

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

Judgment reserved on: March 03, 2010
Judgment delivered on: March 17, 2010

+ **CRIMINAL APPEAL NO.859/2009**

MANOJ KUMAR

....APPELLANT

Through:

Ms. Neelam Grover, Advocate

Versus

STATE

.....RESPONDENT

Through:

Mr. Sunil Sharma, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. This appeal is directed against the judgment of the Additional Sessions Judge dated 12.08.2009 in Sessions case no. 31/05, FIR No. 970/04, Police Station Dabri convicting the appellant Manoj Kumar for the murder of his brother Virender Pal under Section 302 IPC as also the order on sentence dated 17.08.2009 in terms of which the appellant was sentenced to undergo imprisonment for life and to pay a

fine of Rs. 1000/- and in default of payment of fine, to undergo imprisonment for a further period of six months.

2. Briefly stated, case of the prosecution is that on 19th December, 2004 at around 6:35 am, Constable Pramod of Police Control Room informed police station Dabri that someone rang up from telephone No. 55782592 and informed that acid has been poured over one person at House No. C-363, Gali No. 42, Mahavir Enclave. The information was recorded at the police station as DD No. 6-A (Ex.PW3/A) and copy of the DD report was given to SI R.K.Meena, PW25 who proceeded for the spot of occurrence.

3. On reaching the spot of incident, SI R.K.Meena found that the victim had been removed to the hospital by the Police Control Room Van. He, therefore, reached DDU Hospital and found victim Virender Pal admitted there. SI Meena moved an application Ex.PW23/A to seek permission of the doctor for recording the statement of Virender Pal. The doctor declared the patient 'fit for statement' vide his endorsement Ex.PW26/A on the application Ex.PW23/A. SI R.K.Meena recorded the statement of Virender Pal Ex.PW23/B, which, after the death of the deceased is treated as his dying declaration. The deceased Virender Pal, in the aforesaid statement, narrated that they were four brothers. He and the appellant Manoj were residing in the house in question and the other two brothers Pawan and Satender were living in their separate houses. There was a dispute between him

and appellant Manoj concerning the house in which they were residing. The said dispute was settled and the house was partitioned with the intervention of the family. As per the settlement, Manoj owed him Rs. 28,000/- and since appellant had not paid said amount, he was not vacating the kitchen, which, as per the partition agreed upon, fell to the share of the appellant Manoj. Virender Pal further stated that on 19th December, 2004 at around 6:00 o' clock, he went to ease himself in the toilet and he did not bolt the door from inside. Suddenly, the appellant came there saying "*tujhe aaj zinda nahi chodunga*" and threw some '*jwalansheel padarth*' on him from a container after opening the door of the toilet, as a result of which his body started burning. He somehow came out of the toilet and on hearing his cries, neighbours collected at the spot and someone informed the police. He stated that his brother Manoj had tried to kill him by throwing said liquid upon him and in that attempt of Manoj, his two brothers Pawan and Satender and a neighbour Subhash were also parties as he had seen them conspiring against him on several occasions and he wanted legal action. SI R.K.Meena obtained the left foot impression of the deceased on his statement, and after appending his endorsement on the said statement sent it to the police station for registration of the case under Section 307/34 IPC. On the basis of said *rukka* Ex.PW23/C, formal FIR was recorded on 9:25 am on 19th December, 2004 vide DD No. 9A. Crime Team arrived at the spot and prepared its report.

Photographs of the site of crime were taken, which were exhibits Ex.PW5/P1 to P4.

4. On 20th December, 2004 at around 6:10 pm, Duty Constable Mahesh informed from Safdarjung Hospital that victim Virender Pal had expressed his desire before the doctor for giving his second statement. Information was recorded as DD No. 27A and SI R.K.Meena went to Safdarjung Hospital where he recorded the second statement of Virender Pal. In the said statement Ex.PW23/E, Virender Pal stated that when his statement was recorded on 19th December, 2004, he was under a lot of pain and his mental equilibrium was disturbed. He claimed that he was better and wanted to say that his brother Pawan and Satender as well as neighbour Subhash were not party to the incident of causing burn injuries to him by the appellant Manoj and actually Braham Singh, father-in-law of Manoj was alongwith him at the relevant time who had thrown matchstick upon him. He explained that in his earlier statement, he had named Pawan, Satender and his neighbour because they used to talk with Manoj.

