

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

Judgment Reserved on: January 29, 2016

% *Judgment Delivered on: February 08, 2016*

+ **CRL.A. 387/2000**

SUNIL KUMAR

..... Appellant

Represented by: Mr.Harsh Prabhakar, Advocate.

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP for
the State with SI Sachin, PS
Vasant Vihar.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Based on the three dying declarations of the deceased Kamlesh, wife of the appellant, Sunil Kumar has been convicted for the offence punishable under Section 302 IPC.
2. The three dying declarations of Smt.Kamlesh were the MLC Ex.PW-4/A, statements made to the Investigating Officer SI Satya Pal Sharma PW-13, Ex.PW-6/C-1 on the basis of which FIR was registered and to the SDM Smt.Devasri Mukherjee PW-11, Ex.PW-11/A.
3. In the MLC Ex.PW-4/A recorded at 11.15 a.m. on February 06, 1994 Kamlesh informed the doctor herself and it is recorded "*history of alleged to have sustained burn injuries when her husband set her on fire by pouring kerosene oil over her*".
4. In the statement made to Inspector Satya Pal Singh PW-6/C-1 at around 12.30 noon on February 06, 1994, Kamlesh stated that she was

residing at 80A/4, Vasant Village. She was married to Sunil Kumar s/o Inderjit Sharma around ten years ago and had two children named Deepak aged 4 years and Neha aged 1½ years. For the last 8-9 months she was residing at the said house on the first floor. Her husband Sunil Kumar was addicted to smack and was not doing any work. Besides he also asked for money from her and assaulted her. Sunil would sell small things of the house and when Kamlesh stopped him he would beat her. On the said day, in the morning at around 10.00 a.m. she was at home when Sunil brought smack. She again objected, took the smack from him and threw it. Sunil started beating her, poured kerosene oil on her and lit her by the matchstick. When she shouted, her sister-in-law Savitri and other people came and started dousing the fire. Later her husband also doused the fire but when other men came he ran away. She was brought to the hospital by her brother-in-law Satish and his wife.

5. The third dying declaration Ex.PW-11/A made to the SDM Smt.Devasri Mukherjee PW-11 is in question answer form and we note: -

*“Statement of Smt.Kamlesh, w/o of Sunil, R/o Vasant Gaon.
Age: 25 years*

Q. When were you married?

Ans. 10 years ago.

Q. Do you have children?

Ans. Yes, one boy and one girl. Boy is aged 4 years and the girl of 1½ years.

Q. Did your in-laws demand dowry in your marriage.

Ans. They did not ask for dowry at the time of marriage however, later on mother-in-law and father-in-law used to ask for it. Husband also used to ask for it.

Q. Were you beaten?

Ans. Yes, three of them used to beat too much.

Q. What is the name of your father-in-law?

Ans. Inderjit Sharma.

Q. And your mother-in-law?

Ans. Leela.

Q. How did you suffer burn injuries?

Ans. My father-in-law used to tell his son that lit her by pouring kerosene oil. I used to stay on the first floor and my father-in-law and mother-in-law on the ground floor. On the second floor my elder brother-in-law and his wife used to stay. Today morning around 10.00 -11.00 a.m. we (husband and wife) had a fight. Thereafter all these three persons pour kerosene oil and lit me by the matchstick. Kerosene oil was given by my father-in-law from the ground floor. My husband is smack addict and used to fight with me after taking smack. All three used to demand dowry. I was burnt on the first floor.

Q. Who doused the fire?

Ans. My brother-in-law and his wife.

Q. Who brought you to the hospital?

Ans. My brother-in-law and his wife.

Q. You want to say something more?

Ans. Thats all. I have heard the statement and the same is correct.

6. The right toe impression of Smt.Kamlesh was taken as her hands were bandaged. Since in the dying declaration to the SDM, Kamlesh also implicated her father-in-law and mother-in-law they were also charge-

sheeted and faced trial. However, vide the impugned judgment the father-in-law and mother-in-law, that is, Inderjit Sharma and Leelawati have been acquitted whereas Sunil Kumar, the husband has been convicted for offence punishable under Section 302 IPC.

7. Assailing the impugned judgment the learned counsel for the appellant states that there is no material on record to show that before recording the statements Ex.PW-6/C1 and Ex.PW-11/A the doctors certified Kamlesh to be fit to make the statement. No such fitness has been proved by the prosecution. The appellant was arrested on the same day in the evening from the Jungle near Vasant Vihar and was medically examined which revealed that he had sustained minor superficial 1% injuries over the face, index finger and middle finger of his left hand establishing that he tried to douse the fire of Kamlesh and thus Kamlesh committed suicide and the appellant did not burn her. This fact is supported by the statement of Baljeet Sharma, brother of Kamlesh who stated that the behaviour of Sunil with the deceased was normal and his sister used to tell him that she would commit suicide in case Sunil did not improve his habit of consuming smack. Baljeet Sharma, examined as PW-5, also stated that his sister was of emotional temperament, had short temper and that she had committed suicide. Dr.Chander Kant PW-6 who conducted the post-mortem in his report Ex.PW-6A opined that the throat of the deceased was congested and she was able to speak with difficulty and thus she could not have got recorded the three dying declarations. Kamlesh in her dying declaration has stated that there was a quarrel before she was doused in kerosene and burnt however, there was no signs of struggle found on the body while conducting the post-mortem.

