

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided On :13.02.2012

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CRL.A. No. 533 /2011 & CrI.M.(Bail) 2214/2011

SUNIL KUMAR & ORS

..... Appellant

Through : Mr. Ashish Kumar, Advocate

Versus

STATE

..... Respondent

Through : Ms. Richa Kapoor, APP for the State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S. P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The appellants impugn a judgment and order of the Additional Sessions Judge (ASJ) dated 11.08.2010 in S.C. No. 100/2010. They were convicted for the offences punishable under Sections 302/34 IPC and sentenced to undergo imprisonment for life, besides fine and in default to undergo sentences.

2. The prosecution alleged that in the morning of 06.03.2007, information was received by Police Station Nand Nagri that one Kusum, wife of Sunil (the first appellant in this case) was admitted to G.T.B. Hospital on account of extensive burn injuries. The information was reduced to a D.D. entry (Ex. PW-4/A) at 11.00 AM and assigned for investigation to ASI Bhupinder Singh. The latter, along with another policeman, Ct. Omveer Singh went to the hospital and collected the MLC, which was produced as Ex. PW-18/A. That document stated that Kusum was taken to the hospital at 10.00 AM. The concerned official, i.e. the Tehsildar was requested to record Kusum's statement. On 06.03.2007, i.e. the same day, PW-1, Yogesh Pal Singh, the

concerned Tehsildar recorded the statement of Kusum, marked as Ex. PW-1/A, in the hospital, on which he made the endorsement, Ex. PW-1/B. This was the basis of an FIR registered by the police against the present appellants and co-accused, Amar Singh, who was acquitted after trial. It is alleged that further investigations were conducted and all the accused were arrested. The appellants were charged with committing offences punishable under Sections 302/498A/34 IPC. They entered the plea of not guilty and claimed trial.

3. The prosecution examined 21 witnesses to prove that the accused were guilty. The material witnesses relied upon by the prosecution were PW-1, the Tehsildar; PW-2, the mother of the deceased girl Kusum; PW-3 Sunder, the elder brother, and the PW-5 doctor who conducted the postmortem on the body. PW-7 Ram Lal, father-in-law of the deceased girl Kusum was also examined during the proceedings. After considering the materials on record, the Trial Court concluded that the offence punishable under Section 498A IPC had not been proved against the accused, and acquitted them. However, as regards the charge of having committed the murder, the present appellants were held guilty but Sunil's father, Amar Singh, i.e. the father-in-law of the deceased, was acquitted.

4. It is urged on behalf of the appellants that neither the deposition of PW-1, Tehsildar, nor the dying declaration relied in this case, Ex. PW-1/A, clarify whether competent doctors' clearance had been sought and obtained, regarding the fitness and mental capacity of the deceased to record the statement. It is urged that the MLC in this case showed that Kusum was taken to the hospital at 10.00 AM. Undoubtedly, the document (Ex. PW-18/A) showed that she was in a fit mental condition to record a statement. The MLC also revealed that her father-in-law had taken her to the hospital. However, the prosecution did not reveal why her statement was not recorded immediately and she was made to wait for more than 5 hours when ultimately the statement was recorded at 02.30 PM. It is argued that the testimonies of PWs-2, 3 and 7 clearly suggest that Kusum's immediate relatives, i.e. the brother and parents had reached the hospital after which her statement was recorded by PW-1. There was a strong likelihood of the deceased being tutored, which should result in the statement being disbelieved.

5. Learned counsel next submitted that the doctor, who sought to prove the MLC, Ex. PW-18, did not depose that he had examined Kusum at the time her declaration was recorded nor was any doctor, who examined her, produced during the course of the trial. Although this aspect is not ordinarily considered significant, the prosecution in this case was under a duty to satisfy the