5. Victim/deceased Virender Pal died on 25th December, 2004. His body was sent for post-mortem and the post-mortem report Ex.PW11/A reported that there were 80 to 90% burns on the dead body. Cause of death was opined as septicaemic shock caused by ante mortem, chemical burn injuries. The burn injuries present over the body, as per

the opinion of the Autopsy Surgeon PW11 Dr. Sarvesh Tandon, were fatal and sufficient to cause death in the ordinary course of nature.

6. We may note that in the MLC Ex.PW12/A, it is recorded by the doctor concerned that victim Virender Pal was brought to the hospital on 19th December, 2004 at 07:45 am. The MLC also records “alleged H/O of burn injures (as per pt.), throwing of some liquid when he was in toilet by his brother”.

7. The clothes found on the person of the victim Virender Pal were converted into a sealed *pullanda* at DDU Hospital and entrusted to the Investigating Officer which were seized vide seizure memo Ex.PW10/A.

8. Subsequent investigation was taken over by Additional SHO, P.S. Dabri. The appellant was arrested on 05th January, 2005. On interrogation, he made a disclosure statement Ex.PW9/C and pursuant to that disclosure, the appellant allegedly got recovered one plastic bottle of one litre capacity, a plastic tumbler (blue colour) and a matchbox from his house No. C-363, Mahavir Enclave, Part III from beneath the staircase which was used as a store. The plastic bottle contained some petrol.

9. The other accused Braham Singh was arrested on 08.04.2005. On completion of investigation, a charge sheet under Section 302 read with Section 34 IPC was filed. In the charge-sheet, accused Braham Singh was kept in column No. 2 along with brothers of the deceased namely Satender, Pawan Kumar and a neighbour Subhash Chand.

While taking cognizance of the offence, learned Magistrate, prima facie found involvement of Braham Singh also, thus summoned him for undergoing trial in view of the dying declaration given by the deceased on 20th December, 2004.

10. The appellant as well as his father-in-law Braham Singh were charged for the murder of the deceased Virender Pal under Section 302 IPC read with Section 34 IPC. Both of them pleaded innocence and claimed to be tried.

11. In order to bring home the guilt of the appellant and his co-accused, prosecution examined 26 witnesses. The appellant as well as his co-accused Braham Singh were examined under Section 313 Cr.P.C. in their respective statements. Both of them denied the prosecution evidence and claimed that they have been falsely implicated in this case.

12. Learned trial Judge on appreciation of evidence found the appellant Manoj guilty of committing murder of his brother Virender Pal by throwing some corrosive chemical on him and convicted him under Section 302 IPC. He, however, acquitted the appellant Braham Singh of the charge.

13. Manoj Kumar has preferred the instant appeal against his conviction. The prosecution, however, has not filed any appeal against the acquittal of the accused Braham Singh.

14. On perusal of record, it transpires that there is no eye-witness in this case and the conviction of the appellant is based mainly on the dying declarations of the deceased. There are as many as six dying declarations in this case.

15. First dying declaration of the deceased is stated to have been made in presence of PW4 Kailash Chand, PW6 Suresh Singh and PW8 Vipul Mishra at the spot of occurrence. Out of the said three witnesses, PW6 Suresh Singh has not supported the case of prosecution regarding the dying declaration made by the deceased in his presence. He was cross-examined at length by learned APP but to no avail. PW4 Kailash Chand testified in the court that on 19th December, 2004, he was sleeping in the STD shop at C-362, Gali No. 42, Mahavir Enclave. At around 6:00 am, he awoke because of the noise of cries and weeping. He noticed a crowd of people at the house of the deceased and when he went inside, he found the deceased lying on the floor in burnt condition and crying that Manoj Kumar has burnt him and he was saying *"bhagwan aisa bhaiye kissi ko na dey"*. PW8 Vipul Mishra has more or less corroborated his version by saying that when he reached at the spot in the morning of 19.12.2004 on hearing the noise, he saw the deceased in burnt condition and the deceased Virender Pal was saying that Manoj had burnt him and he was also saying that *"bhai ne bhai ko mara, aur kese ne nahi mara, bhai ne mujhe jalaya"*.

16. The second dying declaration is claimed to have been made by the deceased in presence of PW12 Dr. Babita Garbiyal who attended to the deceased in the casualty of DDU Hospital on 19th December, 2004. She prepared the MLC of the deceased. She has stated that the deceased was brought to the hospital by his brother and ASI Rattan Lal with the alleged history of burn injuries due to throwing of some liquid by his brother when the patient was in toilet. She also stated that the history was given by the patient himself. Ex.PW12/A is the MLC of the deceased.

