

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

RESERVED ON: NOVEMBER 01, 2011
PRONOUNCED ON: NOVEMBER 14, 2011

+ **CRL. APPEAL NO. 1039/2011**

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

Versus

JITENDER KUMAR @ PAPPU Respondent
Through: Mr. Satpal Malik with Sh. S.K. Gulati,
Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MS. JUSTICE PRATIBHA RANI

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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 |

MS. JUSTICE PRATIBHA RANI

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1. This is an appeal against the judgment dated 14.12.2008 passed by Ld. Addl. Sessions Judge, Delhi whereby the respondent Jitender Kumar was acquitted of the offence punishable under Sec.302 IPC. The leave to appeal was granted to the State on 19.08.2011.

2. In brief, the prosecution's case is that on 20.12.2000, case FIR No.1034/2000 was registered on the basis of statement made by Smt. Sujata (deceased), wife of the respondent to the effect that she was married to the respondent on 19.11.1981 and had two sons. The respondent was a drunkard and was in the habit of quarreling and beating her after consuming liquor. On the date of occurrence i.e. on 20.12.2000 also her husband in a drunken state, started beating her and when she tried to pacify her husband, he poured kerosene oil on her, uttering the words 'Aaj Teri Jubaan Hi Hamesha Ke Liye Band Kar Deta Hoon'. Then he lit the matchstick and set her on fire

3. Sujata was brought to DDU Hospital at 5.30 pm by none other than the respondent himself with 85-90% superficial and deep burn injuries on her body. The police was informed. SI Kehar Singh reached the hospital and without seeking any opinion about her fitness, recorded her detailed statement Ex.PW22/A, made endorsement Ex. PW22/B thereon and sent the rukka at 6.40 pm for registration of the case under Sec.307 IPC.

4. In view of her critical condition, she was transferred to Safdarjung Hospital for further management and was brought there at 7.30 pm in a very critical condition. She was declared dead on 21.12.2000 at 8.30 am at Safdarjung Hospoital. Postmortem report reveals the cause of death as 'shock caused by antemortem thermal burn injuries'.

5. After completion of investigation, chargesheet was filed and case was committed to the Court of Sessions where respondent was charged for committing the offence punishable under Sec.302 IPC. He entered the plea of not guilty.

6. In order to bring home the guilt of the respondent, prosecution examined 22 witnesses. The material witnesses are : PW-1 Sh. Ram Pal – eye witness; PW-2 Sh. Harish Khanna – son of the deceased and respondent, PW-6 Sh. Gulshan Kumar – brother of the deceased; PW-4 Rajender Singh Property Dealer and PW-22 SI Kehar Singh – the investigating officer who recorded the dying declaration of the deceased.

7. In the statement under Sec. 313 CrPC, respondent denied having burnt his wife Sujata under the influence of liquor. He stated that as he was unemployed, his wife Sujata had to be do domestic work to earn the livelihood but still it was not possible to run their day to day expenses and they decided to sell their house to pay the loan and to purchase some other house in another colony, for which they talked to Sh. Rajender

Singh, Property Dealer. He further stated that one day, Sh. Rajender Singh came there house to get the house sold. When they were talking to the property dealer, suddenly his wife told him that she would not allow the house to be sold as her father and brother had told her not to sell the house. When he continued talking to the property dealer, his wife went inside the house and brought a bottle containing kerosene oil and poured it on herself and set herself on fire outside the house and started running. However after few steps, she fell down. He ran after her to save her and tore her clothes which were burning and Rajender Singh put water on his wife. In the process, he also received burn injuries on his hands. He took his wife to DDU Hospital and got her admitted there. Respondent also produced his other son Sh. Sachin Khanna as DW-1 in his defence to bring on record that deceased Sujata throughout remained unconscious and was not in a position to make any dying declaration.

8. After the examination of DW-1 Sh. Sachin Khanna, son of the deceased, the Court also resummoned PW-2 Sh. Harish Khanna as Court Witness to ascertain the truth regarding the condition of Sujata when she was visited by her brother and sons in the hospital.

