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IN THE HIGH COURT OF DELHI, AT NEW DELHI

Decided on : 14.09.2011

+ **CRL.A.836/2011, CrI. M.(B) 1195/2011 & CrI. A. 618/2011, CrI. M.(B) 858/2011**

CRL.A. 836/2011, CrI. M. (Bail) 1195/2011

BALJEET VERMA AND SMT. BABLI

..... Appellants

Through: Ms. Anu Narula, Advocate.

versus

STATE

..... Respondent

Through: Sh. Sanjay Lao, APP.

CRL.A. 618/2011, CrI. M. (Bail) 858/2011

SMT. JAMUNA & ORS.

..... Appellants

Through: Sh. Feroz Khan Ghazi, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Sh. Sanjay Lao, APP.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G. P. MITTAL

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

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. These appeals are directed against a judgment and order of the learned Additional Sessions Judge, Delhi dated 01.03.2011 in S.C. No. 101/2008; the appellants were convicted for the offences punishable under Sections 302/34 IPC and sentenced to undergo life imprisonment, and also directed to pay fine.

2. The prosecution alleged that on 09.09.2007, the accused Appellants, acting further to their common intention, poured kerosene oil on Ms. Anuradha, and set her on fire, resulting in her death, the next day, on 10.09.2007, at 06.30 AM. It was alleged that Anuradha was trying to get a grill fixed on the staircase of the house where she lived with her husband and small children; their premises were located on the first floor of 217, Madipur J.J. Colony, which belonged to her father-in-law. It was alleged that the Appellants, her mother-in-law, sisters-in-law, mother-in-law's sister, and her husband, who used to have altercation with Anuradha and her husband, decided to kill her, and therefore, poured kerosene on her and set her afire. Anuradha was first taken to the Balaji Hospital, and later shifted to Safdarjung Hospital. The prosecution alleged that her mother, PW-1 had heard her narrating the incident, in which she had implicated the Appellants; it was also alleged that a dying declaration was recorded by the police, PW-18, after the attending doctor had declared her fit to make a statement. The husband, PW-2 had, according to the prosecution, also witnessed the dying declaration so recorded.

3. After conducting investigations, and filing the report, implicating the Appellants, the Trial Court charged them with committing the offences alleged. They denied role or any liability, and claimed trial. The prosecution examined 19 witnesses, besides producing several exhibits. After considering them, the Trial Court held the accused – Appellants guilty, convicted them for the offences alleged against them, and sentenced them in the manner described previously in this judgment.

4. Learned counsel for Jamuna argued that the entire prosecution story was unbelievable, and the Trial Court erred in convicting the Appellants. It was submitted that the so-called dying declaration should not have been believed, and made the sole basis of the findings contained in the impugned judgment. Elaborating on the submission, counsel submitted that the prosecution story itself was that the deceased and her husband had strained relations with the latter's parents and his family. In fact, they resided in separate premises, i.e. at 219, Madipur J.J. Colony. If this fact were true, the occasion for the members of the deceased's parents-in-law's family to reach the premises where she lived, with her husband never arose.

5. It was next submitted that the doctor who issued the first MLC (Ex. PW-6/A), Dr. Sanjay Kaushik, PW-6 clearly admitted in his deposition about having stated, in the document, that the patient (Anuradha) was "drowsy" – which was separately marked "Z". This was written in the

first instance when the patient was taken to the Emergency Ward of the hospital. Yet, inexplicably, he wrote – at point “Y” that the patient was conscious and oriented. This was a vital discrepancy which the prosecution was unable to explain, and was fatal to the entire case against the accused. Counsel next urged that the contents of the dying declaration were unbelievable, having regard to the normal conduct of human beings. It was submitted that the deceased said that one of her sisters-in-law brought a bottle of kerosene oil; thereupon other four accused joined her to hold the bottle, poured its contents, and then set her afire. Contending that this was not only an improbability, but entirely false; learned counsel said that the scaled site plan, Ex. PW-3/A produced by the prosecution showed that the story was highly improbable. It was alleged that the place where seven persons, including the six accused, were holding the deceased, and setting her on fire, in a narrow and cramped place, was utterly unbelievable.

6. It was next urged that the deceased’s husband, PW-1, though cited as a prosecution witness, and allegedly examined during investigation, did not support its case at all. Counsel submitted that though he corroborated the theory of a quarrel with his parents, he deposed during examination that upon being asked why the incident happened, Anuradha said “karna parha” (it had to be done), implying that she had set herself afire. Learned counsel submitted that in view of the strained relationship between PW-1 and his father, he had been asked to leave the premises; he had asked for accommodation by about 5 months or so. In the meanwhile, the deceased wished to get a grill fixed, at the staircase, because their children were small, and could have fallen down. This was objected to by the accused, and apparently led the deceased to commit suicide. It was urged that the so-called dying declaration was suspicious, since PW-1 never mentioned that he heard the deceased allegedly making it. In other words, according to counsel, PW-1’s evidence about his signatures having been obtained on several sheets of paper, meant that the entire documentation, including the so called dying declaration, was prepared before hand, and he was made to sign on it.