17. The third dying declaration, as per the prosecution case, was made in presence of PW13 Ramesh Kumar, father-in-law of the deceased who testified that on the receipt of the information about Virender Pal having sustained burn injuries, he visited him in the burns ward of Safdarjung Hospital on 19th December, 2004. Virender Pal, deceased told him that in the morning at around 6:00 am, he was sitting in the toilet without bolting the door from inside when the appellant Manoj Kumar opened the door and threw petrol on him with a plastic jug and then threw a burning matchstick upon him due to which, he had suffered the burn injuries. Witness also stated that Virender Pal told that Manoj Kumar uttered the words that he would not leave the deceased alive. At the outset, we may note that this dying declaration cannot be true because as per the MLC Ex.PW12/A and the post-mortem report, the deceased had suffered chemical burns and not the fire burns.

18. The fourth dying declaration of the deceased, as per the case of the prosecution, is complaint statement Ex.PW23/B recorded by SI R.K.Meena at DDU Hospital, which formed the basis for the registration of the FIR. This statement assumed the character of dying declaration after the death of the deceased. In the said statement, the deceased is stated to have told the Investigating Officer that on 19th December, 2004 at around 6:00 am, when he had gone to toilet and was sitting in the toilet without bolting the door from inside, his brother Manoj came and opened the door saying 'today, I would not leave you alive' and threw some corrosive liquid on him from a container, as a result of which, he suffered body burns. He also added that the appellant Manoj had tried to kill him and in his aforesaid attempt, his brothers Pawan and Satender and a neighbour Subhash are also the party as earlier he had seen them conspiring against him.

19. The fifth dying declaration is purported to have been made by the deceased in presence of PW7 Kavita Devi, who stated that on 20.12.2004 she had a talk with her husband Virender Pal who told her that on 19.12.2004 at around 6:00 am when he had gone to toilet, appellant Manoj Kumar closed the door from outside and said "*Aaj Main Tujhe Jinda Nahi Chodunga*" and thereafter he poured petrol on him and set him ablaze.

20. The sixth dying declaration is claimed to have been recorded by Investigating Officer on 20th December, 2004 on the request of the

deceased Virender Pal. In the said statement Ex.PW23/E, Virender Pal retracted his earlier dying declaration PW23/B explaining that on 19th December, 2004, when his earlier dying declaration was recorded, he was not in control of his mental faculties because of acute pain and claimed that he was in control of his mental faculties and he wanted to say that Braham Singh, father-in-law of the appellant Manoj was also an accomplice of Manoj, who had actually thrown the matchstick upon him. In the said statement Ex.PW23/E, the deceased exonerated his brothers Satender and Pawan as well as the neighbour by saying that he included their names in his earlier statement to the police because they used to talk with Manoj.

21. There is no eye witness to the occurrence and case of prosecution rests on alleged six dying declarations. Therefore, before advertent to the submissions of rival parties, we deem it appropriate to have a look on the law relating to the dying declaration.

22. In the matter of **Smt. Paniben Vs. State of Gujarat**, AIR 1992 SC 1817, Hon'ble Supreme Court after considering several pronouncements on the law relating to dying declaration summed up the principles governing the dying declaration as under:

“(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration (**Munnu Raja v. State of M.P.**) (1976) 3 SCC 104; 1976 SCC (Cri.)376; (1976) 2 SCR 764.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (**State of**

U.P. v. Ram Sagar Yadav) (1985) 1 SCC 552: 1985 SCC (Cri) 127: AIR 1985 SC 416; **Ramavati Devi v. State of Bihar** (1983) 1 SCC 211: 1983 SCC (Cri) 169: AIR 1983 SC 164.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (**K. Ramchandra Reddy v. Public Prosecutor**) (1976) 3 SCC 618: 1976 SCC (Cri) 473: AIR 1976 SC 1994.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (**Rasheed Beg v. State of M.P.**) (1974) 4 SCC 264 : 1974 SCC (Cri) 426.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (**Kake Singh v. State of M.P.**) 1981 Supp. SCC 25 : 1981 SCC (Cri.) 645 : AIR 1982 SC 1021.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (**Ram Manorath v. State of U.P.**) (1981) 2 SCC 654 : 1981 SCC (Cri) 581.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (**State of Maharashtra v. Krishnamurti Laxmipati Naidu**) 1980 Supp. SCC 455 : 1981 SCC (Cri) 364 : AIR 1981 SC 617.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (**Surajdeo Oza v. State of Bihar**) 1980 Supp. SCC 769 : 1979 SCC (Cri) 519 : AIR 1979 SC 1505.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (**Nanahau Ram and Anr. v. State of M.P.**) 1988 Supp. SCC 152 : 1988 SCC (Cri) 342 : AIR 1988 SC 912.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (**State of U.P. v. Madan Mohan**) (1989) 3 SCC 390 : 1989 SCC (Cri) 585 : AIR 1989 SC 1519."

