

Neutral Citation No. - 2023:AHC:225963-DB

Reserved On: 26.10.2023

Delivered On: 29.11.2023

Court No. - 46

Case :- CRIMINAL APPEAL No. - 2865 of 2020

Appellant :- Sukhvir @ Lala

Respondent :- State Of Up

Counsel for Appellant :- Dinesh Kumar Singh

Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Syed Aftab Husain Rizvi,J.

(Delivered by Hon'ble S.A.H Rizvi, J.)

1. Heard the learned counsel for the appellant and learned AGA for the State.
2. This appeal has been preferred by the appellant Sukhvir alias Lala against the judgment and order dated 19.09.2020 passed by Additional Sessions Judge, court no.1/ Special Judge (POCSO Act) Mathura in S.T. No.62/2015 (State of U.P. vs. Sukhvir alias Lala and ors) under section 147, 302, 376D, 34 IPC and Section 5/6 POCSO Act arising out of case crime no.303 of 2015 P.S. Kosi Kalan, District Mathura whereby the appellant has been sentenced to life imprisonment with fine.
3. The allegations of the FIR are that on 19.04.2015 at about 8:00 p.m. the 13 years old daughter of the informant was returning home after attending the nature's call. On the way, Sukhvir called her in the room situated in the *gher* (court yard) of Ramkishore and pushed her inside the room and shut the doorknob from outside. Dinesh, Vikram, Deepak and Vinay who were already present in the room, sexually assaulted her. When the victim did not return for about an hour, the informant with his wife went to search her. They heard the screams of the victim from the room of Ramkishore. The informant and his wife reached there and opened the door, Dinesh, Vikram, Deepak and Vinay Kumar ran away, pushing the informant and his wife and extending death threat. The victim was found in perplexed condition. The informant and his wife took the victim to their house, the victim narrated the entire incident. Due to fear of the accused, informant kept the victim at his house in the night. In the morning of 20.04.2015 at

about 4:00 am the victim being perturbed by the incident attempted suicide by putting herself on fire. She was taken to Harmilap Hospital where she has been admitted.

4. On the aforesaid written information crime no.158 of 2015 U/s 376 D IPC and $\frac{3}{4}$ POCSO Act was registered on 21.04.2015 at 17 O' Clock. S.O. Surendra Singh Yadav took up the investigation. He along with forensic field unit visited the place of occurrence and prepared the site plan at the pointing out of the informant. The Tehsildar Rajit Ram Yadav recorded the statement of victim at Harmilap Hospital, Kosikala Mathura on 21.04.2015 at 6:25 pm. The victim was referred to Safdarjung Hospital, New Delhi for better treatment. The medico legal examination of the victim was conducted which also contains the statement of the victim. The Investigating Officer conducted other proceedings, collected the medical reports, sent the case property for forensic examination, arrested the accused persons and recorded the statements of the witnesses. On 09.05.2015, the victim died at Safdarjung Hospital New Delhi. Inquest proceeding and postmortem was conducted. Section 147 and 302 IPC was added. After concluding the investigation, charge-sheet was submitted against the accused Sukhvir alias Lala, Dinesh and Vinay alias Chotu before the special court. One of the accused named in the FIR was declared juvenile and his case was separated.

5. The special court took the cognizance on the charge-sheet and charges under section 147, 376D, 302/34 IPC and section 6 of POCSO Act were framed against the accused Sukhvir alias Lala, Dinesh and Vinay alias Chotu. The accused denied the charges and claimed for trial.

6. The prosecution produced 10 witnesses who have proved nine prosecution papers marked as Ex.Ka-1 to Ka-9.

7. The statements of the accused were recorded U/s 313 Cr.P.C. Incriminating evidence were put to them. They have denied the allegations of the prosecution and have stated that the victim has not given any statement (dying declaration) as alleged and false documents have been prepared. It is further stated that they have been falsely implicated due to village and family enmity, no such incident as alleged has occurred, the

victim has committed suicide due to torture of her parents. One witness Sohan Lal (D.W.-1) has been examined in defence.