9. After considering the testimony of PW-1 Sh. Ram Pal – eye witness who preferred not to support the case of prosecution, PW-2 Sh. Harish Khanna , PW-4 Rajender Singh Property Dealer and DW-1 Sh. Sachin Khanna, Id. Addl. Sessions Judge, while acquitting the respondent, came to the conclusion which is extracted as under :-

'In view of the clear testimony of Sh. Rampal and Sh. Rajender Singh who have been examined as PW-1 and PW-4 respectively and in view of the statement of Sh. Harish Khanna and Sh. Sachin Khanna who are sons of deceased and who have given statement exonerating the accused, it would not be wise for this Court to rely solely on the statement of the deceased recorded by Investigating Officer in the hospital or alleged history given by her to the doctors in the hospital. As stated above, there is no evidence on record to corroborate and strengthen the statement of the deceased and further as discussed above the making of the statement of the deceased to the investigating officer is itself in doubt.'

10. We have heard Sh. Sanjay Lao, APP for the State and Sh. Satpal Malik and Sh. S.K. Gulati, Advocates for the respondent and have had the advantage of going through the Trial Court Record.

11. On behalf of State, it has been urged that this is a strange case where the material witness i.e. PW-2 Sh. Harish Khanna, who was none-else but son of the deceased and the respondent, initially fully supported the case of prosecution but thereafter he was resummoned as Court Witness. It has been submitted that this is a case where in view of case law *Khujji @ Surender Tiwari Vs. State of M.P. (1991) 3 SCC 627*, the statement made by Sh. Harish Khanna before the Court during his examination as PW-2 should have been considered by the Court and not what he stated after the examination of his brother Sh. Sachin Khanna as defence witness. It has been further submitted that subsequent statement of Sh. Harish Khanna as Court witness at the stage of defence evidence was made under influence and pressure of his father i.e. the respondent and to demolish the case of prosecution, hence his statement should not have been recorded by the Court and even if it was recorded, the statement made earlier by him before the Court as PW-2 should have been considered and appreciated. It has been further submitted that this is a case based on dying declaration which was recorded twice i.e. initially on the MLC by the doctor wherein it is specifically mentioned as under :

*'Alleged history of Burns all over body **by fire; after putting kerosene oil by husband as told by the patient herself.***

(The bold portion marked as portion 'C' in the MLC was inserted in different handwriting by some other person at some later stage.)

Patient Conscious and oriented.

Peripheral pulse – Not felt

BP – Not recordable

RR – 26/min Regular

CVS – S₁S₂ heard

RS-B/C air entry equal

CNS – Oriented

LMP – 19 Nov.2000, have 2 children

80-95% superficial to deep burns'

The second dying declaration was recorded by PW-22 SI Kehar Singh when he reached the hospital and on finding Sujata 'fit for statement' recorded her statement Ex.PW22/A, on the basis of which the case was registered. The contention of the State is that both these dying declarations having been made before the Doctor and the Investigating Officer were sufficient to convict the respondent for the offence punishable under Sec.302 IPC and Id. Trial Court committed a grave error in rejecting these two

dying declarations which were also corroborated by PW-2 Sh. Harish Khanna, son of the deceased and the respondent.

12. First of all, we would like to deal with the contentions of Ld. APP that in view of the Judgement of Apex Court in Khujji's case (Supra), testimony of PW-2 Sh. Harish Khanna should have been considered by the Court which is sufficient to prove that when he visited his mother in the hospital, she made statement as to how she suffered burn injuries at the hands of his father and there was no need to recall him as Court witness.