Court that the injured Kusum was indeed in a fit physical and mental condition to coherently record the events which led to the incident. This, submitted counsel, was in view of the unexplained delay between the time she was taken to the hospital and the time when the dying declaration was in fact recorded. The delay was important and the surrounding circumstances had to be explained since there was every possibility of the injured being tutored. It is submitted that the impugned judgment cannot be sustained because on the same evidence which included the dying declaration, the Court rejected the prosecution case in so far as it concerned the offence punishable under Section 498A. In other words, the Court did not believe even the version in the dying declaration with regard to the ill treatment and persistent demands for dowry and various articles made from time to time. Similarly, the statements of the deceased's relatives with regard to the cruelty meted out to her were disbelieved. Having regard to the other suspicious circumstances and the findings *vis-à-vis* charge under Sections 498A IPC, the Trial Court ought to have proceeded with caution before concluding that the appellants were guilty. Learned counsel highlighted the sequence of events narrated in the dying declaration: that Kusum had got-up in the morning and after finishing household work, wished to take rest. She had stated about her being beaten up by her husband after which she went to bed. She was woken-up on account of burning and a smell of kerosene. She then realized that it she was ablaze on the bed. Upon hearing her cries, her family members and neighbors went-up and extinguished the fire and she was taken to the hospital in a rickshaw by father-in-law, neighbors and elder sister. It was alleged that Sunil; her mother-in-law and the younger sister-in-law were responsible. Learned counsel urged that the entire story was improbable because concededly, the injured was sleeping and had not seen who had lit the fire. Even if it were assumed that one of the accused was responsible, the prosecution made no efforts to single-out who committed the act. Thus, the Trial Court premised its conclusions on the guilt of the accused on the basis of conjectures and allegations.

6. Learned APP submitted that in this case, the testimonies of PWs-2, 3, 7 and 9 showed that there was a previous history of beating and harassment. Admittedly, the couple had got married in 2005. Even though the Court did not hold the accused guilty of offence under Section 498A IPC, the Trial Court was justified on the basis of evidence on record to conclude that the guilt for the offences punishable under Section 302/34 IPC had been proved. It is urged that the Trial Court correctly acquitted Amar Singh since he was never named in the dying declaration.

7. Learned APP urged that the dying declaration clearly traced the sequence of events. Kusum got-up early morning and after finishing the household work and wished to rest. Her mother-in-law and husband objected to this. The latter even gave her beatings. She thereafter went to sleep. The next thing she realized was that she had been set on fire. She even smelt kerosene. All these facts were noted by an independent witness, i.e. the Tehsildar PW-1, at the earliest point of time since he was informed about the incident, and requested to reach there only at 01.30 AM.

8. It is urged that the requirement of having to show that the injured was in a fit mental condition to record the statement, had been duly discharged since the MLC, Ex. PW-18/A itself revealed that fact. It is urged that there was no delay in recording the statement and the appellants' submission about the deceased being tutored had no factual basis.

9. At the outset, it would be necessary to notice the reasons which persuaded the Trial Court to acquit all the appellants and the co-accused Amar Singh in respect of the offence punishable under Section 498A IPC. This is found in the following extract of the impugned judgment:

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In the instant case though the deceased Kusum in her dying declaration Ex. PW-1/A stated that her mother in law demanded a washing machine but other witnesses examined by the prosecution who are the relatives of the deceased have not stated anything about the demand of washing machine. PW-2 Sumantra mother of deceased stated that the accused demanded TSR. However, on cross examination by the prosecution she stated that they demanded TSR and Rs. 1 lac. PW-3 Sunder, brother of the deceased stated that the accused persons demanded TSR and if TSR was not given then Rs. 1 lac which means that accused were not demanding TSR and Rs. 1 lac both and they demanded Rs. 1 lac only in case TSR was not given. However, in the cross-examination the witness has tried to improve upon, stating that firstly they demanded a three wheeler and thereafter they demanded Rs. 1 lac. He could not tell the date, month and year when such demand was made. PW-7 Sh. Ram Lal father of the deceased stated that the accused were demanding motorcycle. It is baffling that only this witness has stated about the demand of motorcycle. All other witnesses have stated about TSR and Rs. 1 lac. He has further stated that since her (deceased) husband was not working, they demanded an auto rickshaw for his livelihood and his daughter told that they demanded motorcycle. Though the deceased in her dying declaration did not mention even a single word about the demand of motorcycle. PW-9 Dharmender is the cousin of deceased who stated that since Sunil was unemployed a three wheeler scooter was demanded and Kusum stated in his presence regarding demand of a three wheeler. This is again in contradiction to the dying declaration of Kusum wherein she has not mentioned anything about the demand of three wheeler. The probity of a witness is verified by his consistent and true testimony. The witnesses herein are not consistent. They have not corroborated each other. Rather

