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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 12.09.2011

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CRL.L.P. 184/2011

STATE (GOVT. OF NCT OF DELHI)

..... Petitioner

Through : Sh. M.N. Dudeja, APP.

versus

CHANDRESH @ SARVESH

..... Respondent

Through : Nemo.

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 (OPEN COURT)

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Crl. M.A. 4703/2011 (Under Section 5 of the Limitation Act) in Crl. L.P. 184/2011

For the reasons mentioned in the application, Crl. M.A. 4703/2011 is allowed.
Crl. M.A. 4703/2011 is accordingly disposed of.

Crl. L.P. 184/2011

1. The State seeks leave to appeal against the judgment and order of the learned

Additional Sessions Judge (ASJ) dated 15.04.2010 in S.C. No. 4/2010. The respondent/accused was acquitted of the charge of having committed offences punishable under Sections 376/452/302 IPC.

2. Briefly the prosecution allegations were that the P.S. Sultan Puri received intimation about the crime, i.e. burning of a woman somewhere in Aman Vihar, Sultan Puri. On reaching the premises, it was discerned that the injured had been taken to the Sanjay Gandhi Memorial Hospital. The concerned Asst. Sub-Inspector (ASI), on reaching that hospital, was informed that the injured had been shifted to the LNJP Hospital. He obtained the MLC, which *inter alia* recorded the history as “burn and sexual assault”. The prosecution also further stated that the patient was conscious; the ASI reached the second hospital where the injured – Pushpa – had been admitted. It is alleged that the attending doctor declared her to be “fit” for making a statement. The ASI recorded the statement which was later exhibited as Ex. PW-9/B in which Pushpa alleged that the respondent/accused, a tenant living in a nearby premises, had on 09.09.2004, at about 01.30 pm, forcibly entered her room and after molesting her and sexually assaulting her, poured kerosene and set her on fire. It was alleged by Pushpa, who died subsequently on 12.09.2004, that the respondent warned her of the danger of disclosing the incident to anyone and that she reacted saying that she would tell her husband. This apparently led the respondent to pour kerosene and set her on fire. Ex. PW-9/B as well as the prosecution version later was that after setting the deceased on fire, the respondent fled and a crowd of over 40 odd people gathered at the spot. Someone informed the police which led them to take action. The respondent was arrested; after conclusion of investigation, he was charged with committing offences punishable under Sections 452/376/302 IPC. He pleaded not guilty and claimed trial.

3. The prosecution examined 22 witnesses and relied on other materials, including the Postmortem Report and two dying declarations, Ex.PW-9/B, and Ex.PW-20/C, allegedly recorded by the doctor, PW-20. After duly considering these, the Trial Court concluded that the prosecution had been unable to establish its allegation and accordingly acquitted the respondent.

4. It is urged by learned APP that the Trial Court has glossed-over the circumstance

that both the dying declarations were preceded by a due certification of the concerned attending doctors. Besides, submitted the counsel, the testimony of PW-20 was significant; being an independent professional, he had no axe to grind against the accused and ought to have been believed, both as to Pushpa's fitness to make statement as well as the contents of the dying declaration. In a similar vein, it was argued that PW-9, who recorded the other dying declaration, Ex. PW-9/B, had duly proved it and the Court could not have, on assumption, rejected it. Furthermore, argued the learned APP, the impugned judgment is *inter alia* silent on the charge framed in respect of Section 376 IPC.

5. We have considered the Trial Court record as well as the submissions of the learned APP. The Trial Court was persuaded to conclude as it did that the respondent's guilt was not established beyond reasonable doubt on several counts. Importantly, the prosecution's version was not supported by Pushpa's husband, who was joined during the investigation and later deposed during the trial. Furthermore, we notice that the prosecution had alleged that a crowd gathered immediately after the incident and after the respondent Chandresh @ Sarvesh fled the spot. Yet, the prosecution did not join any of them during the investigation nor even cared to record their version.

6. We have no doubt in our minds that the legal requirement in proving a dying declaration (which can be a stand-alone evidence, if otherwise credible and proved in accordance with law and without any corroboration) to establish the guilt of the accused, there being no necessity or any stereotypical format in law requiring that the declaration itself should contain a certification of fitness by a doctor (refer to *Lakshman v. State of Maharashtra* 2002 (6) SCC 710. At the same time, the Court would look beyond the mere statement, in order to adjudge whether the prosecution has established the voluntariness of the maker as well as the truth of its contents. PW-20, who recorded the dying declaration, Ex. PW-20/C, after the deceased was admitted to the Burns Ward at the LNJP Hospital at 06.25 PM, deposed during the trial. The noting, termed as the dying declaration reads as follows:

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Alleged history given by the patient herself that her tenant named Sarvesh after, raping her poured kerosene over her and lit fire because of fear that

she will tell everybody that he raped her. She was taken first to Sanjay Gandhi Memorial Hospital from where she was referred to LNJP.

