

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

+ **CRL.A.323/2000**

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Reserved on: 26th March, 2014

Decided on: 02nd May, 2014

GOBIND MISHRA

..... Appellant

Through: Mr. Dinesh Mathur, Sr. Advocate with
Mr. Basant Kr. Singh, Advocate.

versus

STATE N.C.T. OF DELHI

..... Respondent

Through: Mr. Neeraj K. Singh, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal the Appellant challenges the judgment dated 4th May, 2000 convicting the Appellant for offence under Sections 306/376 IPC and the order on sentence dated 9th May, 2000 directing him to undergo a sentence of Rigorous Imprisonment for a period of five years and a fine of Rs. 5,000/- and in default of payment of fine to further undergo Simple Imprisonment for a period of three months for offence under Section 306 IPC and a further sentence of Rigorous Imprisonment for a period of seven years and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo Simple Imprisonment of six months for offence under Section 376 IPC.

2. Learned counsel for the Appellant contends that on the same evidence co-accused Sanjeev Kumar has been acquitted of offence punishable under Section 354 IPC however, the Appellant has been convicted for the offences noted above. The FIR was registered for offence under Section 306 IPC read with Section 511 IPC which was not possible as there can be no attempt to abet suicide. The police officer ASI Rajinder Singh who conducted the inquest has not been examined by the prosecution though he was summoned and subsequently bailable warrants issued. Learned APP gave him up and examined PW16 SI Brahm Singh who stated that the investigation was handed over to him on 23rd July, 1991, he did not do any work pertaining to investigation as the investigation was already complete and he simply forwarded the investigation file of the case to the SHO concerned. A perusal of the photographs, letters and the brief facts shows that there was no abatement of suicide rather the Appellant and the deceased were having a love affair and when the family came to know about it because of fear of the family and the shame, the deceased committed suicide. As per the death summary, when the deceased was admitted at the hospital she was semi-conscious, grossly dehydrated and pulse and blood pressure were not recordable. In such a situation the statement of the deceased could not have

been recorded. The statement of the deceased cannot be used under Section 32 of Evidence Act for offence under Section 376 IPC and there is no averment in the statement which would show that there was abatement of suicide. The doctor who opined her to be fit for statement has not appeared in the witness box and hence the MLC cannot be looked into. The identification of the handwriting by PW5 Constable Vinod Kumar is of no consequence as he had not seen the author of the MLC writing the same and thus the MLC has not been proved. Reliance is placed on *B. Raghuvir Acharya Hiten P. Dalal vs. CBI 2013 (7) Scale 722*. The lady doctor Kavita Kaushik, who opined that the deceased was fit for statement at the time of admission has not been examined and Dr. Kapil Sethi has noted that the deceased was fit for statement at 6.00 p.m. Once the statement of the deceased was recorded by the Investigating Officer then there was no need for taking further endorsement from the doctor that the patient was not fit for statement on 24th April, 1991 at 11.45 a.m. The death summary Ex. PW4/B belies the case of the prosecution. The signatures of the deceased on the statement have not been proved as PW3, the mother of the deceased states that though the statement was made in her presence and the deceased signed it, however, she does not identify the signature being illiterate.

3. It is stated that even if the alleged suicide note is not an exhibited document, the same can be looked into for the benefit of the accused. The alleged suicide note is only a marked document and has not been exhibited and thus cannot be looked into in favour of the prosecution. Relying upon *Raj Bahadur vs. State*, (Supra) 45 (1991) DLT 144 it is stated that the accused can rely even on those documents of the prosecution which are not proved in case they were filed with the charge sheet. As per the inquest report, the deceased committed suicide because of the shame and suspected pregnancy and in the postmortem report the deceased was not found to be pregnant.

4. The photograph of the deceased and the Appellant on record at best show that the deceased is moving on the road and does not show them in a compromising position. Further there is no live link between the alleged abatement and the suicide committed. Hence the Appellant be acquitted of the charges.