8. Learned counsel urges that when the truth in the statements of the witnesses is inextricably interwoven with falsehood and it is impossible to disengage the truth from falsehood it would be permissible to discard such evidence in toto. Though the genesis of occurrence was the factum of the deceased snatching a packet of smack from Sunil and throwing away however, from the spot no packet of smack has been recovered. Even if the version of the deceased in the dying declarations is accepted by way of demurer, the offence at best would be punishable under Section 304 Part-II IPC as the quarrel between the couple erupted suddenly on a trifling issue and regrettably the unfortunate incident transpired in the heat of the moment. This is further evident from the fact that the appellant made efforts to douse fire and he himself got burnt on the face and hands. Reliance is placed on the decisions reported as 2000 SCC (Cri) 86 Kalu Ram vs. State of Rajasthan, (2006) 11 SCC 444 Pulicherla Nagaraju @ Nagaraja Reddy vs. State of A.P. and (2011) 181 DLT 790 (DB) Vinod Kumar vs. State.

9. As noted above the first dying declaration was made by the deceased Kamlesh at 11.15 AM on February 06, 1994 to Dr.R.K.Srivastava PW-4 and the MLC Ex.PW-4/A notes that the informant was patient herself. MLC also reveals that the patient was conscious though irritable and critical. The patient had suffered fresh thermal injuries over neck, chest, abdomen, both lower limbs, lower part of back and both upper limbs comprising of 70% burns.

10. PW-4 in his cross-examination clarified that by the word “irritable” he meant that she was demanding water, complaining of pain and crying. On a Court question he reiterated that the patient made the statement with conscious mind and appeared to be normal. No doubt the prosecution has

not proved that when the two dying declarations i.e. one recorded by SI Satyapal Sharma PW-13 and the other by SDM Smt.Devasri Mukherjee PW-11 were recorded fitness certificates were obtained from the doctor. However, it may be noted that the MLC was recorded at 11.15 AM and the statement recorded by PW-13 based on which FIR was registered was at around 12.30 Noon. PW-4 has deposed about the fitness of the deceased at 11.15 AM. SI Satyapal Sharma has clarified in his cross-examination that when he recorded the statement there was no relative of Kamlesh and she was alone. Similarly, the statement Ex.PW-11/A recorded by the SDM is also a detailed statement in question-answer form which shows that the deceased was in a fit state of mind to make her statement. The fact that Kamlesh was conscious oriented is evident from the cross-examination of PW-11 who stated that though Kamlesh was in pain but she answered the questions put to her. Further Kamlesh herself gave her name, name of her husband, residence, age and other particulars.

11. The Constitution Bench in the decision reported as (2002) 6 SCC 710 Laxman vs. State of Maharashtra held that certification by a doctor as to the fitness of the declarant is a rule of caution and the voluntariness and truthful nature of the declaration can be established even otherwise. It was held:

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to

accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to 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 looks 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. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. 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. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without

examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

12. In view of the improvement made in her statement to the SDM the parents of Sunil have already been acquitted. However, even ignoring the statement made to the SDM, the two dying declaration made by Kamlesh to the doctor PW-4 and the investigating officer PW-13 are sufficient to sustain conviction of the appellant Sunil Kumar for the offence committed.

13. Learned counsel for the appellant has also sought to assail the dying declaration on the count that neither the packet of smack on which the quarrel started was recovered from the spot nor there were injuries on the body of the deceased, though she claimed that she was beaten. The packet of smack having not been recovered would not belie the statement of the deceased because the place of occurrence was unguarded till the Police reached there after 12 O'clock. Further body of the deceased having suffered 70% deep burn injuries no marks of assault would be visible which would be only superficial in nature as the deceased did not allege that she was beaten by any instrument either sharp or blunt.

14. Based on the statement of the elder brother of the deceased PW-5 Baljeet Sharma that the deceased committed suicide which is further fortified by the fact that Sunil Kumar tried to save her and suffered burn injuries learned counsel for the appellant contends that the deceased committed suicide and was not murdered. PW-5 Baljeet Sharma is not an eye-witness to the incident and thus his deposition is not relevant. This witness was declared hostile and it would be relevant to note the observation

of the learned ASJ while his statement was being recorded that while answering the question he would look towards the counsel for the accused. Further in his statement under Section 313 Cr.P.C. Sunil Kumar has not stated that he suffered burn injuries while saving the deceased, he rather claims that the report of the doctor was incorrect and he had suffered no injuries. Thus having received 1% superficial burns cannot be a mitigating factor in favour of Sunil Kumar.

15. In view of the consistent dying declarations one made to the doctor PW-4 and the second to the investigating officer PW-13 SI Satyapal Sharma soon after the incident when the deceased Kamlesh was conscious and in a position to speak as deposed by the witnesses, we find no reason to interfere in the judgment of conviction and order on sentence.

16. Appeal is dismissed. Bail bond and surety bond of Sunil Kumar are cancelled. He would surrender to custody.

17. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

FEBRUARY 08, 2016
‘vn/ga’