7. It is next submitted by learned counsel that the Trial Court failed to see that the deceased had a clear motive to implicate all her husband’s family, in view of the admitted dispute over property. The death was in all probability a suicide, which was attempted as a threat to intimidate them (the deceased’s in-laws). Learned counsel urged that the conspectus of circumstances pointed to the prosecution manipulating the facts with the intention of implicating all the in-laws

of the deceased. This was sought to be corroborated – by the husband, PW-1, who initially alleged that his wife had been murdered. However, for reasons best known, he did not support the story later. It was emphasized that though the Courts can solely rely on an uncorroborated dying declaration, yet, care and caution has to be exercised, and independent support as to the making, and veracity of such statements should be sought whenever available. If the intrinsic materials do not support the dying declaration, the Court should not return a conviction.

8. Ms. Anu Narula, learned counsel for the other Appellants, argued that the impugned judgment cannot be sustained. Counsel reiterated that the utter improbability of the involvement of six persons in the allegedly burning apart, the conviction in the present case was not sustainable, as no motive could be ascribed to the sister and brother-in-law of Jamuna, who did not even live with them. Also, the implication of the two young sisters-in-law in the crime – which was not concededly dowry harassment – was inexplicable, and unbelievable. It was also submitted that the dying declaration was suspect, because it contained the deceased's signature, which was impossible, since PW-6 deposed that Anuradha had suffered 100% burns, on her hands and feet.

9. The learned APP, on the other hand, submitted that the dying declaration was corroborated by the testimonies of PW-1 and PW-2, submitting that though the husband, PW-2 had turned hostile in part, yet, he agreed to having a dispute with his father over the property occupied by him, and that he was asked to leave it. PW-2 also admitted that he and the deceased wanted to fix a grill, to protect their children from falling down, whilst on the staircase. These admissions in fact corroborated the dying declaration, which was about the deceased's attempt to get the grill fixed, resulting in her quarrel with the accused, and later pouring Kerosene and setting her on fire. PW-1, the deceased's mother supported the prosecution story fully, about Anuradha mentioning the circumstances surrounding the burn injuries and the role played by the accused.

10. As can be gathered from the above discussion, the prosecution mainstay in this case was the dying declaration said to have been made by Anuradha, before she passed away. That document, recorded by the police, was produced as Ex. PW-2/D; the relevant extract from the Trial Court judgment, reads as follows:

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That on the date of the incident her relatives masi sas Babli and her mausera sasur Baljeet had come from Madangir. She had got fixed one iron grill for the safety of her two small children, regarding which her mother-in-law, Jamuna, father-in-law Uma Shankar (since deceased), Nanand Poonam and Arti and his mamere sas and sasur, who had come from Madangir, and all of them were objecting to the said iron grill and at around 07.00 pm when she did not agree with them, all of them became angry and started quarrelling with her and Nanand Poonam came with the bottle of kerosene oil and thereafter Babli, Baljeet also caught hold the bottle of kerosene oil along with Poonam and thereafter Baljeet poured the kerosene oil over her, and Baljeet lighted the match and put her on fire. While all of them had caught hold of her and she stated that all of them had done so in order to kill her.

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11. The prosecution story is that the incident occurred at about 07.00 PM; Anuradha was taken first to the Balaji Hospital, from where she was shifted to the Safdarjung Hospital. Her mother, PW-1, claims to have been told about the incident while Anuradha was in Balaji Hospital itself; the police, PW-18, recorded it. The concerned doctor, PW-6, deposed that he endorsed the statement, and signed on it, at point PW-6/B. The prosecution also relies on the signature of PW-2, the husband, at Point A on Ex. PW-2/D and his endorsement, that “*yahe bayan mere samne diya hai*”. Further, it is said that the husband, PW-2 corroborated the deceased’s statement recorded in the dying declaration about a quarrel regarding the property no. 217, and her attempt to have grill fixed, which ultimately led to the ghastly burning incident. The issue is, whether the prosecution had discharged its burden of proving the dying declaration to have been made voluntarily, consciously, and truthfully, regarding the incident which resulted in Anuradha’s death, as found by the Trial Court.

12. The learned APP is right in his submission that Courts can rely on dying declarations to convict an accused. At the same time, over the years, judgments have emphasized the necessity of exercising caution, and the Supreme Court has evolved guidelines that are to be taken into consideration, which include:

- (1) the Court’s satisfaction that the statement was made voluntarily and without influence; or possibility of tutoring;
- (2) that the maker of the declaration was in conscious and fit state of mind;

(3) that as far as practicably possible, it must be recorded or taken down in the words of the maker;

(4) That the Court is satisfied, from the facts proved and the surrounding circumstances, about the veracity of the contents of the dying declaration

(5) that dying declaration stand on the same footing as other pieces of evidence, and has to be tested in the light of all available circumstances.