8. The learned trial court after hearing the arguments of the learned counsels of both the parties, by the impugned judgment held the accused appellant Sukhvir alias Lala guilty for the offence under section 376, 302 IPC and Section 6 of POCSO Act and sentenced him as above. The learned trial court however giving benefit of doubt has acquitted the other two accused namely Dinesh and Vinay alias Chotu.

9. The medico legal examination report of sexual violence Ex.Ka.2 and Medico Legal Report Ex.Ka-3 have been proved by Dr. Surichi Gupta (P.W.-6). According to Medico Legal Examination Report of sexual violence Ex.Ka.-2, the age of the victim was about 14 years, she was admitted in Safdarjung Hospital, Delhi on 21.04.2015 at 10:45 pm and the medico legal examination was conducted on 22.04.2015 at 7:00 am. Pubic hair, vaginal smear, vaginal washing collected. No injury was noted on external genitalia. Nail scrapings, nail clippings, oral swab, blood sample and urine sample collected. Sixty percent deep thermal burns with facial and inhalational burns, two days old. In the column of description of incident, the doctor has noted as follows:

“Rape by neighbours in village named Bholu, Deepak and Chotu (Vinay Kumar) on 19.04.2015 at around 7:00 pm in evening at some room in middle of farm. According to patient, she went for toilet with her uncle Sukhvir accompanying him where he suddenly locked her in that room where accused persons were present. On next day, A/H/O/ suicidal thermal burns where present, poured kerosene oil on herself and set herself on fire.”

Due to suicidal thermal burns clothes were burnt.

10. According to medico legal report Ex.Ka.-3 A/h/o/ suicidal thermal burns when the patient poured kerosene oil on herself and set herself on fire. As alleged by the patient, she was raped by the villagers due to which she set herself on fire. The samples of:-

nail scrapings, in b/w fingers, Combing of pubic hairs, clippings of pubic hairs, vaginal secretions, Cervical mucus collection, Washing from vagina, Oral swab, blood of the victim, Urine and oxalate blood vial, were collected.

11. (a) The postmortem of the victim was conducted on 08.05.2015 at about 2:45 pm. According to postmortem report Ex.Ka.-9, as per hospital records, the victim was admitted in the hospital on 21.04.2015 at 10:45 pm and died on 07.05.2015 at 7:15 am. As per inquest report, brief history is *“alleged history of deceased committing suicide by pouring kerosene oil over herself after alleged gang rape on 20.04.2015 at about 4 am. The deceased was referred from Harmilap Nursing Home Kosikalan, Mathura and admitted in Safdarjung Hospital, Delhi where during the course of treatment, she died.”*

(b) In external general appearance, there was surgical dressing present over burn area except face and neck. Built; average, Cornea: hazy, Hypostasis: present over back of body except pressure areas and fixed, Rigor Mortis; developed all over the body, Decomposition Changes; not present.

External Examination (Injuries etc.)

Infected epidermal to dermal thermal burns present over the face, neck, front and back of both upper limbs including palms, chest, abdomen, over back in patches, front of both thighs. Superficial layers of skin are burnt and peeled off at places revealing foul smelling, yellowish green slough overlying necrotic base. Line of redness present at the junction of burn and unburn area. Granulation tissue present at places. Singeing of hair present at places including scalp hair. Burnt area covers approximately 60% of total body surface area.

(c) In internal examination, both limbs were congested and edematous. Multiple patches of consolidation present over the lobes of both the lungs. Cut surface exudes pus mixed fluid. Liver and both kidneys were congested, spleen was congested and enlarged, bladder was empty, hymen tear of size 1 cm X 0.3 cm X 0.2 cm present at 6 O'clock position with redness and edema of margins. Whitish discharge from vagina present. Brain was congested and edematous.

(d) In the opinion of the doctor, the death was due to septcimia as a result of ante mortem infected flame burn injuries involving about 60 % of total body surface area. The injury to the genital are suggestive of forceful penetration

with hard erect penis/ object. The postmortem Ex.Ka-9 has been proved by Dr. Mukesh Kumar Bansal (P.W.-10).