there are contradictions and inconsistencies in their statement. It seems that prosecution witnesses being relatives of the deceased in their zest to nail the accused made exaggerations at the time of recording of their statement before the court. Such exaggerations are quite common in these types of witnesses. Since there are contradictions in the statement of the prosecution witnesses, I hold that the prosecution has not been able to prove beyond reasonable doubt that there were demands by the accused persons and due to non fulfillment of those demands deceased was subjected to cruelty. In view of the above stated discussion, I am of the view that the accused persons deserves to be acquitted for the offence punishable u/s 498A IPC.

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10. On the question of the appellants’ guilt under Section 302 IPC, the Trial Court held *inter alia* that:

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.....However, perusal of her dying declaration clearly shows that she was in a fit condition of mind when her statement was recorded on 06.03.07. She has categorically stated in the statement Ex. PW-1/A that on 06.03.07 she was unwell and was taking rest. Her mother in law started wrangling with her and told her that she did not do any work and would take rest all the time. When she told her that she was taking rest only after finishing the house hold chores and that she was feeling unwell, she started shouting and using intemperate language. When she went upstairs, her husband wielded a danda and gave her beatings as a result of which she sustained injuries in both her hands but could not show the same due to bandage. She also got blue marks on her leg due to beating. Her husband left after giving her beating. She started weeping and thereafter fell asleep covering her with a bed sheet. When she woke up due to inflammation, she found her suit burning and there was smell of kerosene oil. She started screaming and her entire body was ablaze. On hearing her cries, her neighbours and her family members came and they extinguished the fire. She was taken to GTB Hospital in a rickshaw by her mother in law, a neighbour and her elder sister in law. She has stated that her husband Sunil, mother in law Bhoora, brother in law Rinku and younger sister in law Neetu are responsible for her burns. She has stated that while she was asleep, they poured kerosene oil on her and set her ablaze. There is nothing on record to suggest that the deceased Kusum had been influenced by any of her relatives to make a false statement. No motive on the part of the deceased to implicate her in-laws has been shown. The truthfulness is deeply embedded in her statement. She has made specific allegations against each of the accused regarding meeting out cruel treatment to her. She has also leveled allegations against her father in law Amar Singh saying that he used to threaten her and tell her that they had fed her enough and now they would not keep her and she should go back to her parental home. Despite having a golden opportunity to ensnare her father in law and to have him in clutches of law. She has not done anything of that sort. She has only inculpated her husband Sunil, mother in law Bhoora, devar

Rinku and sister in law Neetu. This fact itself lays an assurance and credibility to the truthfulness of the statement. There are inconsistencies and exaggeration in the statement of relatives of the deceased who have been examined as prosecution witnesses. PW-9 Dharmender has exaggerated the incident and tried to improve on his own stating that on the day of incident when the deceased got up in the morning the sound of TV was in high volume. She asked her husband to decrease the volume and on this he asked her to cover her face and sleep and had put a sheet on her face and after sometime they set her on fire. She was held by three persons i.e. Neetu, Rinku, her mother in law and Sunil had put cloth on her. However, he has also stated that father in law of Kusum was at roof when she was set on fire. This witness has also exonerated father in law of deceased Kusum. Though there are inconsistencies and improvements in the statements of other witnesses but it is the duty of the court to ensure that the truth prevails. While appreciating evidence the court has to consider carefully as to why would the deceased implicate all members of the family except one and would let go the real culprit. The statement of PW-1 Sh. Yogesh Pal Singh who recorded the dying declaration is also very crucial and cannot be brushed aside. He was totally an independent witness and there was no reason for him to concoct any false story. Similarly, the statement of PW-20 ASI Bhupinder Singh and PW-21 IO Inspector C.M. Meena are also consistent and corroborate the prosecution case.

