

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

Reserved on: 04th March, 2014

Pronounced on: 18th March, 2014

+ CRL.A.1058/2010

SHYAM LAL

..... Appellant

Through Ms. Rakhi Dubey, Advocate

versus

STATE(GOVT OF NCT) OF DELHI **..... Respondent**

Through Ms. Rajdipa Behura, APP

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G.P. MITTAL, J.

1. Appellant Shyam Lal impugns the judgment and the order on sentence dated 30.01.2010 and 16.02.2010 respectively passed in Sessions Case No.97/1/08 (arising out of FIR No.89/08, P.S. J.P. Kalan) whereby he was convicted for an offence punishable under Section 302 of the Indian Penal Code, 1860 (IPC) and was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of which he was to undergo simple imprisonment for two months.
2. DD No.15A dated 28.08.2008 regarding some quarrel in front of shop of appellant Shyam Lal was assigned to ASI Mahender Singh (PW24).

He along with Constable Anand (PW-22) reached the house of appellant Shyam Lal and noticed the smell of kerosene oil from the *miyani* (a small room with less height). PW-24 found one mattress in partly burnt condition, some burnt matchsticks, a match box and four currency notes of denomination of Rs.100/- in semi-burnt condition inside the *miyani*. PW-24 also noticed a red colour canister of 5 ltrs. containing some kerosene; some pieces of broken bangles of green colour; a piece of cloth in burnt condition stuck to the ground; a pair of plastic *chappals* in burnt condition, *etc. etc.* On inquiry, he (PW24) was informed that the lady who had been burnt had already been removed to Rao Tula Ram Memorial (RTRM) Hospital by PW-6, her brother-in-law (husband's elder brother). PW-24 proceeded to RTRM Hospital while leaving PW-22 to preserve and supervise the spot. At the hospital, he collected the MLC Ex.PW16/A of Smt. Manoj Devi (the deceased). On the MLC, she was declared conscious-oriented by the doctors. On the deceased having been declared fit to make a statement, PW24 proceeded to record her statement Ex.PW16/B in presence of Dr. Praful Kumar (PW16). In the statement Ex.PW16/B, deceased Smt. Manoj Devi informed PW24 that she was married to the appellant in the year 1993. She had two children. On 24.08.2008, the appellant was discharged from de-addiction Centre (Nasha Mukti Kendra). She informed that on his return to the home, the appellant would demand money and on her refusal would extend beatings to her. On 28.08.2008 around 11:00 a.m., the appellant started beating her with a stick and threatened her that if she would not pay him money, he would embarrass her (make her dance naked). She informed that despite her efforts, she was unable to contact the police on No.100.

She told PW24 that the appellant poured kerosene oil on her from the canister lying in the house and set her ablaze.

3. PW24 made endorsement Ex.PW24/A on the statement Ex.PW16/B and transmitted it to the Police Station through Constable Dharamvir (PW-13) for registration of case under Section 307 IPC.
4. The area SDM was informed about the incident. Since the deceased was found to have suffered serious burn injuries, she was referred to Safdarjung Hospital for better management and treatment.
5. In the meanwhile, Khushi Ram (PW3), father of the deceased received a call from PW1 Tara Chand (appellant's father) regarding the incident and her removal to Safdarjung Hospital. Khushi Ram (PW3) and Inderjeet Yadav (PW4), brother of the deceased proceeded to Safdarjung Hospital. On reaching the Hospital, PW3 and 4 found that the deceased was still in the ambulance. She (the deceased) informed PWs 3 and 4 about the factum of her being set her ablaze by the appellant.
6. On getting information of a lady being admitted to Safdarjung Hospital with burn injuries from PW24, Surender Singh, Executive Magistrate Palam/ Najafgarh (PW-19) reached Safdarjung Hospital at about 3:30 P.M. on 28.08.2008. He moved an application Ex.PW19/A seeking the doctor's opinion if the patient was fit to make the statement. Deceased was declared fit to make statement by Dr. Shilpi Baranwal (PW5) by her endorsement Ex.PW5/A on the application. PW-19 proceeded to record her statement Ex.PW19/B which corroborated the statement Ex.PW16/B made by the deceased to

PW24.

