

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

Date of Hearing and decision: 10th February, 2011

+ **CRL. L.P. No.452/2010**

STATE

..... Petitioner

Through : Mr.Sanjay Lao, APP for the State.

versus

SUSHILA

..... Respondent

Through : Nemo

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 |

J U D G M E N T

G.P. MITTAL, J.

Crl.M.A.No.18420/2010 (under Section 5 of the Limitation Act.)

Delay condoned for the reasons as stated in the application.

Crl. L.P. No.452/2010

1. By virtue of this petition, the Petitioner-State seeks leave to file an appeal against the judgment dated 25.3.2010 passed by the learned Additional Sessions Judge whereby Respondent-Sushila was acquitted.
2. On 6.6.1998, DD No.12A was recorded at Police Station Prasad Nagar to the effect that one lady had put herself on fire in House No.60/285, I-Block, Gali No.1 Piare Lal Road, Delhi. On receipt of this DD SI Balwan Singh reached Lok Nayak Jai Prakash Narain hospital (JPN hospital) and

found that Smt. Sunita had been admitted in the hospital. She was declared unfit to make a statement when she reached the hospital. The Doctor recorded “admitted with alleged history of burnt by her parents, brother Sunil and Bhabhi Promila @ Neena”. A rukka was sent to the Police Station on the basis of which this case was registered.

3. A challan was presented against the three accused Sunil Kumar-brother, Om Prakash-Father and Ms.Neena-Bhabhi of deceased Sunita for the offence punishable under Section 302 read with Section 34 of Indian Penal Code (the Code). The respondent-Sushila had absconded and therefore she was declared a proclaimed offender. After trial, the said three accused persons were convicted for the offence punishable under Section 302 read with Section 34 IPC by judgment dated 20.11.2000 by the learned Additional Sessions Judge.
4. In the meanwhile respondent-Sushila was arrested. A supplementary challan was filed against her. The respondent pleaded not guilty to the charges framed against her.
5. In order to prove its case the prosecution examined 27 witnesses. There is no eye witness to the occurrence.
6. According to the prosecution on 6.6.1998 Sunita had gone to her parents’ house to ask for the return of ₹ 9 lacs advanced by her to her parents. There was a quarrel between Sunita on the one hand and Sunita’s parents, brother Sunil and Bhabhi Neena on the other. Sunita was dragged inside house No.60/285, I-Block, Gali No.1, Piare Lal Road and set on fire by her parents, her brother and Bhabhi in furtherance of their common intention to kill her.
7. The prosecution case rests mainly on the dying declarations allegedly made by deceased Sunita to various officials, her daughter and her husband. The testimony of PW-26 ASI Ratan Singh, who made enquiry from Sunita in the van on way to JPN hospital, PW-5 Ms.Dheeraj

daughter of Sunita, PW-6 Ram Lal Dua, husband of Sunita are on record. PW-14 Sh Lal Singh, the then SDM who recorded one of the dying declarations, PW-18 Dr. Harish Mansukhani prepared the MLC and recorded the history at the time of Sunita's admission and PW-27 SI Balwan Singh, Investigating Officer of the case also recorded another dying declaration after Sunita had been declared fit to make the statement by the Doctor.

8. In her Statement under Section 313 Cr.P.C. the accused denied that any dying declaration implicating her was made by Sunita. She took up the plea that Sunita had never advanced any money to them and alleged instead that after the deceased marriage, her own family continued to support her family. A tea shop was set up for Ram Lal (husband of Sunita) and a Sewing machine and a sweater knitting machine were also given to help her earn money. Sunita and Ram Lal Dua used to ask them to sell a floor of their house (constructed by them) which the accused refused, thereafter Sunita and Ram Lal started threatening them. Consequently they disowned Sunita from their property.
9. On 6.6.1998, on hearing some cries the respondent-Sushila went out and noticed that a lady was burning outside their house. They threw water on her and discovered that it was Sunita. They informed the police telephonically and returned to the spot, and accompanied Sunita to the hospital in the police van. They were not allowed to enter the hospital and were falsely implicated as accused.
10. There are six dying declarations allegedly made by Sunita before she succumbed to burn injuries. Upon analysis of the evidence, the trial court found that the dying declarations were not reliable so as to convict the respondent. The relevant conclusions of the trial court in paras 47 and 48 of the judgment are extracted hereunder:

“47 In the present case, after going through all the six dying declarations made by the deceased Sunita to the

PWs, I am of the considered view that the dying declarations made by the deceased are not reliable and do not inspire confidence. There is no inconsistency (sic consistency) in the dying declarations. There are material contradictions and omissions in the dying declarations. Prosecution has miserably failed to prove that deceased was mentally sound or in a fit state of mind to make the dying declarations.