5. Learned APP for the State submits that the present is not a case of false implications. The dying declaration states facts which would not have been in the knowledge of the Investigating Officer and thus cannot be a doctored document. Reliance is placed on *Surinder Kumar vs. State of*

Punjab, 2013 (1) Criminal Court Cases 437 (SC). The contention that the ruqqa did not contain the thumb impression of the mother of the deceased, thus the same does not reflect that it was signed by the deceased is untenable as no question in this regard has been put to PW3 the mother of the deceased or PW13 the Investigating Officer. PW14, the Medical Record Clerk has been examined as Dr. Kapil Sethi had left the hospital. PW14 has duly proved and exhibited the MLC vide Ex.PW14/A. Relying upon *State of Madhya Pradesh vs. Dal Singh and others, 2013 (2) Criminal Court Cases 590 (SC)* it is contended that even in a case of 100 percent burns the person can be in a position to make the statement. The allegation of rape on girl itself is sufficient to constitute the offence of abetment to commit suicide. Relying upon *Laxman vs. State of Maharashtra, 2002 (6) SCC 710* it is stated that if the eye witness has stated that the deceased was fit for statement, the same should be relied upon even if the medical opinion is to the contrary. The four letters Ex. PW13/1-4 at pages 125 to 133 of the LCR have been put in cross-examination by the accused to PW13 after he had filed the same with his bail application. However, neither the source of the letters has been proved nor the hand writing to be that of the deceased. Thus Exhibit PW13/1-4 cannot be looked into. The photograph of the deceased

and the Appellant show them to be standing with intimacy and thus the deceased was being exploited on that count. Hence the appeal be dismissed.

6. Heard learned counsel for the parties. The FIR in the present case was registered on the statement of deceased given to PW13 SI Gurnam Singh wherein she stated that she was unmarried and was residing with her parents. One Govind Mishra was posted as Home Guard. While the prosecutrix was going on the road, he took her snaps. He called her and showed the photographs. He wanted to make her his wife. However, the prosecutrix did not like him. Govind Mishra called her to his residence, however, she refused. Then he threatened her that if she does not come to his house, he would show the photographs. Govind Mishra has stated that she should come in night as in the day everybody would see . Due to fear, she went to the house of Govind Mishra. 4-5 days ago, he came to her house and woke her from the sleep. The prosecutrix came out of the house and due to fear went to his house. He took her to his house which is on the 3rd floor and after reaching there, bolted the room from inside. Thereafter he committed rape on her. Govind Mishra further threatened her that in case she shouted she will be defamed because she was in his house. He also showed her photographs. Thereafter he again called her at his house for taking away the

photographs and when she again went to take the photographs two days prior, he again committed rape with her. When she started to run and shouted, the landlord of the house woke up. Govind Mishra threatened that no harm would be caused to him because he was a home guard. On 23rd April, 1991 around 4.30 PM when her mother had gone to take vegetables and her two sisters and brother had gone to the school, she being alone in the house, she poured kerosene oil on herself and lit by matchstick because Govind Mishra was threatening her that in case she stated to anybody he would kill her father. Sanjeev also tried to commit rape on her however, she saved herself after running. She further stated that due to shame and due to the threat of Govind Mishra she was forced to lit herself with fire.

7. The objection of learned counsel for the Appellant is that though the Rukka proceedings state that the statement of the deceased was signed by her and thumb mark by her mother, however, there was no thumb mark impression of the mother. Further PW 3 the mother has not identified the signatures of the deceased and in the absence thereof, the document cannot be proved. There is no doubt that there is no thumb impression of PW3 mother of the deceased on the statement of the deceased. However, PW3 in her testimony has stated that on 23rd April she did not remember the year she

was not present at home when her daughter set fire on herself . She died because Govind Mishra and Sanjay Kumar, two accused committed rape on her. She stated that somebody had recorded her statement in her presence, however, she could not identify her signatures at point A on Ex.PW1/B as she was illiterate. Thus, this witness corroborates the version of PW 13, the Investigating Officer that he recorded the statement of the deceased. As regards thumb impression of PW 3 not being on Ex.PW1/B, it may be noted that the fact that Ex.PW1/B was thumb mark by the mother of the deceased was not stated by PW13 SI Gurnam Singh in his deposition before the Court. This witness has, however, not been confronted with the Rukka wherein the fact that the mother's thumb mark on the statement has been noted, though he has been cross-examined. He has clarified that he had not made the mother of the deceased an attesting witness, however, he had recorded the statement of the mother of the deceased separately.