23. From the above enunciated principles of law, it is obvious that though there is no bar under law to act upon a dying declaration without corroboration, yet before acting on the dying declaration, the Court should scrutinise it carefully and must be assured and satisfied that the dying declaration is of sterling quality and it is not the result of tutoring, prompting, imagination or vindictiveness, etc. In light of above enunciated principles of law, we now proceed to consider the submissions made by the rival parties.

24. Learned counsel for the appellant has submitted that as per the case of prosecution the deceased made as many as six dying declarations, which are inconsistent. Therefore, it is not safe to rely upon either of the dying declarations. Learned counsel further drew our attention to the MLC of the deceased Ex.PW12/A wherein the concerned doctor has recorded on the MLC “alleged H/O burn injury (as per pt.) by throwing of some liquid when he was in toilet and “no H/O vomiting, ...(not legible) which circumstance create a doubt, perhaps the words “by his brother” have been squeezed in at a subsequent stage to implicate the appellant. Learned counsel further pointed out that as per the case of prosecution, on 19.12.2004 the deceased gave a dying declaration Ex.PW23/B, wherein apart from the appellant Manoj, he implicated his brothers Pawan and Satender and a neighbour Subhash as accomplices of appellant but on 20.12.2004, he retracted from his earlier dying declaration on the ground that on 19.12.2004, he was not in fit mental condition and he introduced the

name of father-in-law of the appellant Brahampal as an accomplice of the appellant Manoj and assigned the role of throwing a matchstick on him. In the said statement Ex.PW23/E, he also explained that in his earlier statement, he named his brothers Pawan and Satender as also his neighbours because they were on talking terms with appellant Manoj. This explanation of the deceased, it was submitted, indicate that the deceased was a vindictive mind and if for such a trivial reason he could falsely implicate his brothers and a neighbour as co-culprits in the incident, what is the guarantee that he was truthful in his other dying declaration. Thus, learned counsel for the appellant has strongly urged us to conclude that the dying declarations relied upon by the prosecution are of suspicious character and extend benefit of doubt to the appellant.

25. Learned counsel for the State, on the other hand, has submitted no doubt the dying declarations made by the appellant are inconsistent to certain extent, but there is one common feature in all the dying declarations that it was the appellant Manoj, who threw the corrosive chemical on the deceased. Therefore, there is no reason to discard the dying declarations of the deceased so far as the role of the appellant Manoj is concerned. Thus, he has submitted that the learned Trial Court has rightly convicted the appellant on the basis of the dying declarations.

26. We have carefully considered the rival contentions and perused the material on record. We find substance in the submissions made by the learned counsel for the appellant. As per the case of prosecution, the first dying declaration was made by the deceased immediately after the incident at the spot of occurrence. To prove this fact, prosecution examined PW4 Kailash Chand, PW6 Suresh Singh and PW8 Vipul Mishra. PW6 Suresh Singh has not supported the case of prosecution. As regards Vipul Mishra, PW8, case of the prosecution is that he rang up telephone No.100 from telephone No.55782592 and informed the police control room about the incident. It is the said information which formed basis for recording of DD No.6A dated 19.12.2004 (Ex.PW3/A), which put the investigating machinery into motion. On perusal of DD No.6A, it transpires that though this information conveys that acid was poured on some person, but there is no mention of the name of the culprit in the DD report. If the version of PW8 Vipul Mishra about the dying declaration made by the deceased is to be believed, then he was expected to inform the police control room that Manoj had thrown acid on the deceased, which fact does not find mention in the DD report.

27. The next dying declaration on the record is in the form of alleged history of cause of burns given by the patient to PW12 Dr. Babita Garbiyal, who attended to the deceased at the casualty of the hospital. Perusal of the MLC Ex.PW12/A reveals that on the right hand column of

the MLC meant for particulars of injuries or symptoms, it is recorded in following form:

“Alleged H/O Burn injury by(as per pt.)
throwing of some liquid v when he was in toilet
by his brother
No H/O vomiting , convulsion, vomiting”

28. From the above, it appears that the words “by his brother” were not written on the first occasion and it is highly probable that these three words have been squeezed in between the lines subsequently. This makes the dying declaration suspect; otherwise also, this dying declaration is inconsistent with the first dying declaration in which the name of Manoj as the culprit has come in unequivocal terms. This circumstance cast a doubt about the correctness of the testimony of PW4 and PW6 regarding the first dying declaration. Had that dying declaration been true, then the patient definitely would have told the attending Doctor that the corrosive liquid was thrown on him by Manoj.