Sd/illegible (of the doctor)
9.9.2004

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7. The Court noticed that Ex. PW-20/C, a printed form, where the words “fully conscious” were encircled. The Court also noticed that the MLC prepared by the other hospital – Sanjay Gandhi Memorial Hospital, Ex. PW-20/A, which contained other written portions – which were later exhibited as Ex. PW-10/A, Ex. PW-9/D etc. had originally contained the words “Unfit for Statement”. Apparently PW-20 scored-off those words and wrote “Fully Conscious”. In the cross-examination, the said witness deposed that he had not scored-off the words “Unfit for Statement”. The Trial Court did not find any fault with his deposition, but at the same time, observed that the document, Ex. PW-20/C could not be relied because when Pushpa reached LNJP Hospital, Ex. PW-20/DA was first recorded and the doctor who recorded her statement noted her condition as “conscious but disoriented”; later on in the same sheet he wrote that the patient could be admitted to the ward, i.e. Ex. PW-20/B. Pertinently, it was observed that there was no evidence when the deceased reached LNJP Hospital, although according to the OPD Ticket of the Sanjay Gandhi Memorial Hospital, the time and date of the patient reaching the hospital was 02.25 PM. In other words, the Court was concerned about the unexplained time-gap between the making of the MLC by the Sanjay Gandhi Memorial Hospital and the noting/statement, Ex. PW-20/C. The Court also noticed that the MLC of the first hospital mentioned that she was administered a sedative to the extent of 30 mg and there was a possibility of her being under its influence when she reached LNJP. Having regard to these factors, the Court concluded that the possibility of the deceased making a conscious and voluntary statement was remote. As far as the evidence of PW-9, the Court observed as follows:

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15. *Coming to the other dying declaration recorded by the PW9 ASI Azad Mohd., on the basis of which the FIR was registered in the case, the*

evidence on the record is that the said statement of the deceased Ex.PW9/B was recorded after PW9 obtained the fitness of the patient to make the statement, on her MLC as mentioned above bearing No.2402 of the Sanjay Gandhi Memorial Hospital and the said fitness of the deceased for making the statement was given by PW20 in the said MLC at point Ex.PW20/A as “patient fit for statement” (Sd/Doctor illegible) 7.30 p.m. The natural inference is that the statement of the deceased Ex.PW9/B must have been recorded by the PW9 after 7.30 p.m on 9.9.2004. I have already reproduced the statement of the deceased given to PW9 as mentioned above which was allegedly thumb marked by the deceased.

16. I am of the considered opinion that there is no need of going into greater details of the deposition of PW9 who recorded the said second dying declaration or PW20, the doctor who gave the fitness certificate because the statement Ex.PW9/B was allegedly thumb marked by the deceased by her right thumb and a bare perusal of the thumb mark goes to show that the ridges and curves are clearly visible in the thumb mark whereas as per PW20, the thumbs and the other fingers of the deceased of both the hands were burnt and no thumb mark could have been obtained in the said circumstances. Moreover, the said second dying declaration recorded by PW9 cannot be relied because of the reasons as stated by me above while discarding the first dying declaration recorded on Ex.PW20/C. The statement Ex.PW9/B of the deceased has not been recorded in question/answer form and it gives the minute details of the incident and even reading of the said statement takes considerable time what to talk of recording of the statement by pen in hand which must have consumed substantial time. The patient in the said state of health and burn injuries was altogether conscious and oriented continuously till the statement Ex.PW9/B was recorded and thumb marked by her, becomes doubtful. Besides, the statement Ex.PW9/B was not got certified or was not asked to be signed by any doctor, staff of the hospital or any relative of the deceased, further gives a jolt to the reliability of the said dying declaration. These were the similar situations and conditions before the Hon'ble Supreme Court in the cases titled **State of Punjab Vs. Gian Kaur and Anr.** reported as **1998 CrL. L.J 2061**, **State of Maharashtra Vs. Sanjay** reported as **2005 (1) RCR (CrL.) page 149** and before the Hon'ble High Court of Delhi in case titled **Kaushalya and others Vs. The State** reported as **1989 CrL. L.J 157** and both the said Hon'ble superior courts declined to accept the dying declarations such as one given by the deceased in the present case Ex.PW9/B.

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8. So far as the charge concerning the committing of offence punishable under Section 376 IPC is concerned, besides the dying declaration, the solitary piece of

evidence was the postmortem report prepared by PW-14, the doctor, which was produced as Ex. PW-14/A. It mentioned that the enclosed papers contained various samples, including vaginal swab and another sample, i.e. vaginal slide. The relevant deposition of PW-14, in this regard is as follows:

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On internal examination both lungs were found oedematus, congested showing patchy consolidation in lower lobes having few pus points. There was no perineal tear or fresh injury to external genitala. Hymen shows old heeled scars. Uterus was empty.

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9. We are conscious that the High Court, in exercising appellate review, whilst considering petitions for leave to appeal, grants that relief to the State when it is satisfied that the record discloses substantial or compelling reasons to do so. Applying that standard, this Court is of the opinion that the Trial Court’s judgment in this case does not show any misappreciation of evidence or grave misapplication of law or its understanding that calls for interference. In the circumstances, we decline the leave sought. Crl. L.P. 184/2011 is, therefore, dismissed.

S. RAVINDRA BHAT,J

G. P. MITTAL, J

SEPTEMBER 12, 2011

‘ajk’