12. Tehsildar Rajit Ram Yadav (P.W.-9) has recorded the statement of victim on 21.04.2015 at 6:25 pm, at Harmilap Hospital Kosikalan. The statement is quoted below:

“बयान कु० हेमलता उर्फ ममता D/O श्री हरी सिंह उम्र 14 वर्ष निवासी नगरिया (दस वीसा) ने बयान किया कि मेरी शादी नहीं हुई है। यह घटना कल दि० 20/4/15 की सुबह की है। बदन का छोरा भोलू व छोटी व दीपक S/O गुल्ला निवासी नगरिया ने जलाया है। लाला S/O किशन ने मेरे साथ गलत काम कराया और उसने ही मुझे जलवाया है। तू घर जाकर लोगो को बतायेगी। इसलिये मैं तूझे जलवा रहा हूँ। घर से थोड़ी दूर पर गैत में लिवा गये। मैं भागना चाहती परन्तु उन लोगो ने मुझे पकड़ लिया। यह घटना सुबह 4.30 बजे प्रातः की है। मेरे साथ दि० 19/4/15 की सांय लगभग 8.30 बजे मेरे साथ भोलू आदि ने गलत काम किया था। दि० 20/4/15 को प्रातः 4.30 बजे मुझे बुलाये और भेद खुल जाने के डर से मेरे ऊपर मिट्टी का तेल डालकर आग लगा दिया। मेरे भैया रवि ने आकर मुझे बचाया। मेरे ऊपर पानी डालकर आग बुझाये।”

The above statement (dying declaration) has been proved as Ex.Ka.8.

13. Five public witnesses, the informant (P.W.-1), the mother of the deceased (P.W.-2), the brothers of the deceased (P.W.-3 & P.W.-5) and uncle of the deceased (P.W.-4) and two other formal witnesses, S.I. Kailash Babu Pandey (P.W.-7) chik writer and Inspector Surendra Singh Yadav the then SO, P.S.- Kosikalan (Investigating Officer) have also been produced.

14. The Defence witness Sohan Lal (D.W.1) has stated that he knew the accused as well as the informant and the deceased. The deceased was in a relationship with some boy of the village and used to go to meet him in the night on pretext of easing herself. Complaint was made to the informant and other family members and the informant admonished the deceased. In the morning of 20.04.2015 when the informant had gone to ease herself, the victim pouring kerosene oil set herself on fire. On getting information, he also reached on the spot, the victim and other neighbours present there, told that the victim has committed suicide by pouring kerosene oil on her due to scolding of her parents. Due to enmity and village rivalry and also to save himself, the informant with legal advice has falsely implicated the accused persons. No incident of rape on 19.04.2015 at about 8:00 pm as alleged, had taken place. He lives in the neighbourhood of the informant, four to five houses away from the house of the informant.

15. The learned counsel for the appellant accused contended that all the public witnesses including the informant have not supported the prosecution case as alleged in the FIR, instead they have set up a different version. It is further contended that the statement of victim (dying declaration) Ex.Ka.-8 recorded by Rajit Ram Yadav (P.W.-9) is wholly unreliable. No fitness certificate has been given by the doctor, although the doctor was present there. The other statement recorded in the medico legal examination report Ex.Ka-2 and Ex.Ka-3 is also not reliable. Dr. Suruchi Gupta (P.W.-6) who has prepared these documents has admitted that the victim was not under her treatment or supervision. The medico legal report Ex.Ka-3 has been prepared by some other doctor. It is further contended that the two statements (dying declarations) one recorded by Tehsildar Ex.Ka-8 and the other recorded by Dr. Suruchi Gupta Ex.Ka.-2 and Ex.Ka.-3 are not identical and there are material variations between the two. The finding of guilt recorded by the trial court is erroneous and illegal.

16. Per-contra learned AGA submitted that there is cogent evidence on record in the form of dying declaration recorded by the Magistrate. Although there is no fitness certificate of the doctor but the Magistrate/ Tehsildar (P.W.-9) has stated that the victim was fully conscious and fit to make statement. The doctor has failed in his duty to give fitness certificate just to avoid the court proceedings. It is further submitted that there is no sufficient ground to disbelieve the dying declaration. The corroboration of the dying declaration is not necessary for conviction. The learned trial court has rightly relied on the dying declaration and the finding of guilt recorded by the trial court is neither perverse nor illegal.