29. Fourth dying declaration sought to be proved by the prosecution is purported to have been made by the deceased in presence of his father-in-law PW13, which is unreliable, being inconsistent with the medical evidence. From the post mortem report Ex.PW11/A as also the testimony of PW11, the cause of death of the deceased was chemical burn injuries, whereas according to PW13 Ramesh Kumar, the deceased told him that Manoj Kumar threw petrol on him from a plastic jug and threw a burning matchstick. If that version was true, then the

deceased ought to have suffered the fire burns and not chemical burns as opined in the post mortem report Ex.PW11/A.

30. The dying declaration Ex.PW23/B recorded by the Investigating Officer, is also unreliable because as per the subsequent dying declaration Ex.PW23/E recorded on 20.12.2004, the deceased himself claimed that when he made the earlier dying declaration Ex.PW23/B, he was not in control of his mental faculties.

31. The fifth dying declaration as per case of prosecution is purported to have been made in presence of PW7 Kavita Devi, wife of the deceased. She had stated that in the morning of 20.12.2004, her husband Virender Pal told her that on the fateful morning when he had gone to toilet, the appellant had closed the door from outside saying *"Aaj Main Tujhey Nahi Chodunga"* and poured petrol on him and burnt him. The above version cannot be true as it is inconsistent with the medical evidence inasmuch as the deceased died due to chemical burns. Therefore, no reliance can be placed on the version of PW7 Kavita Devi.

32. The last dying declaration sought to be proved by the prosecution is Ex.PW23/E purported to have been recorded by the Investigating Officer at Safdarjung Hospital on 20.12.2004. In this dying declaration, the deceased retracted from his earlier statement Ex.PW23/B inasmuch as that he introduced the name of Braham Singh, father-in-law of the appellant as an accomplice of the appellant and assigned a role of

throwing a matchstick to the accused Braham Singh and he exonerated his brothers Pawan and Satender as well as neighbour Subhash, who were named as accomplices in the earlier dying declaration Ex.PW23/B and explained that he had named them in his earlier dying declarations as he had seen them talking with appellant Manoj. This conduct of the deceased is indicative of the vindictive character of the deceased. If the deceased could have falsely implicated his brothers and a neighbour because of such a trivial reason, there is no guarantee that he has come out with the truth about the role of the appellant Manoj, particularly when, admittedly, he had a dispute about the partition of the house and payment of money with the appellant. Thus, a possibility cannot be ruled out that the deceased had named the appellant Manoj Kumar as a culprit in his above referred dying declarations as an act of vindictiveness. Thus, we do not find it safe to rely upon the so-called dying declarations of the deceased. Otherwise also, it is settled position in law that effort must be done to requisition the services of the SDM to record the dying declaration, which was all the more necessary in this case when the deceased wished to change his statement by withholding his allegation against three persons and adding the name of Braham Singh in lieu of that. Despite that, the Investigating Officer did not care to call the SDM, which circumstance points towards unfair investigation and entitles the appellant to benefit of doubt.

33. There is one more aspect to this case. PW8 Vipul Mishra in his examination-in-chief has stated that at the spot of occurrence appellant Manoj made an extra judicial confession by saying that since the deceased was not vacating his kitchen, he had set the deceased on fire. In our considered view, the aforesaid version of PW8 Vipul Mishra is not reliable, firstly because as per the medical record, the deceased died because of chemical burns and not because of fire burns. Secondly, according to the prosecution, PW4 Kailash Chand and PW6 Suresh Singh were also present at the spot, but none of them have spoken about the extra judicial confession made by the appellant. PW6 Suresh Singh had even gone to the extent of stating that appellant Manoj Kumar was not present at the spot. Thus, we do not find it safe to rely on uncorroborated testimony of PW8 regarding the extra judicial confession.

34. In view of the above, we are of the view that the dying declarations relied upon by the learned Trial Court are not only inconsistent but suspect. Thus, it is not safe to base conviction on the strength of said dying declarations or the testimony of PW8 regarding extra judicial confession made by the appellant. We feel that this is a fit case for extending benefit of doubt to the appellant. We accordingly accept the appeal and set aside the impugned judgment of conviction as also the order on sentence. We hereby acquit the appellant of charge under Section 302 IPC, giving him benefit of doubt.

35. Appellant is in jail. He be released forthwith, if not required in any other case.

36. Appeal is disposed of accordingly.

AJIT BHARIHOKE, J.

MARCH 17, 2010
akb/pst

A.K. SIKRI, J.