

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

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Judgment delivered on: 10.01.2011

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**CRL.A. 617/2010**

**SHANKAR LAL @ GAURI SHANKAR GUPTA & ANR.**

..... Appellants

versus

**STATE**

..... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr K.B. Rohatgi with Mr Mahesh Kasana & Ms Aparna Rohatgi Jain.

For the Respondents : Mr Sanjay Lao, Addl. Standing Counsel for the State.

**CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE MANMOHAN SINGH**

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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 |

**BADAR DURREZ AHMED, J (ORAL)**

1. This appeal is directed against the judgment and order on sentence passed by the trial court on 26.03.2010 and 29.03.2010 respectively. The appellants Shankar Lal @ Gauri Shankar Gupta and his son Gautam Gupta @ Rinku have been convicted under Section 302 read with Section 34 IPC for setting ablaze their tenant Laxmi Narain who succumbed to the burn injuries. The appellants were sentenced to life imprisonment and were also subjected to fines of Rs. 5,000/- each, and in default thereof, to simple imprisonment for six months each. The incident is said to have taken place on 25.03.2004 at

about 11 P.M. The deceased (Laxmi Narain) passed away in Safdarjung Hospital, New Delhi on 28.03.2004.

2. The learned counsel for the appellants submitted that the prosecution case is that the appellant No.1 (Shankar Lal @ Gauri Shankar Gupta) was the landlord of the room in the second floor where the deceased Laxmi Narain was a tenant and that because the landlord wanted Laxmi Narain to vacate the said room, he was set ablaze on 25.03.2004. The learned counsel for the appellant further submitted that the entire case of the prosecution rests on the so called dying declaration (exhibit PW-6/B) which is said to have been made by the deceased Laxmi Narain to the Investigating Officer in Safdarjung Hospital on 26.03.2004 itself. He submitted that the said statement does not inspire any confidence and in any event cannot be regarded as a dying declaration, inasmuch as, there is no certification of any doctor on the said statement. He also submitted that the alleged motive has also not been established, inasmuch as, the so called dying declaration exhibit PW-6/B itself records that the deceased was earlier a tenant of the appellants and that he had left the premises but was once again inducted as a tenant about one year back. This is also corroborated by the testimony of PW-2 Alpana Devi who is the wife of the deceased Laxmi Narain. Consequently, the learned counsel for the appellants submitted that where the appellants themselves had re-inducted Laxmi Narain as a tenant only a year back, there was no occasion for them to want Laxmi Narain to vacate the said room.

3. The learned counsel for the appellants also submitted that by virtue of exhibit PW-6/A, the Investigating Officer had made a request on

26.03.2004 to the doctor to give his opinion as to whether Laxmi Narain was fit to make a statement or otherwise. On the same request letter exhibit PW-6/A, Dr S.K. Chawla (PW-7) endorsed that the patient was conscious and oriented and was following verbal commands and was fit for giving a statement. The endorsement of the doctor was made at 2 a.m. on 26.03.2004. The learned counsel for the appellants submitted that while this endorsement is there on the request letter exhibit PW-6/A there is no certification in the alleged dying declaration exhibit PW-6/B which was recorded at some time prior to 4.50 a.m. on 26.03.2004. The exact time of recording of the so-called dying declaration is not indicated in exhibit PW-6/B. Therefore, according to the learned counsel for the appellants it cannot be said that the deceased Laxmi Narain was in a fit state of mind at the exact point when the so-called dying declaration was recorded.

4. The learned counsel for the appellants also drew our attention to the testimony of PW-6 S.I. Rajesh Kumar who was the Investigation Officer. This witness has stated that the statement of a neighbor Santosh Kumar was also recorded however, that person has not been produced as a witness. It has also come in the testimony of PW-6 S.I. Rajesh Kumar that in the morning of 26.03.2004, that is, subsequent to the registration of the FIR, Laxmi Narain was unfit for making a statement. It has also been pointed out that during the course of cross-examination PW-6 S.I. Rajesh Kumar had admitted that both the accused had tried to douse the fire and in that process appellant No.2 (Gautam's) hand was also burnt. Of course, this witness has

denied the suggestion that Laxmi Narain had set himself on fire as he was drunk.

5. The learned counsel for the appellants also referred to the testimony of PW-2 Alpana Devi who is the wife of the deceased to show that the deceased Laxmi Narain had not only consumed a great amount of liquor on 25.03.2004 but that he had also quarreled with his wife who had left the room along with her children at about 7 p.m. He also referred to the testimony of PW-2 Alpana Devi to show that she had clearly stated that there was no quarrel between the appellants and her husband.