13. In order to appreciate this contention, we have to look into the condition of the deceased at the time of her admission in DDU Hospital. In the instant case, both the sons of the deceased Sujata have made statement to the effect that their mother remained unconscious in the hospital and she did not make any dying declaration before them. It has been explained by PW-2 Sh. Harish Khanna that earlier statement made by him before the Court was made under the pressure of his maternal uncle i.e. PW-6 Sh. Gulshan Kumar, with whom both the brothers were living at the time of occurrence. The contention of Id. APP for the State that this is a case squarely covered by the ratio of Khujji's case (Supra) is not tenable in this case for the simple reason that the medical record also nowhere described the condition of deceased Sujata during the period of her admission/treatment as 'fit to make statement'. Rather her treatment record reveals that her condition remained very very critical so much so that at the time of her admission in the hospital, her peripheral pulse was recorded as 'not felt' and her BP was not recordable and there is not even a single endorsement on the MLC or application that Investigating Officer obtained the opinion of the doctor regarding her fitness to make statement. The statement Ex.PW22/A recorded by the Investigating Officer is detailed one giving minute details which in view of the condition of deceased Sujata at that time, was highly improbable.

14. 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.”

15. The dying declaration referred to on the MLC Ex.PW3/A wherein the *alleged history of burns all over body* is written in one handwriting and thereafter the words **‘by fire; after putting kerosene oil by husband as told by the patient herself’** described as portion ‘C’ have been written by some other Doctor, is sufficient to infer that at the time of admission, she did not disclose as to who poured the kerosene oil and set her on fire. Had it been so, these lines could not have been inserted in different handwriting at some undisclosed point of time. Here it is pertinent to mention that deceased was brought to the hospital by none-else but her husband and even his MLC was prepared as he got his hands burnt while extinguishing fire of his wife. The MLC of Sujata has been prepared at DDU Hospital by Vikas Gupta of that hospital. In his cross examination, he has specifically stated that portion ‘C’ (referred to above) was not written in his presence and that it must be written by Dr. Tejinder Pal Singh of DDU Hospital, which further proves

that neither she made any such statement at the time of preparation of MLC nor it was written so at that time. In this context, statement of PW-20 Dr. Sudhir Rath of Safdarjung Hospital becomes very crucial to come to the conclusion whether any such history was given by Sujata before the Doctor. As per PW-20 Dr. Sudhir Rath, on 20.12.2000 he was working as Senior Resident in Plastic Surgery Department at Safdarjung Hospital and on that day, at about 7.30 pm, patient Sujata was brought to the hospital and examined by him. Patient Sujata gave alleged history of 'burn injury by pouring kerosene oil over her head by her husband' which was written by him. Again, the question arises that how the Doctor posted at Safdarjung Hospital could insert the portion 'C' on the MLC Ex.PW3/A which was prepared by some other Doctor at DDU Hospital. If any such statement was made at Safdarjung Hospital after 7.30 pm by deceased Sujata, there was no bar on Dr. Sudhir Rath to record it on the medical record prepared at Safdarjung Hospital. Inserting those lines in the MLC prepared at DDU Hospital by some other doctor raise a big question mark about the credibility of making such statement by deceased before any of the doctor who prepared the MLC especially in view of the statement of Pw-3 Dr. Vikas Gupta that it was not written in his presence. The treatment record of deceased Sujata at DDU Hospital as well as at Safdarjung Hospital has been carefully perused which describe her condition as very critical and at no stage, she was opined to be 'fit for statement'.

16. In these circumstances, not much reliance can be placed on the inserted portion 'C' of MLC Ex.PW3/A containing the history of burns suffered by the deceased. Normally, a first dying declaration made either to a Magistrate or to a doctor is preferred to any subsequent statement made by the deceased. As in case of any other evidence, the prosecution is always at liberty to prove and satisfy the Court that a particular dying declaration is truthful, convincing and should be relied upon. Whenever the Court finds a dying declaration to be suspicious, the same cannot be taken into consideration to base conviction of an accused.

17. Coming to the statement Ex.PW22/A of deceased Sujata recorded by PW-22 SI Kehar Singh, the very language and tone in which that statement has been written, is sufficient to establish that neither the words used in that statement are that of deceased nor the contents could have been described with such minute details when her condition

was so critical.

