

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

RESERVED ON: 16.08.2011
PRONOUNCED ON: 23.08.2011

+ CRL.A. 829/2001

KAMLA & ORS. Appellants
Through: Mr. Ranbir Singh Kundu, Advocate.

versus

STATE OF DELHI Respondent
Through: Mr. Sanjay Lao, APP.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL

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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 |

MR. JUSTICE S.RAVINDRA BHAT

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1. In this appeal, the judgment and order of the learned Additional Sessions Judge dated 08.10.2001 in S.C. No.77/98, convicting the appellants (referred to hereafter by their names, i.e. Sanjay, Kamla and Chanderkanta) for the offences punishable under Section-302/498A/201/34 IPC, has been challenged. During the pendency of the appeal, the appellant Kamla – (mother of the other two appellants), died. The proceedings abated as far as she was concerned.

2. The prosecution alleged that information was received from Constable Ramesh, (PW-21 duty constable in DDU hospital) about the incident which occurred on 29.09.1997 at 09:30 on the second floor C-36, J.J. Colony, Khyala, Delhi. Sarla (the deceased) had sustained extensive burn injuries and was admitted by PW-6 Om Prakash (elder brother of Sanjay). This information was recorded and the case was assigned to ASI Shekhar Lal, PW-18 for further investigation. Sarla, was initially admitted to Deen Dayal Upadhyaya Hospital but was later referred to Dr. Ram Manohar Lohia, Hospital. The police alleged that upon visiting the spot, the premises were found locked. It was alleged that Kamla used to reside on the ground floor of the premises; Chanderkanta used to live with her. Om Prakash, PW-6 used to reside on the first floor and Sarla, with Sanjay, used to live on the second floor. The parents of Sarla were notified. Her mother Chaman Devi, PW-2 recorded a statement on 30.09.1997 to the SDM. The prosecution's version was that Sanjay married Sarla about 1½ years prior to the incident; PW-2 stated that Sarla had informed her about the ill-treatment and physical abuse at the hands of Chanderkanta and Kamla with the object of extracting dowry. It was also stated that Sanjay used to habitually consume liquor. PW-2 further stated about some demand for an over-lock machine and scooter by Sanjay and that she received information about the burning incident at about 12:30 on the mid-night of 29.09.1997.

3. The prosecution carried on investigation and made recovery of material objects and articles. The accused were also arrested. The prosecution alleged that on 02.10.1997 Sarla (who all the while had been declared unfit to make the statement in view of the burn injuries suffered by her) was declared fit to record a statement. Her statement was recorded by the SDM. In it, she stated that Sanjay used to beat her regularly for flimsy reasons and also made constant demands for dowry, since her father had received lump sum compensation upon closure of the establishment where he used to work. She alleged that Sanjay poured kerosene oil on her and set her afire; Kamla pushed her and Chanderkanta, the third appellant had caught hold of both her hands. Sarla subsequently died after the statement was recorded. Her body was sent for post mortem examination. PW-1 Dr. K. Goel in his report Ex.PW-1/A stated that the burn injuries which were ante mortem were the result of flames and involved 98% of the body. According to the

doctor, death was due to septicemia consequent to infected burn injuries. On the basis of the investigation, a report was filed in Court; the accused were charged with the offences described in the previous portion of the judgment. They denied guilt and claimed trial.

4. The prosecution examined 23 witnesses and exhibited a number of documents in support of its case. After considering them, the Trial Court convicted the Appellants and sentenced them to undergo rigorous imprisonment for life in addition to other sentences, all of which were to operate concurrently.