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33. *Further, from the tenor and texture of the dying declaration in the present case it is clearly evident that deceased was in a fit state of mind at the time of making her statement. Medical report on record also states that she was medically fit. Though she suffered burn injuries on 06.3.07. She died only on 11.3.07. This case solely hinges on the dying declaration of the deceased as she was the only witness of the incident as it took place within the four corners of her matrimonial home. The statement of relatives of the deceased who, to an extent, have exaggerated the incident is to be totally ignored as whatever they have stated is only hearsay. Basically the instant case rests on the dying declaration of the deceased and the medical evidence on record. Though the defence has tried to suggest that it was suicidal. However, they have failed to bring any evidence on record to prove the same. It could not have been accidental as she was not in the kitchen but she was in the room at the time she sustained burn injuries. Since there is no eye witness of the occurrence the statement of deceased has to be taken into consideration. The prosecution case is based on the dying declaration which is an important piece of evidence against the accused. There is no eye witness of the occurrence in this case nor it can be expected in such a case where the occurrence takes place inside the house. The Supreme Court has observed in case of **Om Prakash Vs. State of Punjab reported in 1992 CrL J 3935** "It is the duty of the Court, in a case of death because of torture and demand of dowry, to examine the circumstances of each case and evidence adduced on behalf of the parties, for recording a finding on the question as to how the death has taken place. While judging the evidence and the circumstances of the case, the court has to be conscious of the fact that a death connected with dowry takes place inside the house, where outsiders who can be said to be independent witnesses in the traditional sense are not expected to be present. The finding of guilt on the charge of murder has to be recorded on the basis of*

circumstances of each case and the evidence adduced.” The prosecution has relied on dying declaration and the circumstances while the defence is bare denial. The statement of the deceased in the dying declaration goes to show that kerosene oil was poured on her and she was ignited by her in laws while she was asleep. This statement coupled with medical evidence leaves no room for doubt that it was the case of homicide and all the accused except her father in law set her ablaze while she was asleep. The occurrence took place inside her matrimonial home and no explanation whatsoever has come forth from the accused regarding the occurrence. There is no basis to discard dying declaration of the deceased. In the present case dying declaration was recorded on 06.3.07 while she expired on 11.3.07 and the testimony of Tehsildar and the medical record establishes beyond reasonable doubt that the deceased Kusum was fully conscious and was in a fit mental condition to give her statement.

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11. The evidence in this case, in the form of Ex. PW-18/A, the MLC, shows that the deceased was taken to the hospital by the father in law, Amar Singh. He was acquitted of all charges. In the dying declaration itself, the deceased stated that she was taken to the hospital by her mother in law. These are important circumstances. The MLC was recorded at 10-00 AM; the earliest intimation to the police- given *after* Kusum was medically attended, was at 11:00 AM. The IO reached the spot. Yet, for inexplicable reasons, no effort was made by the prosecution to record the statement of the injured girl. PW-1 deposed, in his testimony that he was asked to go to the hospital, to record Kusum’s statement at 1:30 PM. The prosecution did not attempt to explain this delay. This aspect assumes some importance because the statement was ultimately recorded at 02:20 PM; that formed the basis of the FIR. The parents of the deceased, PW-2 and PW-7 as well as her brother, corroborated the contents, and implicated the accused. They also deposed having gone to the hospital and met the deceased, who narrated the day’s events to them. Thus, there is positive evidence establishing that Kusum’s parents and brother reached the hospital, when she was alive, and were able to converse with her. However, they did not mention about having been asked to keep away from Kusum. On the other hand, PW-9, a cousin of Kusum, who also went to the hospital, mentioned specifically about the recording of the dying declaration. There is, consequently, every possibility that the police waited for the parents and other relatives of Kusum, to reach the hospital, after which the dying declaration was recorded.