18. PW-22 SI Kehar Singh has failed to explain any reason as to why he preferred not to get opinion regarding the fitness of Sujata to make statement about how the occurrence had taken place nor has it been witnessed by any doctor. In view of the critical condition of Sujata at the time of her admission in DDU hospital or shifting to Safdarjung Hospital, it was just not possible to make such a detailed statement on the basis of which PW-22 SI Kehar Singh could get the FIR registered.

19. In *Jayaraj v. State of Tamil Nadu*, (1976) 2 SCC 788; it was observed that, *'.....When the deponent was in severe bodily pain, and words were scarce, his natural impulse would be to tell the magistrate, without wasting his breath on details, as to who had stabbed him'*. It was also observed that, *'the very brevity of the dying declaration, was an index of its being true and free from the taint of tutoring'*.

20. 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.

21. There is another reason to disbelieve the dying declarations referred to above. As per PW-1 Sh. Rampal, who just visited that area to attend some family function, it was deceased Sujata who poured kerosene oil on herself and set herself on fire. His statement that when she was running in flames, her husband i.e. the respondent and some other public persons extinguished fire, is corroborated from the MLC of respondent Jitender that he also suffered burn injuries in process of dousing the flames of his wife. Photographs Ex.PW22/D1 to D4 show that occurrence had taken place just outside the house of the deceased and as per statement of PW-1 Sh. Rampal, many public persons

were present there when quarrel was going on between the deceased and the respondent. In that circumstance, it was improbable for the respondent to enter the house, bring the kerosene oil bottle and pour it on his wife and set her on fire in full public view. Had it been so, in natural course of conduct, the respondent would have absconded. In that case, he would not have removed his wife to the hospital to save her life. This further supports the statement of PW-1 Sh. Rampal that it was a case where deceased Sujata who was already fed-up with drinking habits of her husband and due to the quarrel on sale of property, lost her cool and set herself on fire.

22. The principles which govern and regulate the hearing of Appeal by the High Court, against an order of acquittal passed by the Trial Court are well settled by catena of judgments of the Apex Court. Of course, High Court has power to reconsider the whole issue and reappraise the evidence and come to its own conclusion and finding in place of the findings recorded by the Trial Court, if the said findings are against the weight of record or are perverse. However, the High Court would be slow to interfere with the view taken by the Trial Court where two views are possible and one view has been taken by the Trial Court. A reference may be made to '**Madan Lal vs. State of Jammu & Kashmir, (1997) 7 SCC 677**, where the Apex Court held as under :-

'8. The different expressions used in different judgments of this Court to the effect that there must be "sufficient and compelling reasons" or "goods and sufficiently cogent reasons" for the appellate court to alter an order of acquittal to one of conviction, by no manner curtail the power of an appellant court in an appeal against acquittal to review the entire evidence and come to its conclusion. But in doing so the appellate court should consider every matter on record and the reasons given by the trial court in support of the order of acquittal. The essence of several decisions of this Court is the rule that in deciding appeals against acquittal the court of appeal must examine the evidence in a particular case; must also examine reasons on which the order of acquittal was based; and should interfere on being satisfied that the view taken by the acquitting Judge is unreasonable. It two views are possible on a set of evidence then the appellant court need not substitute its own view in preference to the view of the trial court who has recorded an order of acquittal. In other words, if an order of acquittal is based on proper appreciation of evidence then the same cannot be reversed.'

23. In the instant case, after examining the dying declarations, statement of both the sons of the deceased i.e. PW-1 Sh. Harish Khanna & DW-1 Sh. Sachin Khanna and that

of public witness PW-1 Sh. Rampal, Ld. Trial Court has come to a logical conclusion that there was nothing on record to corroborate the alleged dying declarations of deceased Sujata and the material on record was not sufficient to convict the respondent for setting her on fire.

24. We do not find any error or infirmity in the impugned judgment. The appeal is devoid of any merit and the same is hereby dismissed. Trial Court Record be sent back alongwith copy of this order.

PRATIBHA RANI, J

S. RAVINDRA BHAT, J

NOVEMBER 14, 2011
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