17. The five public witnesses, all near relatives of the deceased have not supported the prosecution case. The informant (P. W. 1), the father of the deceased contrary to the allegations of the F.I.R., in his examination in chief has put up a different version of the incident. The witness has stated that he suspected his daughter because she used to go outside in the night. On 19.04.15 at 8 p.m. his daughter went outside, when she did not return for a long then he went to look her. He saw his daughter sitting and talking with

an unknown boy, her clothes were not in order. Seeing the informant, the unknown boy fled. He asked the name of that boy and why she was talking with him? He came back with her daughter. The informant and his wife then again asked about the boy and said why she is defaming them. His daughter refused to disclose the name of the boy. Then the informant said that he will lodge a report and the police will interrogate her and get the name disclosed. The informant and his wife scolded their daughter, and went to sleep. Their daughter immolated herself. The witness has feigned ignorance about the contents of the first information report. The witness has identified his signature on the written report exhibit Ka 1, however he has stated that the villagers have got the report typed and then he put his signature on it. The witness has been declared hostile by the prosecution. In the cross examination by the prosecution, witness has again stated that he has not read the written report before signing it. The witness has further denied the statement as recorded under section 161Cr.P.C. In his cross-examination by the defence witness has stated that her daughter never complained about sexual assault, she told that she immolated herself. The witness has further stated that her daughter never gave the statement that she was sexually assaulted and set on fire by the accused.

18. P.W.2, the mother of the deceased, has also not corroborated the prosecution case and reiterated the version as stated by P.W.1. This witness has also been declared hostile. In the cross examination by the defence this witness has also denied her statement recorded under section 161 Cr.P.C.. The witness has also stated that her daughter was not in a position to give any statement and she never made any complaint of the accused.

19. P.W.-3 & P.W.-5 are brothers of the deceased, While P.W.-4 is the uncle of the deceased. All these witnesses have also not supported the prosecution case. P.W.-3 & P.W.-4 have feigned ignorance about the incident. They have only stated that the deceased has died during treatment. P.W.-4 has also denied that he saw the accused persons fleeing from the spot. He has also stated that he lives at Hodel. P.W.-5 has categorically denied that accused persons have committed the offence. He has reiterated the version as narrated by his father (P.W.-1). In cross-examination conducted by the

prosecution, these witnesses have denied their statements as recorded U/s 161 Cr.P.C. P.W.-3 has only corroborated the fact that inquest proceedings was conducted before him. The witness has also stated that the deceased has not told any fact to him. P.W.-4 in his cross-examination by the defence has stated that the deceased was scolded by her parents, enraged by it she immolated herself. P.W.-5 in his cross-examination by the defence has stated that his sister was badly burnt and she was not able to speak.

20. As all the witnesses of facts have turned hostile, the prosecution case rests only on the dying declaration. It is settled law that dying declaration has a special sanctity, as at the solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding the circumstances leading to his death. But at the same time, the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so as the accused does not get an opportunity of questioning the veracity of the statement by cross-examination. The dying declaration, if would have found reliable can form the basis of conviction.

21. The Apex Court, in the case of **State of Gujarat v. Jayrajbhai Punjabbhai Varu**, (2016) 14 SCC 151 has laid down that courts have to be extremely careful while dealing with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigating or which may be negligent while recording the dying declaration. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The Courts must bear in mind that each criminal trial is an individual aspect. It

may differ from the other trials in some or the other respect, and therefore a mechanical approach to the law of dying declaration has to be shunned. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous.

22. In **Ramakant Mishra v. State of Uttar Pradesh, 2015 SCC OnLine SC 178** it was held that once statement is found to be genuine, voluntary, consistent, credible and untutored, it assumes great probative value and can be form sole basis of conviction. State of mind of maker is essential for discerning mental fitness of maker of dying declaration and whether maker actually could have contemplated death.