8. Learned counsel for the Appellant also assails the dying declaration on the ground that though the Rukka states that she was declared fit for statement by lady doctor, however, as per the MLC Dr. Kapil Sethi had declared her fit for statement. Further Dr. Kapil Sethi has not been examined and the MLC having been exhibited by the record clerk is not the

sufficient proof of the document. Again this witness PW 13 has not been confronted with the Rukka wherein it is stated that lady doctor declared the prosecutrix fit for statement. PW 14 Shri Deen Dayal, Medical Record Clerk of RML Hospital had appeared in the witness box along with MLC of the prosecutrix. He has stated that the MLC was prepared and signed by Dr. Kavita Kaushik, however, endorsement fit for statement was made by Dr. Kapil Sethi. He had stated that both these doctors have left the services of the hospital and their whereabouts are not known. He exhibited the MLC as Ex.PW14/A. He has also identified the handwriting and signatures of Dr. N.K. Garg on Ex.PW14/B the death summary. Since this witness has not been cross-examined, his testimony has gone unchallenged and at this stage it cannot be said that the prosecution has not proved that the deceased was not in a fit state of mind when her statement was recorded.

9. Objection has also been raised for calling of further opinion regarding fitness of the prosecutrix. Learned counsel for the Appellant states that once the statement of prosecutrix was recorded after being fit for statement, there was no reason that the Investigating officer took a further opinion of the doctor on 24th April, 1991 with regard to fitness of the prosecutrix for making the statement. It may be noted that no cross-examination of PW13

the Investigating Officer has been done on this count as well. Further it is well settled that efforts are always made that dying declaration should be recorded by the SDM. Thus in an effort to get the statement recorded before the SDM, if PW13 took further opinion with regard to the fitness of the deceased for making statement, no mala fide or illegality can be attributed to him. As per the MLC Ex.PW14/A when the prosecutrix was admitted on 23rd April, 1991 at 5.50 PM she was conscious and her pulse rate was 90. Hon'ble Supreme Court in *State of Madhya Pradesh v. Dal Singh and others*, 2013 (2) Crl. Court Cases 590 (SC) held that law does not require who can record dying declaration; there is no prescribed form or procedure for the same. The requirement of certificate by a doctor in respect of such state of the deceased was not essential in every case. However, the person recording the dying declaration should be satisfied that the maker is in a fit state of mind and is capable of making such a statement. In the present case the dying declaration was recorded by PW13 after she was declared fit for statement.

10. The next question which arises for consideration is whether the MLC has been proved in terms of Section 47 of the Indian Evidence Act ('IE Act'). Learned counsel for the Appellant has relied upon *Hem Raj v. State of*

Haryana, 2014 (1) JCC 587 (SC) , B. Raghuvir Acharya v. CBI, IV (2013) DLT (Crl.) 635 (SC) to contend that the identification by the prosecution witnesses cannot be used as they had not seen the author of the document writing the same. Reference is made to the explanation to Section 47 of the IE Act. Section 47 of the IE Act provides that when a court has to form an opinion as to the person by whom any document is written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact. The explanation to the section provides that a person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purporting to be written by person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. PW14 Deen Dayal, Medical Record Clerk in his testimony has stated that he had been working in the Medical Record Department of RML Hospital since 1974 and in the course of his working there, he had become acquainted with the handwriting and signatures of various doctors who had worked in the said hospital. He

identified that the MLC Ex.PW14/A was prepared and signed by Dr. Kavita Kaushik and the endorsement “Fit for Statement” had been made by Dr. Kapil Sethi. Both these doctors have left the services of the hospital and their whereabouts were not known. He also identified handwriting and signatures of Dr. N.K. Garg on Ex.PW14/B the death summary. This witness has not been cross-examined. It is thus apparent that MLC Ex.PW14/A and death summary Ex. PW14/B have been duly proved by the prosecution in conformity with Section 47 of the IE Act.