48. Prosecution has failed to prove that accused Sushila in furtherance of her common intention with co-accused Sunil, Om Prakash and Prima @ Neena committed the murder of Smt. Sunita by setting her on fire on 6.6.98 at about 9.30 PM at house No.16/285-1, Piare Lal Road, Bapa Nagar Delhi with the intention of causing her death. Accordingly, accused is acquitted of the offence she was charged with."

11. It has been urged by Mr.Sanjay Lao, learned Additional Public Prosecutor for the State that except in the dying declaration recorded by the SDM, Ex.PW14/A and the statement made to SI Balwan Singh Ex.PW-24/B, Sunita had consistently blamed her parents, brother Sunil and Bhabhi Neena for setting her on fire. The trial court, therefore, was not justified in discarding the dying declaration made to ASI Ratan Singh, Dr. Harish Mansukhani, to her daughter PW-5 Ms.Dheeraj and her husband PW-6 Ram Lal Dua. It has been argued that a dying man will never lie. It has been contended that the four dying declarations referred to above clearly make out a case under Section 302/34 of the Code against the respondent. The petitioner seeks the grant of leave to file an appeal so that the matter may be heard on merits. We would, therefore consider each dying declarations said to have been made by Sunita.
12. The first dying declaration (according to the prosecution) was made to PW-26 ASI Ratan Singh who had reached the spot on receipt of a telephonic call that a woman was burnt in front of House bearing No. 60/285, I-Block, Gali No.1 Piare Lal Road, Delhi. He deposed that on reaching the spot he lifted her (the lady) with the help of members of the

public and took her to LNJP hospital in the van. She told him that her family members had set her on fire on account of some money dispute.

13. The second declaration is claimed to have been made by Sunita to PW-18 Dr. Harish Mansukhani at the time of her admission in the hospital who also prepared MLC Ex.PW10/A. At this time Sunita allegedly disclosed to the doctor that she was burnt by her parents, brother Sunil and Bhabhi Neena.
14. The third statement according to the prosecution was made to PW-5 Ms.Dheeraj, daughter of Sunita. She stated that on reaching the hospital at about 4.30 PM, she talked to her mother, and she (her mother) informed her that she had been burnt by her parents i.e her father, mother, brother and bhabhi.
15. The fourth statement made by Sunita is to PW-6 Ram Lal Dua her husband. According to this witness, he inquired from her (Sunita) as to how this had happened upon which Sunita informed him that she had demanded money from her parents. She was beaten up and dragged inside the house. Her father, mother, brother and bhabhi poured petrol or oil on her and set her afire. She then ran out in burnt condition. Some neighbors poured water on her. PW-6 Ram Lal, further deposed that his wife had told him that her mother and bhabhi had caught hold of her and her father poured petrol or oil on her and brother lit the fire with a match stick.
16. The fifth statement (as per the prosecution version) made by Sunita is to PW-27 SI Balwan Singh, Investigating Officer of the case which was recorded by him under Section 161 Cr.P.C. The substance of the relevant portion of the statement as recorded by this witness is that she had gone to her parents house to ask for return of ₹ 9 lacks which had been advanced to them by her. There was a quarrel between her parents and brother Sunil on the issue. Sunil dragged her inside the house, his Bhabhi Neena and father held her. Sunil poured petrol on her and lit the fire. She ran outside

the house to save herself. This statement according to PW-24 SI Balwant Singh was recorded by him after obtaining fitness certificate from PW-17 Dr. Chander Shekhar at 4.20 PM.

17. The last such statement is recorded by PW-14 Sh.Lal Singh, SDM. This statement is recorded in question and answer form. Here Sunita is claimed to have given the cause of the quarrel and implicated her father, brother Sunil and Bhabhi Neena. She did not attribute any act to the respondent here.
18. The basic authority on appreciation of a dying declaration is ***Khushal Rao Vs. State of Bombay, AIR 1958 SC 22***. The safeguards and the tests were given in detail to find out whether a dying declaration was truthful and reliable in order to base conviction of an accused on the basis of the same. In para 16 of the judgment it was observed as under:

“ On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it can not be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character and (6) that in order to test the reliability of a dying

declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

19. The courts have always favoured a dying declaration recorded by a Magistrate preferably in question and answer form after obtaining fitness certificate from the doctor. These safeguards are insisted because of an inherent flaw of admitting hearsay evidence without the maker being subjected to cross-examination to test his veracity. By virtue of Section 32 of the Evidence Act a statement made by any person is admissible when it relates to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in case in which the cause of that person's death comes into question. A dying declaration is admitted in evidence as a rule of necessity. It is believed that a dying man does not lie while leaving this world but then all safeguards have to be complied with to ensure that the dying declaration is voluntary, truthful and has been made without tutoring and in a fit state of mind.
20. If there are multiple dying declarations then all of them should be consistent. In case there is variation in different dying declarations the contradictions/variations must be explained and the court must be satisfied about the true and voluntary nature of the dying declaration relied to base conviction of the accused. Whenever there is any doubt, the dying declaration cannot form the basis of conviction of the accused without corroboration.
21. In ***Paniben*** vs. *State of Gujarat*, (1992) 2 SCC 474, there were three dying declarations consistently pointing out that kerosene oil was poured on the

deceased by mother-in-law before lighting the fire. The same were found sufficient for conviction of the mother-in-law.