12. Apart from the above facts, another vital aspect in this case is that PW-1, after recording the dying declaration, directed that a case should be registered; he specifically directed the FIR should be recorded against the appellants, as well as Amar Singh. This was done, despite the fact that Kusum did not name Amar Singh as a suspect or perpetrator of the crime. The most crucial

aspect which the Trial Court lost sight of in this case, in our opinion, was that even according to Kusum's account, the fire was lit when she was asleep. There is no indication that apart from her mother in law and husband, the other accused were present. She clearly states about her lack of knowledge as to who set her ablaze. She suffered 75% burns, and eventually succumbed to her injuries on 12-03-2007. However, she could not say who was responsible. Her dying declaration only mentioned about the previous quarrel with some of the accused, and that she suspected involvement by all of them, in the incident. It is a fact that a larger Bench ruling of the Supreme Court in *Lakshman v. State*, 2002 (6) SCC 710 has clarified that it is not necessary that a doctor should certify that the injured or patient is fit or oriented to record a statement. As long as the person recording it is able to depose about what was stated fairly and faithfully and is credible in his deposition, and the surrounding circumstances also corroborate the prosecution story, the court would nevertheless believe it.

13. In the present case, the deceased's inability to point to any one of the accused as the one responsible for setting her on fire, the unexplained delay in asking the Tehsildar to record the dying declaration, the fact that the injured's relatives had gone to the hospital, and were with her, when the statement was in fact recorded, are aspects which alert the court to have a careful look at the declaration itself. The fact that no doctor who actually examined the deceased, at the time she was taken to the hospital, or even around the time when she made her dying declaration, throws more suspicion on the prosecution version. To cap it all, even though the deceased did not implicate Amar Singh, PW-1, in the endorsement made on the dying declaration, directed registration of FIR, against all persons, including him.

14. Uncorroborated dying declarations can, in given circumstances, be the only basis for conviction. Yet, this is subject to three important conditions. One, the prosecution should establish that the maker was conscious of what he or she was saying; two it is to be proved to have been made voluntarily, and three the declaration should inspire confidence in the court as reflecting the truth of what is stated. Thus, in *State of Maharashtra v. Sanjay*, (2004) 13 SCC 314, it was held that:

"It has been repeatedly pointed out that the dying declaration should be of such nature as to inspire full confidence of the court in its truthfulness and correctness (vide the observations of a five-Judge Bench in Laxman v. State of Maharashtra). Inasmuch as the correctness of dying declaration cannot be tested by cross-examination of its maker, "great caution must be exercised in considering the weight to be given to this species of evidence". When there is more than one dying declaration genuinely recorded, they must

be tested on the touchstone of consistency and probabilities. They must also be tested in the light of other evidence on record.”

This was also reiterated in other judgments, reported as *Thurukani Pompaiah v State of Mysore* AIR 1965 SC 939, *State of Punjab v Parveen Kumar* 2005 (9) SCC 769, etc. The larger Bench ruling in *Laxman*, where it was held that a formal certification on the dying declaration of a doctor as to the fitness of the person making it is inessential, significantly also states that:

“The court, however, has to always 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 look 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.”

It was further observed,

“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.”

15. In this case, apart from the suspicious circumstances discussed earlier, the medical documents in the form of the MLC, as well as the post-mortem report do not corroborate the prosecution version about Kusum having been set on fire with kerosene. Neither document speaks about smell of kerosene. These, together with the prosecution’s inability to pin-point the role of any one accused, in the context of the acquittal of all the accused for the charge under Section 498-A IPC, renders the entire story suspect. This court has noticed elsewhere that such charge was held not proved, even on the basis of the dying declaration. Such being the case, the Court ought to have been doubly careful in taking the aid of that evidence, especially when there was no chance of its being subjected to cross examination, to hold the Appellants guilty under Section 302, IPC.

16. In view of the above discussion, it is held that the Trial Court fell into error in convicting the Appellants for the offences punishable under Sections 302/34 IPC. The

impugned judgment is therefore set aside. The appeal, consequently succeeds. The Appellants shall be released forthwith, if not required in any other case. A copy of this judgment shall be sent for immediate compliance, Dasti, to the Jail Superintendent. The Appeal is allowed in these terms.

(S.RAVINDRA BHAT)
JUDGE

13th February, 2012

(S.P. GARG)
JUDGE