11. Learned counsel for the Appellant further assails the dying declaration on the ground that as per Ex.PW 14/B the death summary the patient was admitted in a semi conscious, grossly dehydrated condition and the pulse and blood pressure was not recordable, so the statement could not have been recorded. As noted above, the MLC immediately prepared at the time of admitting the deceased in the hospital records the pulse rate at 90 and that the patient was conscious. Further Dr. Kapil Sethi had opined that the prosecutrix was fit for making statement at 6.00 PM on 23rd April, 1991 immediately after admission at 5.55 PM. Thus on the basis of death summary, the Appellant cannot claim that the deceased was not in a fit state of mind to make the statement to the Investigating Officer.

12. Learned counsel for the Appellant has further sought to rely upon copy of brief facts which has not been exhibited by the prosecution. Referring to a Division Bench decision in *Rajbahadur v. State, 1991 (21) DRJ 340* it is contended that documents relied upon by the prosecution though not exhibited can be looked into in favour of the accused. Even if the document can be looked in favour of the accused, brief facts prepared during inquest proceedings is not a substantive evidence. Merely because the brief facts state that it is learnt that the deceased died due to shame as she was pregnant will not absolve the Appellant of the offence of abatement to commit suicide. The brief facts clearly note this fact on the basis of hearsay.

13. Learned counsel for the Appellant further states that the main investigating officer who conducted the inquest proceedings ASI Rajinder Singh has not been examined and hence the same caused prejudice to the Appellant. As per the record ASI Rajinder Singh has not been examined and in his place SI Brahm Pal Singh has been examined, who has only stated that investigation of this case was given to him on 23rd July, 1991. He did not do any work pertaining to the investigation as the same had already been completed and thus he simply forwarded the investigation file to the SHO concerned. However, ASI Rajinder Singh was only assisting SI Gurnam

Singh, who was the main Investigating officer and who reached the spot immediately after the incident and recorded the dying declaration of the deceased. All search and seizures had been conducted by PW13, SI Gurnam Singh. He has conducted the entire investigation and thereafter the file was marked to ASI Rajinder Singh only for performing the inquest and post mortem of the deceased. In the facts of the case, I do not find that any prejudice has been caused to the Appellant by non-examination of ASI Rajinder Singh.

14. Learned counsel for the Appellant thereafter states that a perusal of the suicide note shows that deceased died of the shame and thus, the Appellant cannot be convicted for offence under Sections 306 IPC as the same would not amount to abatement. A perusal of the statement of the prosecutrix as recorded by the Investigating Officer shows that the Appellant had been calling her to his house on the pretext of exposing her by her photographs in his possession and thereafter committed rape on her. By committing rape and threatening the prosecutrix who was very scared, the Appellant abated the suicide by the deceased. The test to ascertain whether an act is sufficient to cause abatement is that of prudent and reasonable person and neither over sensitive person nor too strong a person. It cannot be said that despite

petrified, the deceased could not have committed suicide. Hence I find no reason to accept the contention of learned counsel for the Appellant.

15. It is well settled that if the statement of deceased relates to the circumstances leading to death, the same is admissible under Section 32 IE Act. In the present case, the contents of the statement recorded by PW 13 SI Gurnam Singh speak about the circumstances leading to death of the deceased/prosecutrix and hence the same is admissible under Section 32 IE Act. This Court in *Sandy @ Ved Prakash and Others v. State*, 2010 (4) JCC 2416 and *Joginder v. State*, 2012 (1) JCC 578 held that such a statement of prosecutrix was admissible under Section 32(1) of the Indian Evidence Act as it described the circumstances leading to her death. Consequently, I find no merit in the appeal. The appeal is dismissed. The Appellant, who is on bail, will surrender to custody. The bail bond and the surety bond stand cancelled.

(MUKTA GUPTA)
JUDGE

MAY 02,2014
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