oil thereon as per the report Ex.PX of the Central Forensic Science Laboratory. This negates the claim in the dying declaration that kerosene oil was thrown on her urges the counsel and calls upon us to take note of the fact that was in the MLC the doctor has not noted that he could smell kerosene on the patient.

24. We may note that Surender Singh PW-7 is related to the deceased from the side of her mother. Surender Singh PW-7 is not related to the deceased from the side of her in-laws. In his deposition he had stated that he had gone to the house of his niece as he was informed that she had quarreled with her husband. When he went to her house a quarrel was on. He advised his niece not to quarrel. She went inside a room and he saw her in flames. Lastly it would be relevant to note that as per post-mortem of the deceased burn injuries were noted on the front side of her body; but not on her palms. The normal and instant reaction of a person who catches fire

accidentally or is set on fire is to douse out the flame by stamping out the same using the palms.

25. Cumulatively read, with primacy to the fact that there is no certification qua the mental condition of Geeta at 3:05 PM and the prosecution is seeking to rely upon the fitness recorded on the MLC at 1:10 PM, we are of the opinion that it would be unsafe to sustain the conviction of the appellants on the given evidence.

26. The appeals are allowed. Impugned judgment and order dated 26.9.2006 is set aside. The appellants are acquitted of the charge of having murdered Geeta.

27. Since the appellants are in jail we direct that they should be set free forthwith unless required in any other case.

28. Copy of this order be given dasti to learned counsel for the appellants.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

February 23, 2010
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