23. So this piece of evidence is to be scrutinized on the above parameters. The dying declaration Ex.Ka.-8 has been recorded by Rajit Ram Yadav (Tehsildar P.W.-9) on 21.04.2015 at 6:25 pm at Harmilap Hospital, Kosikalan where the deceased was first admitted for treatment. Admittedly there is no fitness certificate that the deponent is in a fit mental condition to give statement. There is endorsement on the dying declaration that at the time of recording of statement Dr. Satish Arora was present there and he examined the patient but refused to give any fitness certificate. Rajit Ram Yadav (P.W.-9) in his statement has also admitted the aforesaid facts and has further stated that he has made an endorsement of the above fact on the document. However, the witness has further stated that the patient was fully conscious, the witness has also admitted that the patient was in a serious condition. The witness has further stated that he does not remember whether any other person was present beside the patient at the time of recording of the statement. The witness has also admitted that he has also not made any endorsement that the victim is fit to give statement, he has not attested the thumb impression of the victim on the dying declaration, he has not sealed the envelop containing dying declaration at the hospital rather he sealed it at tehsil building. So there are serious discrepancies. The statement has been recorded without obtaining any fitness certificate while admittedly doctor was present there who has examined the victim but refused to give any fitness certificate.

24. The contents of the dying declaration is at variance with the allegations of the first information report. In the first information report there are allegations that due to incident of the previous night the victim in the early morning at 4:00 am has attempted suicide by setting herself on fire, while in the dying declaration Ex.Ka-8, it is mentioned that Bholu, Chotu and Deepak had set her on fire, Lala S/o Kishan was instrumental in the act of sexual assault upon the victim and at his instance the victim has been set on fire, on the apprehension that she will inform her family members. Further in the first information report, there are allegations that on 19.04.2015 at about 8:00 pm when the victim was returning after attending the call of nature, on the way in the room constructed in the Gaith (field) of Ramkishore, Sukhvir S/o Kishan called her, pushed her inside the room and shut the doorknob. Dinesh, Vikram, Deepak and Vinay who were already present inside the room committed sexual assault on her, while in the dying declaration, it is mentioned that the victim was taken to a field near her house, she tried to run away but the accused caught her, she was sexually assaulted on 19.04.2015 about 8:30 pm by Bholu and others. It is also mentioned in the aforesaid statement that on 20.04.2015 at 4:30 am, the victim was called and set on fire pouring kerosene oil on her, due to fear that incident of sexual assault will come into notice. So the dying declaration is at variance with the allegations of the FIR and two versions cannot be reconciled. The variation is prominent and cannot be ignored. All the aforesaid facts and circumstances doubts the veracity of this dying declaration.

25. There is another dying declaration in form of endorsement made by Dr. Suruchi Gupta (P.W.-6) on the Medico Legal Examination Report (Ex. Ka.-2) and Medico Legal Report (Ex. Ka-3), both these documents have been proved by Dr. Suruchi Gupta. In column no.15A (VII) of Ex. Ka.2 under the heading description of incident in the words of the narrator. Following description is noted:-

“Rape by neighbours in village named Bholu, Deepak and Chotu (Vinay Kumar) on 19.04.2015 at around 7pm in the evening at some room in middle of farm. According to patient, she went for toilet with her uncle Sukhbir accompanying

him where he suddenly locked her in that room where accused persons were present. On next day, A/H/O/ suicidal thermal burns where patient poured kerosene oil on herself & set herself on fire.”