7. PW-24, the I.O. seized various articles from the scene of the crime. In the evening of 28.08.2004 at about 7:00 P.M., the appellant was apprehended from near Laxmibai Factory in Village *Khera* on the basis of secret information. There was smell of kerosene in the clothes worn by the appellant. The appellant was instructed to remove his clothes after his medical examination. The I.O. obtained a sealed parcel sealed with the seal of 'RTM' containing the appellant's clothes along with other articles which were deposited with MHC (M) and subsequently sent for FSL for chemical examination.
8. On 01.09.2008, Smt. Manoj Devi succumbed to the burn injuries. After completion of the investigation, a report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was presented in the Court of Metropolitan Magistrate.
9. The factum of the deceased having suffered burn injuries by kerosene is not in dispute. The case of the prosecution is that it was the appellant who set her ablaze after pouring kerosene oil on her after she refused to give him (the appellant) any money. On the other hand, the defence version is that there was a quarrel between the deceased and the appellant and in a fit of rage on account of frustration, the deceased poured kerosene oil on herself and lit fire.
10. In order to establish its case before the Trial Court, the prosecution examined 27 witnesses. The prosecution case mainly rested on the testimonies of Khushi Ram (PW3), father of the deceased and Inderjeet Singh (PW4), brother of the deceased who testified about the

oral dying declaration; Surender Singh, Executive Magistrate (PW19) who recorded the formal dying declaration Ex.PW19/B in the Safdarjung Hospital and ASI Mahender Singh (PW24), the first I.O. who recorded another dying declaration in RTRM Hospital.

11. In his examination under Section 313 Cr.P.C., the appellant admitted that he used to consume liquor. He denied giving beatings to his wife. He took up the plea that on 28.08.2008, he had asked his wife (the deceased) to hand over the mobile phone and the key of the motorcycle as he wanted to go to the plot which he had purchased. His wife quarrelled with him, threw weights on him and followed him to his father's house. He beat his wife with a stick on her right hand. His father refused to come in between the appellant's and deceased's dispute and therefore, they returned to their house. The deceased entered the house and bolted the door from inside. He broke open the door to enter the house and found that his wife had set herself on fire. He tried to save her and in the process, burnt his hands. In support of his version, the appellant examined three witnesses in his defence. During examination of PWs 3 and 4, the appellant tried to build a case that he was implicated in the case falsely because PWs 3 and 4 wanted him to transfer his plot in their name which he had refused to comply with their request. However, no evidence was brought by the appellant in support of this plea nor this fact was even stated by the appellant in his statement under Section 313 Cr.P.C.
12. By the impugned judgment, the Trial Court found that the two dying declarations Exs.PW16/B and PW19/B duly recorded by PW24 (the I.O.) and PW19 (the Executive Magistrate) after obtaining fitness

certificates from the doctor were credible and reliable. They were consistent with each other as also with the oral statement made by the deceased to PWs 3 and 4. There was no indication of the deceased having been tutored or any motive to falsely implicate the appellant. Thus, relying on the dying declarations, the appellant was convicted and sentenced as stated earlier.

13. The learned counsel for the appellant has argued that the prosecution version of the deceased having been set ablaze after pouring kerosene oil on her by the appellant is inconsistent with DD No.15A (Ex.PW24/A-1). MLC Ex.PW11/A of appellant Shyam Lal which discloses burn injuries on both his hands clearly reflects the appellant's attempt at the cost of his own life and serious injury to him to save his wife which also gets corroboration from the testimonies of PWs 1 and 2 as also the defence witnesses. The learned counsel for the appellant argues that PWs 3 and 4 had reached Safdarjung Hospital while the deceased was still in the ambulance and there is a strong possibility of the deceased being tutored by PWs 3 and 4 to make a false statement implicating the appellant to the Executive Magistrate.
14. On the other hand, Ms. Rajdipa Behura, learned APP for the State supports the impugned judgment and urges that when the first dying declaration (Ex.PW16/B) was recorded in RTRM Hospital by PW-24 after obtaining the fitness certificate from the doctor and in presence of the doctor, admittedly, the deceased's relatives (PWs 3 and 4) had not reached RTRM Hospital. Thus, there was no chance of tutoring the deceased to make a false statement against her own husband

implicating him falsely. She urges that the two dying declarations recorded by the Executive Magistrate and the Investigating Officer are not only corroborated by the statement given by the deceased to PWs 3 and 4 but also by the FSL report Ex.PW22/B which finds presence of kerosene oil on the appellant's clothes. The learned APP very strenuously canvasses that there was no possibility of presence of kerosene oil on the appellant's clothes if he himself had not poured kerosene oil on the deceased. The learned APP argues that the appellant's conduct in fleeing from the spot after the incident would further give credence to the statement made by the deceased not only to her relations but also to the competent officers.