[Ref. *Khushai Rao v. State of Bombay* AIR 1958 SC 22; *State of UP v. Ramesh Sagar Yadav* AIR 1985 SC 416; *State of Orissa v. Bansidhar Singh* 1996 (2) SCC 194].

13. It is equally well settled that a dying declaration is not a deposition in Court, and its credibility cannot be tested through cross-examination. Therefore, there cannot be a presumption that the maker of the statement would tell the truth: (*Dadu Lakshmi Reddy v. State of A.P.* AIR 1999 SC 3255). For the same reason, the Court has to consider the statement of all the witnesses supporting it – (*Paparambaka Rosamma v. State of A.P.* 1999 (7) SCC 695).

14. The Supreme Court, in *Laxmi v. Om Prakash*, (2001) 6 SCC 118 observed that :

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One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance.

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In the larger, five member Bench of the Supreme Court in *Laxman v. State of Maharashtra*, 2002 (6) SCC 710, the entire matter was put in perspective, in the following manner:

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The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the

weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirement of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to 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 looks 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. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. 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. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

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15. A careful analysis of the evidence in this case would show that while there is no doubt that Anuradha’s family had a dispute with her in-laws, and there existed perhaps considerable

tension between the two families, some important features, which have not been explained by the prosecution, stand out. The first set of these, pertain to the making of the dying declaration. PW-1's testimony about being told the facts relating to the incident by the deceased, is brief. However, the official version was deposed to by PW-18, who claims to have recorded the dying declaration. Here, PW-2's version is crucial; he admits having been made to sign on the dying declaration. (Ex.PW-2/D), and beneath the endorsement, that it had been recorded in his presence. However, he did not state that the contents of the dying declaration, in his deposition, or that it was recorded in his presence; the prosecution was constrained to cross examine him, on this aspect, after leave was granted by the court. The doctor, PW-6 stated that he had certified that the injured was conscious and capable of recording the statement, and even stated that it was recorded in his presence. He admitted that the endorsement in the MLC was also that the patient was drowsy, which meant that she could not give any statement. Significantly, though he stated having certified about the mental capacity, and even having been present, when the statement was recorded, his testimony is silent as to what was stated by the deceased. These features, in the opinion of the court are sufficient to cast a serious doubt about whether the declaration was recorded in the manner alleged by the prosecution, and whether the deceased made it.

16. The second set of circumstances, which has to be considered, in the light of the evidence on the record, is whether the attending circumstances point to the dying declaration (assuming it to be so, as found by the Trial Court) stated the truth. Firstly, the deceased lived independently of her in-laws, in fact the house, located on the first floor, belonged to the father-in-law. Therefore, having regard to the nature of the relationship between the parties, there was little occasion for the deceased and to interact socially with her in-laws, or for them, to have come to her premises. Secondly, if the quarrel erupted, about the staircase, it would have occurred there, or near the vicinity of the premises; the deceased nowhere stated that she was dragged into the house, kerosene doused over her, and set on fire. Thirdly, the premises where the mishap occurred is in the midst of a J.J. cluster, i.e. a lower middle class colony, predominated by tenements. There is evidence that the ground floor - of the premises where the deceased lived, were tenanted. The incident occurred around 07.00 PM; one of the witnesses, whose PCO was used to intimate the police, deposed that a lot of people had gathered, after a cry was taken up that a fire incident took place. Fourthly, PW-2, the deceased's husband, cited as a witness, did not support the theory of the dying declaration; he said that when asked, the deceased said that it

was necessary for her to do it (set fire), implying that it was an attempt to commit suicide. This version is important, because it is at variance with the testimony of PW-1 and PW-18. It casts a doubt on the truthfulness of the dying declaration. Fifthly, and perhaps most crucially, the description of the incident, wherein five persons are alleged to have held a kerosene oil bottle, and poured the contents over the deceased, defies logic. It is not the prosecution case that the deceased was particularly strong or well built. If indeed, there had been an incident, at most three people could have been sufficient to subdue the deceased, and do what she alleged. Yet, she “roped in” all manner of people, including two wholly unconnected individuals, i.e. the sister of Jamuna, (the mother-in-law) and her husband, who concededly lived separately and could have had no common motive with Jamuna. Equally, the involvement of Jamuna’s two unmarried daughters, is an improbable circumstance, which cannot be believed.

17. On an application of the standard indicted in *Laxman (supra)*, i.e. that the dying declaration should “*inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to 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...*” this court is of the opinion that the prosecution story about the dying declaration – both *vis-à-vis* its making, as well as the truth of its contents, cannot be believed, having regard to the overall circumstances in this case. The appeal, therefore, has to succeed. The Appellants are directed to be released forthwith. The appeals and all pending applications are allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

G.P.MITTAL
(JUDGE)

SEPTEMBER 14, 2011