22. In *Kamla vs. State of Punjab*, (1993) 1 SCC, it was held that if the deceased had opportunity to make several dying declarations, the same should be consistent. If some inconsistencies are noticed between one dying declaration and the other, the Court has to examine nature of inconsistencies; whether they are material or not. In one of the dying declarations it was indicated that the burns were accidental in nature. In view of the inconsistencies in dying declarations it was held that conviction of the appellant's mother-in-law and father-in-law could not be made solely on the basis of dying declaration.
23. Turning to the facts of this case, the learned Additional Sessions Judge has given his own reasons for rejecting all the dying declarations. It has to be kept in mind that oral dying declaration is a weaker type of evidence because the court does not even know as to what was exactly stated by the deceased. That is the reason a dying declaration recorded in question and answer form is considered to be more reliable as the court can see the questions put so as to analyse if any answer was suggested or not.
24. The first dying declaration purported to have been made to PW-26 ASI Ratan Singh, in fact does not incriminate the respondent. According to this witness Sunita had stated that she was set on fire by the members of the family. About the second declaration in the form of alleged history recorded in the MLC Ex.PW10/A by Dr. Harish Mansukhani (PW-18) at the time of admission of Sunita in the hospital it has been mentioned that the informant had been admitted with the history of being burnt by her parents, brother (Sunil) and Bhabhi (Neena). We are not inclined to agree with the reasoning given by the learned Additional Sessions Judge that in the treatment card Ex.PW18/A it had not been recorded by the doctor that the patient was conscious or unconscious. Once it was recorded on the MLC that the patient was conscious and oriented and the doctor had

entered the witness box to depose that the patient was fit to make the statement, it is difficult to doubt the fitness of the patient merely on the ground that the fitness certificate had not been given on MLC.

25. In *Laxman vs. State of Maharashtra*, (2002) 6 SCC 710, it was held by the Constitution Bench of the Supreme Court that mere absence of doctor's certification as to fitness of the declarant's state of mind would not ipso facto render a dying declaration unacceptable. In *Laxman* it was held that normally the Court in order to satisfy whether the deceased was in a fit mental condition to make a dying declaration looks up to the medical opinion but where the eye witness state that the deceased was not 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, dying declaration is not acceptable. It was observed that 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. Thus, 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 it (the declaration) can be acted upon provided the Court ultimately holds the same to be voluntarily and truthful. A certification by the doctor is essentially a rule of caution and, therefore, the voluntarily and truthful nature of the declaration can be established otherwise.
26. The learned Additional Sessions Judge in this case while analyzing the declaration claimed to have been made to Dr. Harish Mansukhani was mainly swayed by the contradiction in the Admit Card and the MLC. It is not necessary that all the facts mentioned in the MLC must be recorded in the Admit Card. Therefore, the reasoning given by the learned Additional Sessions Judge to reject the history given by the patient is not acceptable. But, in our view the dying declaration in the form of alleged history claimed to be given by the patient to Dr. Harish Mansukhani (PW-18) and the oral statement given to PW-5 Ms. Dheeraj daughter of Sunita, PW-6

Ram Lal Dua, husband of Sunita, cannot be preferred to the statement Ex.PW24/B recorded by SI Balwan Singh recorded after obtaining fitness certificate from the doctor and the statement Ex.PW14/A recorded in question and answer form by SDM Sh. Lal Singh. In this view of the matter the findings reached by the learned Additional Sessions Judge cannot be faulted.

27. It is a matter of law that the High Court possesses wide powers and can re-appreciate the evidence while hearing an appeal against an order of acquittal; at the same time the Court has to be satisfied that the conclusions reached by the trial court are unreasonable and that relevant and convincing material were unjustifiably not taken into consideration. The High Court while hearing an appeal would be slow to interfere in the order of acquittal if the view taken by the trial court is reasonable and probable. Even where two views are possible and one is taken by the trial court, the High Court has no power to replace the view of the trial court with its own view. The view taken by the learned Additional Sessions Judge in this case is reasonable and plausible and therefore does not call for any interference.
28. The petition seeking leave to file an appeal is therefore without any merit, it is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

FEBRUARY 10, 2011
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