15. Admission of dying declaration in evidence is an exception to the rule of inadmissibility of hearsay evidence. It is said that truth sits on the tongue of a dying man. When a person is at the point of his death and when every hope of this world is gone, every motive to falsehood is silenced a person is not inclined to lie. At the same time, since the accused has no opportunity to cross-examine the deceased, he/she being already dead, the Court has to be satisfied about the truthfulness of the statement made by the deceased before acting upon the same. The Court must be satisfied that the statement made by the deceased is not a result of tutoring, prompting or a product of imagination. The Court also has to be satisfied that the statement was made by the deceased when he or she was in a fit state of mind.
16. In *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh*, (2007) 15 SCC 465, while reiterating the principles under which the dying declaration is admitted in evidence, the Supreme

Court in paras 23 to 25 held as under:

“23. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be the last to give untruth as he stands before his creator.

24. There is a legal maxim “nemo moriturus praesumitur mentire” meaning, that a man will not meet his Maker with a lie in his mouth. Woodroffe and Amir Ali, in their Treatise on Evidence Act state:

“when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross-examination are dispensed with”.

25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures.”

17. *Khushal Rao v. State of Bombay*, AIR 1958 SC 22 is an authoritative pronouncement which lays down the safeguards and tests to analyse a dying declaration and the circumstances when a conviction can be based on a dying declaration even without any corroboration. In para 16, the Supreme Court held 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 cannot 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. ”

18. Keeping in mind the above proposition, in *Paniben (Smt). v. State of*

Gujarat, (1992) 2 SCC 474, while relying on its earlier decisions, the Supreme Court again summed up the law on the subject as under:

“(i) There is neither a 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) The Court has to scrutinize 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 deceased was in a fit mental condition to make the dying declaration look 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 version as given in the dying declaration, the said declaration cannot be acted upon.”

19. In view of the proposition of law which is well settled, we have to examine the dying declarations, evidence produced by the prosecution, the attending circumstances and the defence put forth by the appellant to examine the worth of the dying declarations.
20. The first statement was made by the deceased to ASI Mahender Singh (PW24) wherein she gave a vivid account as to how the incident occurred. She told PW24 that she got married to the appellant in the year 1993. She was blessed with two children. The elder one was a boy and the younger one was a girl. She informed that on 24.08.2008, the appellant was discharged from the de-addiction Centre. Thereafter, he (the appellant) would ask for money and would beat her on not acceding to his demand. She told PW24 that on that day, i.e. 28.08.2008 at about 11:00 A.M., the appellant beat her with a stick and threatened her to make her dance naked in case she did not pay any money. She, in vain tried to contact the police on no.100. The appellant poured kerosene oil on her from the canister lying in the house and set her ablaze. This statement was recorded by PW24 sometime between 12:30 P.M. to 1:10 P.M. In fact, the *rukka* was transmitted to the Police Station at 1:10 P.M. Before recording the statement, PW24 not only obtained a fitness certificate by endorsement Ex.PW16/C from Dr. Praful Kumar (PW-16) of RTRM

Hospital, but he also recorded the statement in presence of the doctor. This was the first statement made by the deceased. By that time, even the information of the deceased being burnt or otherwise catching fire had not been even given to her parents/brother. PW24 in cross-examination was not even challenged by the appellant about the truthfulness of the statement made by the deceased. PW24 was merely given a suggestion that he had not conducted the investigation fairly in the case. Apart from that, the appellant has not challenged the veracity of the statement made by the deceased to PW24 in cross-examination. His plea is that the deceased had herself bolted the door of the house from inside, had poured kerosene oil on herself and then set herself on fire. The appellant's plea is that he had to break open the door to enter the house and he made all efforts to extinguish the fire and, in the process, suffered burn injuries on both of his hands. It is true that appellant's MLC Ex.PW11/A did reveal that he has suffered some burn injuries on his palms, yet the defence version is not proved even on the preponderance of probability. In fact, there is no material on record which could support the defence version. Rather, the evidence adduced falsifies the defence version. Burn injuries could have been caused when the appellant had burnt the deceased. Evidence and court depositions show and prove that the said defence of the appellant is sham and false.

21. According to the appellant, after extinguishing fire, he left the spot, *i.e.*, his own house to arrange for a vehicle to remove the deceased to the hospital. Admittedly, the deceased was removed to RTRM Hospital by one Satish (PW6) who is the appellant's elder brother. It