6. The learned counsel for the State supported the trial court decision and submitted that the trial court had correctly placed reliance on the testimonies of PW-7, PW-2, PW-6 and the other witnesses on record and particularly the dying declaration exhibit PW-6/B to conclude that the appellants were liable for the offence under Section 302/34 IPC.

7. Having heard the learned counsel for the parties and after examining the entire evidence on record we are of the opinion that the appellants are entitled to the benefit of doubt. This doubt has arisen because of several factors. The so-called dying declaration exhibit PW-6/B indicates that Laxmi Narain had been a tenant of Shankar Lal @ Gauri Shankar Gupta earlier and that he had left the premises. Subsequently, about one year prior to the incident, Laxmi Narain had been re-inducted as a tenant by Shankar Lal @ Gauri Shankar Gupta. This statement, if taken on face value indicates that Shankar Lal @ Gauri Shankar Gupta did not bear any animosity towards

Laxmi Narain otherwise he would not have re-inducted him as a tenant in his premises.

8. Apart from this, exhibit PW-6/B also indicates that Laxmi Narain was drunk and that he fell asleep in an inebriated condition. Exhibit PW-6/B also indicates that he woke up because he found the room to be engulfed in flames. He then stated that he saw the landlord Shankar Lal @ Gauri Shankar Gupta standing there. He further stated that certain other persons had doused the fire and lastly it is recorded in exhibit PW-6/B that the landlord's son Gautam Gupta @ Rinku poured kerosene oil on him and had set him ablaze. The question which arises at this stage is that if Laxmi Narain woke up because of the flames, surely he could not have seen the landlord's son or anybody else pouring kerosene oil on him and setting him ablaze. Moreover, the state of affairs recorded in exhibit PW-6/B is contradicted by the alleged history recorded in the MLC exhibit PW-7/A wherein it is recorded that the landlord had poured kerosene oil on him and set him ablaze. In other words, according to what is recorded in exhibit PW-6/B it is the landlord's son Gautam Gupta @ Rinku who set him on fire, while according to exhibit PW-7/A it is the landlord namely Shankar Lal @ Gauri Shankar Gupta who had poured kerosene oil on him and set him on fire. So it is unclear on a conjoint reading of these documents namely exhibit PW-6/B and PW-7/A as to who poured kerosene oil and who set Laxmi Narain on fire.

9. Furthermore, as has already been noticed above, the Investigating Officer PW-6 S.I. Rajesh Kumar has stated in his cross-examination as under:

“It is correct that during the course of inquiry it has come to my notice that both the accused persons present in the court today tried to cease the fire and in this process the hand of accused Gautam was burnt.”

10. This admission on the part of the Investigation Officer that the appellants tried to douse the fire also runs counter to the prosecution case that the appellants wanted to see Laxmi Narain dead. If they, on the one hand, wanted to kill Laxmi Narain by pouring kerosene oil over him and setting him on fire, why would they in the same instance try to save him?

11. It is also important to note the testimony of PW-2 Alpana Devi, the wife of the deceased Laxmi Narain. In her testimony she stated that on 25.03.2004 her husband had consumed liquor in her house. She stated that, in fact, he had started consuming liquor at 2 p.m. on that day and after some time she had left the house but when she returned at 7 p.m. he was still consuming liquor and was in a drunken condition. She stated clearly that:

“At that time my husband was already in drunken condition. I remained at my house for about 5 minutes and thereafter I took my children to park”.

12. In her examination in chief she had also stated that:

“On 25.3.2004 in the evening my husband Laxmi Narain was consuming liquor at my house. He raised some quarrel with us. Therefore I had taken my children to the DDA park. At about 10 or 10.30 p.m. when we were coming to our house in a gali in front of my house, son of Shanker Lal namely Raj Kumar met me. He told me that my husband had been burnt and ran away from the house. When I reached in the house my husband was not there. I searched for my husband and found him in front of the Haweli of Mahinder Choudhary. He was in burnt condition. He was crying and abusing. He told me that Shanker Lal

Cholewala and his son had burnt him Name of son of Shanker Lal is Rinku.”

In her examination in chief she also stated that when her husband used to quarrel with her under the influence of liquor “*accused Shankar Lal used to ask him not to quarrel and he also used to ask us to vacate the room.*”

13. From the aforesaid testimony of PW-2 while it does appear that the deceased Laxmi Narain had pointed fingers at the appellants, it is also clear that on 25.03.2004 Laxmi Narain was drinking from 2 p.m. onwards and that at 7 p.m. he was in a drunken condition. At that point of time PW-2 Alpana Devi had returned home and immediately a quarrel ensued and within five minutes she left with her children towards the DDA park. This itself indicates the inebriated condition of Laxmi Narain. Since the incident of burning took place later, it can be safely presumed that even after PW-2 left the home with her children, Laxmi Narain continued to drink. It is, therefore, clear that Laxmi Narain was clearly under the influence of liquor. As such, not much credence can be given to his alleged statement made to his wife PW-2 at about 10.30 p.m. or to the Investigating Officer between 2 a.m. and 4.50 a.m. on 26.03.2004.