26. However, in this document, doctor has not specified that who has narrated the facts of the incident. In Medico Legal Report (Ex. Ka.-3) almost identical narration has been made. In this document, it is mentioned that patient (victim/ deceased) and her mother have narrated the facts. Dr. Suruchi Gupta (P.W.-6) in her examination-in-chief have stated that the patient/ victim in presence of her mother has narrated the incident. The witness in her cross-examination has further stated that he has mentioned the facts of incident in his report on the basis of enquiry made with the victim and her mother and it is not based only on the enquiry made from the victim. The witness has further stated that she has not separately recorded what the victim has disclosed and what her mother has disclosed, she could not definitely tell whether the names of the accused were disclosed by the victim or her mother. The witness has also admitted that patient/ victim was neither under her treatment nor supervision. The Medico Legal Report (Ex.Ka-3) also reveals that it was prepared by Dr. Chandni S., Sr. Resident (B & P Department) examining medical officer. All columns and the other particulars, the symptoms and the treatment advised are in the hand writing of Dr. Chandni S. In the lower part of the Medico Legal Report (Ex. Ka.-3) Dr. Suruchi Gupta has written about the facts of the incident and particulars related to Medico Legal aspect encircling it.

27. The contents of the two dying declaration Ex. Ka.8 and Ex. Ka2 & Ka-3 are also not similar and there are material contradictions between the two. While in the first dying declaration (Ex.Ka.-8), it is mentioned that the deceased was called in the morning on 20.04.2015 at 4:30 am and set on fire by the accused persons while in the other dying declaration Ex.Ka.-2 and Ka.-3 it is mentioned that the victim herself set on fire being sexually assaulted by the three accused in the night of 19.04.2015.

28. The informant (P.W.-1) has not corroborated the allegations of the FIR and has put up a different version of the incident. As per his version, the deceased used to go outside in the night on the pretext of attending the call

of nature and return after much delay. The informant was suspicious about her conduct. In the night of 19.04.2015 the deceased had gone outside saying that she is going to attend the call of nature. As the informant was suspicious about her activity and it become late, the informant with his wife went in search of the deceased. They found her sitting and talking with an unknown boy, her clothes were not in order, the unknown boy fled from the spot. The deceased refused to disclose the name of the boy. The deceased with her parents returned home where she was scolded by her parents and in the early morning on 20.04.2015 she immolated herself. P.W.-2 the mother of the victim and P.W.-5 the brother of the victim have also supported this version of the incident. This version is also probable. It has been set up by the prosecution witnesses themselves.

29. Three versions of the incident emerges from the material on record. The allegations of the FIR implicates all the accused only for the first incident of sexual assault. It is also the version of Ex.Ka-2 & ka-3. The second version of the incident emerges from the dying declaration Ex.ka-8 which implicates the accused persons for both the incident i.e. the incident of sexual assault occurred in the evening of 19.04.2015 as well as the incident of setting the victim on fire in the morning of 20.04.2015. The third version emerges from the oral testimony of the witnesses and it contradicts the earlier two versions. According to it, the victim was seen by her parents in the company of an unknown boy in the night of 19.04.2015, she was scolded by her parents and enraged by this, she immolated herself in the morning on 20.04.2015. The third version which emerges from the oral testimony of the witnesses is also probable and this eventuality cannot be ruled out. It is settled legal position that if two views are possible then the one which is favourable to the accused will have to be accepted and benefit will be extended to him.

30. On the basis of above analysis, it is clear that the dying declarations Ex. Ka-8 and Ex. Ka-2 & Ex. Ka-3 are at variance. There are serious discrepancies and material contradictions and in the facts and circumstances of the case, both the dying declaration are not reliable, particularly in view

of the facts that there is another version of the incident which emerges from the oral testimony of the witnesses and which does not implicate the appellant accused.

31. We have gone through the judgment of the learned trial court. The trial Court relying on the prosecution evidence i.e. the dying declaration has held that appellant-accused guilty, but on the same evidence has acquitted the other co-accused giving them benefit of doubt. The learned trial court has failed to appreciate the evidence and has erred in relying upon the dying declaration. The finding of the guilt recorded by the learned trial court is not sustainable.

32. The appeal is allowed and the conviction and sentence of accused-appellant Sukhvir alias Lala vide judgment and order dated 19.09.2020 passed by the court below is reversed. The appellant-accused is acquitted of the charges by granting him benefit of doubt and shall be released on compliance of Section 437A Cr.P.C., provided he is not required in any other case.

33. Lower court record along with copy of the judgment be transmitted to the trial court immediately for compliance.

Order Date :- 29.11.2023
C. MANI