is established from the statement of PW1 which stands corroborated by PW2 that the appellant and his four brothers were residing separately (in separate houses, but adjacent to each other) which was built on a plot of land, whereas the appellant's father PW1 was residing at a distance of about 400 mtrs. from the house of the appellant and his brothers. PW1 (the appellant's father who did not support the prosecution version and was declared hostile) in his cross-examination by the learned APP admitted that the appellant ran away from the house but he (PW1) volunteered to add that the appellant *ran away only after Manoj set herself on the fire and after saving her*. Thus, in view of PW1's statement, the defence version coming in the statement under Section 313 Cr.P.C. and through the defence witnesses that the appellant left the house to arrange for a vehicle cannot be believed and has to be rejected. Otherwise also, had the appellant gone out of the house simply to arrange a vehicle to remove the deceased to the hospital, he would have returned home along with the vehicle and would have then proceeded to RTRM Hospital to take care of his wife, the deceased. On the other hand, from the statement of PW24 it is established that after the incident the appellant had escaped and he was arrested on the same day in the evening on the basis of secret information. In fact, in reply to Q. No. 30 in his examination under Section 313 Cr.P.C., the appellant admitted that he was apprehended at about 7:15 P.M. (on 28.08.2008) on the pointing out of a secret informer. Thus, the appellant's absconsion and his false plea that he had left the spot to arrange for a vehicle shows his guilty mind and gives credence to the dying declaration Ex.PW16/B made by the deceased. The dying declaration is further fortified from

the FSL report Ex.PW22/B. As stated earlier, at the time of his arrest, the appellant's clothes were smelling of kerosene. PW24 while referring the appellant and sending him to the Hospital along with PW22 required the doctor to seize the clothes worn by the appellant. As per FSL report Ex.PW27/F, the appellant's clothes were found to contain kerosene oil. The clothes would not get soiled with kerosene oil if a person simply tries to save a person already ablaze and on fire. Presence of kerosene oil on the clothes of the appellant is indicative that he had handled/ thrown kerosene oil on the deceased. Clothes worn by the appellant were not burnt. The appellant had burn injuries on his hand, but not on other parts of his body. These all facts support the prosecution version. The defence version that the deceased set herself ablaze after bolting the door from inside is also falsified from the fact that the I.O. (PW24) did not notice any broken door at the time of his visit to the spot. The appellant preferred not to put any question to PW24 in his cross-examination to elicit material on record in support of the defence version.

22. The dying declaration Ex.PW16/B is further corroborated by the dying declaration Ex.PW19/B recorded by the Executive Magistrate (PW19). In this regard, PW19 deposed that on getting information of Smt. Manoj being removed to RTRM Hospital and then being referred to Safdarjung Hospital (after being burnt), he reached Safdarjung Hospital at about 3:30 P.M. on 28.08.2008. He moved an application Ex.PW19/A to the doctor in-charge, ICU Burn Unit seeking information if the patient was fit to make a statement. PW19 testified that the doctor declared the deceased fit for statement vide her

endorsement Ex.PW5/A. He questioned the patient (the deceased) about the incident and whatever was stated by her (the deceased), the same was recorded by him (PW19) in his own handwriting. PW19 stated that the deceased on account of burn injuries was not able to put her signatures on the statement and, therefore, her thumb impression was obtained on her statement Ex.PW19/B. In cross-examination, a suggestion was given to PW19 that the deceased was not in a fit state of mind to make a statement and that the statement was not correctly recorded by him. PW19 was a Government Servant performing his official duties while recording the statement of the deceased. He was a responsible officer. We do not see any reason as to why PW19 would record the statement falsely. As far as fitness of the deceased to make the statement Ex.PW19/B is concerned, PW5 Dr. Shilpi Baranwal gave the fitness certificate Ex.PW5/A. Nothing was brought in her cross-examination, even a suggestion was not given that the deceased was not fit to make the statement on 28.08.2008 at 3:40 P.M. when the same was recorded by PW19.

23. Although, a contention has been raised on behalf of the appellant that the statement Ex.PW19/B was the result of tutoring as PWs 3 and 4 had met the deceased in the ambulance and had told her to depose against the appellant, however, in the lengthy cross-examination of PWs 3 and 4 to which they were subjected, not even a suggestion was given that they had tutored the deceased to implicate the appellant falsely. Of course, the appellant has got slight burn injuries on both of his hands. That, by itself, will not absolve the appellant of his guilt because we find the dying declarations Exs.PW16/B and PW19/B to

be clear, cogent and consistent. Moreover, these two dying declarations are supported by the testimonies of PWs 3 and 4, the deceased's father and brother, who were orally informed by the deceased that it was the appellant who had set her on fire.

24. As stated earlier, it is well settled that if a dying declaration is found to be true and voluntary, that, by itself, is sufficient to base conviction of an accused even without any corroboration. In the instant case, the two dying declarations are corroborated by the oral statement made by the deceased to PWs 3 and 4. The dying declarations are further fortified by the appellant's conduct in running away from the spot and the presence of kerosene oil on his clothes. Thus, the Trial Court rightly concluded that the prosecution case was established beyond shadow of reasonable doubt; consequently we affirm and uphold the impugned judgment and dismiss the appeal being devoid of any merit.

(G.P. MITTAL)
JUDGE

(SANJIV KHANNA)
JUDGE

MARCH 18, 2014
pst