5. The Appellant's counsel urged that their conviction cannot be sustained. It was argued that the Trial Court relied predominantly on the dying declaration of the deceased Sarla which was recorded on 02.10.1997. Elaborating on this, it was stated that the Medico Legal Certificate (MLC) placed on record Ex.PW-5/A indicated that Sarla was admitted with 80% burns at 10:25 PM on 29.09.1997. It was submitted that the said document itself records a number of endorsements including those made on 30.09.1997 (at 7:15 PM,) 01.10.1997 (at 12:15 noon) and the further endorsement at 12:20 AM on 02.10.1997, to the effect that the injured Sarla was unfit to make a statement. Learned counsel emphasized that the last endorsement i.e. of 12:20 AM of 02.10.1997, clearly indicated that the patient had been administered sedatives and there was a possibility of recording her statement at 04:00 AM. The subsequent endorsement, submitted counsel, on the document Ex.PW-5/A, was at 05:00 AM; it noted that the patient was fit for statement. These circumstances, according to counsel, clearly established that the injured Sarla was not in a position to make any statement on successive dates i.e. 29.09.1997, 30.09.1997 and 01.10.1997 and the early hours of 02.10.1997. Concededly, the last endorsement was made on 02.10.1997 to the effect that Sarla was fit to make a statement, at 05:00 AM. However, inexplicably, her statement was recorded only at 03:45 PM i.e. more than 10 hours later.

6. It was argued by the Appellant's counsel that the prosecution's version about the dying declaration being recorded by the SDM, in the light of the documentary material in the form of Ex.PW-5/A could not have been believed and needed corroboration having regard to the peculiar circumstances of the case. In this context, it was submitted that

when the prosecution case was that on four occasions, the deceased's statement could not be recorded and it had relied on endorsements to these effect - a fact corroborated by the SDM, PW-14 who deposed having visited the hospital on 29.09.1997 and 30.09.1997, a vital corroboration about the truthful nature of the dying declaration was essential. Counsel argued that it was incumbent upon the prosecution to lend assurance to the Court that the deceased was indeed conscious and oriented to make a voluntary statement that could be relied upon to record a conviction. Here, counsel highlighted the absence of any ocular testimony that the dying declaration had been witnessed by a doctor. It was submitted that none of the doctors who examined the deceased - from the time the first MLC was recorded onwards till the time the endorsement that the patient was fit at 03.20 PM to make the statement, - was examined in the course of the trial. Learned counsel submitted that even though there is no inviolate rule that the dying declarations should bear the endorsement by a Doctor that the patient was fit or oriented to give a statement, yet the Court has to weigh all the materials presented before it to be satisfied that an uncorroborated dying declaration could result exclusively in conviction. It was submitted that the material evidence in this regard in the form of endorsement Ex.PW-5/A read together with the testimonies of PW-5 Dr. Bindal and PW-10 Shri Pooran Mal, point to Dr. Sushma, Dr. Raman Bhardwaj and Dr. Rajesh Valuja, having examined the patient. However, none of these doctors (who examined Sarla or had allegedly declared her fit for making a statement) were produced during trial. Instead, the testimony of PW-10 (Pooran Mal) was relied upon. He merely claimed to be familiar with the signatures of Dr. Raman Bhardwaj but had not witnessed the endorsement made by him at a crucial time i.e. 03:20 PM on 02.10.1997 when the deceased was declared to be fit to make the statement.

7. Learned counsel next submitted that having regard to the suspicious circumstances, shrouding the recording of the dying declaration and the sheer improbability of the patient being fit to make the statement at 03:20 PM on 02.10.1997, having regard to the previous medical history, the Court could not have relied on the testimony of PW-14. Here, it was pointed out that the SDM, PW-14 claimed that the dying declaration was written down by the I.O. as he (PW-14) had a hand injury.

However, I.O. did not support this version and instead deposed to having recorded the statement of Chaman Devi, PW-2/A in his hand writing. He also mentioned about recording the statement of Jai Prakash, PW-3/A on 30.9.1997. This contradiction was glaring and went into the root of the prosecution story. Learned counsel submitted that if these factors were taken into consideration along with the endorsement on the dying declaration itself, which mentioned that the statement was recorded by Sanjeev Kumar then, the Trial Court's reliance upon the statement was erroneous.

8. Learned counsel argued that even otherwise, the prosecution story was untenable because the deceased alleged that all the accused had joined together and caused burn injuries to her. Each accused was given a specific role. However, PW-6 Om Prakash - who took the deceased to the hospital, clearly deposed that Kamla and Chanderkanta were away in a party in the locality. Furthermore, the family members of Sarla were present - as per the version of her mother PW-2 and PW-3 Jai Prakash - in the hospital after she was admitted i.e. from 29.9.1997 till 03.10.1997. The sheer improbability of the deceased remaining silent and not disclosing a word about the alleged crime to them ought to have alerted the Court from relying on the dying declaration.