14. In **Paniben Vs. State of Gujarat: (1992) 2 SCC 474**, the Supreme Court summed up the principles relating to dying declaration as follows :

“18. (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

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

(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.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(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.

(ix) Normally 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 eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the versions as given in the dying declaration, the said declaration cannot be acted upon.”

In *Geeta And Anr. Vs. State* (Crl. A. No.79/1994 decided on 13.08.2009) this Court held as under :

“24. The law with regard to dying declarations is quite well settled. It is an established principle that a conviction can be based solely upon a dying declaration. But, before this can be done, the dying declaration must be established to be authentic and correct as well as truthful. Insofar as the authenticity and correctness of the dying declaration is concerned, the prosecution has to establish that the dying declaration in question was, in fact, made by the person who lost his life. Even where it can be established that the statement, which purports to be the dying declaration of the deceased, was in fact made by the deceased, the prosecution has also to establish that the statement was truthful. Of course, it is normally presumed that a dying person in his last moments does not utter any falsehood. But that does not rule out the possibility that in some cases this may not be the position. There may be instances where out of hate or spite a person may falsely implicate his enemy, even in his dying moments. It is also quite possible that the person making the dying declaration is under the influence or control of someone else and out of fear or other reasons, he may make a false statement prior to his death. There is also a possibility that a person, in order to save his honour and the honour of his family, who would survive him, may make statements which are not entirely correct or truthful. There is also a possibility that the person making the dying declaration is under some medication or because of his precarious condition is suffering from hallucinations and, therefore, the statements he makes at that point of time may be far removed from the truth. It is only when all these circumstances are ruled out and the court is of the belief and opinion that what the dying declaration states is truthful, can a conviction be based upon it without seeking

corroboration. A dying declaration must always pass the scrutiny by the Court because, after all, it is merely hearsay evidence and it is admissible and relevant only because the person who made the declaration is no longer alive and cannot be produced before Court for testifying. At the same time, the courts need to exercise caution in relying upon dying declarations because the maker of the statement is not before it and nor does the defence have an opportunity to cross-examine him. Thus, while there is no rule of law which suggests that a conviction cannot be based solely upon a dying declaration, the courts, as a rule of prudence, look for other corroborative material. If the dying declaration is of such a stellar and unimpeachable quality that it fully inspires confidence of the Court, there is nothing to prevent the Court from relying solely on such a dying declaration and on basing a conviction thereupon. But, the emphasis must be on the quality of the dying declaration. If the dying declaration is suspicious or suffers from some infirmity, then it should not be acted upon without any corroborative evidence.”

Recently, in **Puran Chand Vs. State of Haryana: (2010) 6 SCC 566**, the Supreme Court observed that :

“15.....The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.”

15. Thus, in cases of dying declarations it has to be established first of all that the statement attributed to the deceased is actually the statement of

the deceased and that it has been faithfully recorded. Secondly, it must be established that the person making the declaration was in a fit state of mind and thirdly even if the aforesaid two conditions are fulfilled, there must not be anything on record to suggest that the declarant did not make a true statement or was influenced or tutored in any manner. In the present case, because of the highly inebriated condition of Laxmi Narain, which is admittedly the case of the prosecution itself, the veracity of the statements, even if assumed that they are the statements of Laxmi Narain, are not beyond the pale of doubt.

16. It is quite possible that Laxmi Narain who was completely and totally drunk had a fight with his wife and went into a depressed state and, therefore, set himself on fire. It is also possible that Laxmi Narain drank himself to sleep and the fire started accidentally and at that point of time on seeing the fire the appellants arrived at the scene and this fuelled the deceased Laxmi Narain to believe that the appellants had set him on fire. These are, of course, all theories and the truth is not known. But faced with all these doubts and possibilities which are all consistent with the evidence on record, the benefit would have to go to the appellants. Consequently the impugned judgment is set aside and the sentence awarded to the appellants is also set aside. The appeal is allowed. The appellants who are in custody are directed to be set free at once, if not required in any other case.

**BADAR DURREZ AHMED, J**

**MANMOHAN SINGH, J**

**JANUARY 07, 2011**

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