9. Learned counsel relied upon the decision reported as *Brundaban Moharana & Anr. v. State of Orissa*, 2010 (4) JCC 3037, *Lakshmi v. Om Prakash*, 2001 (6) SCC 710 and *Nanhar v. State of Haryana*, 2011 SCC (Crl) 175, to say that if a doubt can be cast by the defence that on the facts established, the injured could not have been in a position to make a dying declaration or that the dying declaration itself was shrouded in suspicious circumstances, it cannot be relied upon in returning the accused's conviction.

10. The learned APP urged that the approach of the Trial Court and the findings recorded in the impugned judgment ought not to be disturbed. It was argued that the larger Bench ruling of the Supreme Court in *Lakshmi v. State*, 2002 (6) SCC 710 now clarifies that it is not necessary that a doctor should certify that the injured or patient is fit or oriented to record a statement. As long as the person recording it is able to depose about what was stated fairly and faithfully and is credible in his deposition, the court would nevertheless believe it. In the present case, submitted the learned APP, PW-14,

the SDM was an independent witness who had no axe to grind against the accused. It could also not be alleged that he would be a party to the false implication of the Appellants. This was a second aspect which the Trial Court took into account while relying upon the dying declaration Ex.PW-14/A.

11. Learned APP further argued that the version of the SDM, PW-14 also stands corroborated by the depositions of PW-2 and PW-3 who clearly mentioned that he was closeted with the deceased on 3.10.1997 when her statement Ex.PW-14/A was recorded. The cumulative effect of the depositions of three witnesses was that that attempts to record the statement of the deceased were successively made on 29.09.1997 and 30.09.1997 but to no avail. It was only upon her being declared fit to record the statement that PW-14 went to the hospital and recorded PW-14/A. Having regard to the totality of these circumstances, the Court should not disturb the conviction recorded by the Trial Court and the sentence handed down by it.

12. The above discussion would reveal that the prosecution story about the Appellant's role in the death of Sarla, - accepted by the impugned judgment, hinged on the dying declaration, PW-14/A. The dying declaration reads as follows:

"My name is Sarla. Sanjay is my husband. My father's name is Jai Prakash. I was married with Sanjay at C- 36, JJ Colony, Kyala on 15-01-1995. A boy was born after 10 months. My husband used to beat me on petty excuses. He used to drink daily and harass me by making dowry demand and state that he should be given scooter out of the money received by my father on the closure of mill. I declined. On my refusal, Sanjay poured kerosene oil on me and put me on fire. My mother-in-law Kamla pushed me and sister-in-law Chander Kanta held me by her hands. These three persons have burnt me and they should be punished. I'm praying with folded hands for justice."

13. According to the prosecution, the burning incident occurred at 09:30 P.M. on 29-09-1997. The injured Sarala was taken to the hospital and admitted at 10:25 PM. The MLC, EX-05/A records that she was unfit to make any statement at that time. Both the prosecution, as well as the Appellants, do not dispute this position. On the subsequent dates also, the prosecution alleges that she was unfit to make a statement. The endorsement made at 12: 20 AM on 02-10-1997 states that:

"Patient received sedation at 9:30 P.M. unfit for statement at present. Kindly send somebody for taking statement at 4:00 AM in the morning. 12:20 A.M."

The endorsement made after this was apparently at 03:20 P.M. on 02.10.1997. An interesting and important feature in this case is that none of the doctors who recorded the endorsements on the MLC about the fitness or otherwise of the patient, Sarala deposed during the trial. PW- 10 deposed about his knowledge regarding the signatures of one of the doctors and claimed to identify one such signature appearing below the endorsement dated for 2-10-1997 at 3:20 P.M. However, even that doctor was not examined. This aspect assumes some importance because the prosecution alleged before the Trial Court that the dying declaration-EX-14/A was recorded at 3:45 P.M. If that were really the position, the prosecution ought to have examined Dr Bhardwaj, who allegedly made the endorsement certifying that Sarala was fit to record a statement at 3:20 PM. No attempt was made to involve him during the trial. If this aspect is kept in mind in the background of the circumstance that for three successive days, i.e. 29th, and 30th September, 1997 as well as 1st October 1997, Sarla was declared unfit to make any statement, the prosecution was under a duty to lend assurance to the Court that indeed the injured was in a fit and conscious state of mind to record a voluntary statement regarding the incident and its genesis. The third added factor, which the court cannot overlook is that Sarala's relatives i.e. PW- 02 and PW- 03, her parents consistently deposed to being present in the hospital during the four days preceding her death. However neither of them mentioned that the deceased had told them how the incident took place and what was the role played by each of the Appellants.

14. It is no doubt settled law that uncorroborated dying declarations can, in given circumstances, be the only basis for conviction. However, this rule is subject to three important conditions. The first is that the prosecution should establish that the maker was conscious of what he or she was saying; the second is that it is to be proved to have been made voluntarily, and the third is that the declaration should inspire confidence in the court as reflecting the truth of what is stated. Thus, in *State of Maharashtra v. Sanjay*, (2004) 13 SCC 314, it was held that:

“It has been repeatedly pointed out that the dying declaration should be of such nature as to inspire full confidence of the court in its truthfulness and correctness (vide the observations of a five-Judge Bench in Laxman v. State of Maharashtra). Inasmuch as the correctness of dying declaration cannot be tested by cross-examination of its maker, “great caution must be exercised in considering the weight to be given to this species of evidence”. When there is more than one dying declaration genuinely recorded, they must be tested on the touchstone of consistency and probabilities. They must also be tested in the light of other evidence on record.”

This aspect was commented upon in other judgments, reported as *Thurukani Pompaiah v State of Mysore* AIR 1965 SC 939, *State of Punjab v Parveen Kumar* 2005 (9) SCC 769, etc. The larger Bench ruling in *Laxman*, where it was held that a formal certification on the dying declaration of a doctor as to the fitness of the person making it is inessential, significantly also states that:

“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.”

It was further observed,

“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.”

15. In view of the circumstances attending the dying declarations, i.e. the repeated attempts to record the deceased's statements, on four successive days, her being declared unfit at 12:20 AM on 2-10-1997; the declaration that she was fit to record a statement, at 5:00 AM, and the statement itself being recorded at 3:45, i.e. 10 hours later, the absence

of any doctor, particularly the last doctor who declared her to be fit, (after her inability for about four days to record any statement); the passage of time between the incident, and the date when the statement was recorded, the injured's parents being unaware of the attack, and the precise particulars, though they were present in the hospital, throughout, all highlighted the need for corroboration that indeed the patient was fit, and conscious enough to record a voluntary statement. The inability of the prosecution, to examine any doctor who examined the patient/ deceased, also throws a suspicion on its version.

16. The prosecution version about the SDM lacking in motive, in the opinion of the Court, is unpersuasive. The prosecution's inability to produce any doctor, or at least the one who declared the patient fit to record a statement, just about 20 minutes before it was taken down, by PW-14, who recorded the statement, adds to the uncertainty as to whether the injured was conscious, or made a voluntary statement. The matter is further compounded by the circumstance, that neither PW-2 nor PW-3 witnessed the incident, but only talked about past acts of alleged cruelty against the deceased. PW-6 in fact, mentioned that two of the Appellants, i.e. Kamla and Chander Kanta, were away, and were attending a party nearby. These facts belie and contradict the dying declaration about their role.

17. In view of the above discussion, we are of the opinion that the findings of the Trial Court, recording the Appellants' guilt beyond reasonable doubt, cannot be sustained. The impugned judgment is therefore, set aside. The bail and personal bonds furnished by the Appellants in this case are hereby discharged. The Appeal, consequently succeeds, and is allowed.

S. RAVINDRA BHAT, J

G. P. MITTAL, J

AUGUST 23, 2011

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