

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

RESERVED ON : 2nd MARCH, 2016

DECIDED ON : 29th MARCH, 2016

+ CRL.A.1457/2014

KAMALKANT

..... Appellant

**Through : Mr.Gurmeet Singh and Ms.Azma
Parveen, Amicus Curiae**

VERSUS

THE STATE OF NCT OF DELHI

..... Respondent

Through : Mr.Vinod Diwakar, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 13.10.2014 of learned Addl. Sessions Judge in Sessions Case No.37/2014 arising out of FIR No.88/2009 PS Bindapur by which the appellant – Kamalkant was held guilty for committing offence punishable under Section 304 Part-I IPC, the instant appeal has been filed by him. By an order dated 15.10.2014, he was sentenced to undergo RI for seven years with fine ₹10,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 09.03.2009 at around 09.30 a.m. at RZV-129, Bhagwati

Vihar, Uttam Nagar, the appellant along with his other family members Ajay Singh, Kamlesh and Deepak Kumar (since acquitted) in furtherance of common intention poured kerosene on the victim – Mamta resulting in her death. Victim – Mamta was married to Kamalkant on 15.08.2008. It was a love marriage against the wishes of her parents. After the marriage, she lived at her matrimonial home for about two months. Thereafter, they shifted to a rented accommodation at RZV-129, Bhagwati Vihar, where the incident took place. Police machinery came into motion on getting information on 09.03.2009 at around 09.10 a.m. from informer recorded vide Daily Diary (DD) No.18A that his daughter has been set on fire by her family members. Vide DD No.20A recorded at 09.40 a.m. Duty Constable at DDU Hospital informed that Mamta had been admitted by her husband in burnt condition in the hospital. The investigation was assigned to SI Dilip Singh who along with Const.Rajesh went to the spot and met the landlady – Anita who informed that the victim residing on the 2nd floor had got burn injuries and had been taken to the hospital by her husband. The Investigating Officer went to DDU Hospital and came to know that the victim had been shifted to Safdarjung Hospital. Application (Ex.PW-5/A) was moved to record the victim's statement; she was declared fit to make statement. PW-21 Sh. Manjeet Singh recorded her

statement. A case under Sections 498A/307 IPC was lodged by the Investigating Officer. On 14.03.2009 on the intervention of Ms. Jyoti Dharmendra, posted at Delhi Commission For Women, second statement of the victim was recorded by PW-21 Sh.Manjeet Singh, SDM. Efforts were made to find out the perpetrators of the crime. On 17.03.2009, the appellant was arrested. The victim expired on 12.04.2009 in the hospital. Post-mortem examination of the body was conducted. Statements of the witnesses conversant with the facts were recorded. The other accused persons were also arrested subsequently. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. On 25.05.2009 the investigation was entrusted to PW-19 (Insp.Payare Lal). On 30.06.2009 the complainant Sodan Singh, along with his wife Mithlesh joined the investigation and assisted the Investigating Officer to prepare an extract of CD received by him through 'dak'. It contained the statement of the victim recorded in the hospital. Upon completion of the investigation, a charge-sheet was filed against the appellant and his family members – Ajay Singh, Kamlesh and Deepak Kumar for commission of offences under Sections 302/34/108/304B/498A IPC. The Trial Court charged the appellant and his associates for committing offence under Section 304 Part-I IPC. By an order dated 17.07.2012 in Criminal

Revision Petition No. 704/2009, this Court ordered to proceed under Sections 302/34 IPC. Accordingly, a charge under Sections 302/34 IPC was framed on 07.01.2013. In order to establish its case the prosecution examined 29 witnesses and relied on various documents. In 313 Cr.P.C. statements, the accused persons denied their involvement in the crime and pleaded false implication. The Trial Court after considering the rival contentions of the parties and on minute appreciation of the evidence acquitted Ajay Singh, Kamlesh and Deepak Kumar of the charges. It is relevant to note that State did not challenge their acquittal. The trial resulted in appellant's conviction under Section 304 Part-I IPC. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Admittedly, the victim was married to the appellant on 15.08.2008; it was a love marriage against the victim's parents who had lodged complaint against the appellant for kidnapping her (Mamta). The victim – Mamta was interested to marry and live with the appellant. Document executed at the Police Station at pages 649 and 651 (of Trial Court Record) reveals that the victim had given her consent to live with the appellant. Both of them had thereafter, lived at the matrimonial home for about two months. Since the relations with in-laws were strained, they

both started living in a rented accommodation where the incident took place.

4. It is also not in dispute that on 09.03.2009 at around 09.30 a.m. Mamta sustained severe burn injuries on her body. She was immediately taken by the appellant to DDU Hospital from where she was shifted to Safdarjung Hospital. PW-20 (Dr.Rishi) medically examined Mamta, aged around 30 years. On local examination, she was found to have sustained burns over chest, abdomen, back and perineum, both thighs, neck and face constituting about 85% – 90% burns (MLC Ex.PW-20/A). She succumbed to the injuries on 12.04.2009. It is relevant to note that the appellant had also sustained burn injuries in an attempt to rescue her; he was also medically examined on 09.03.2009 at D.D.U. Hospital.

5. Undeniably PW-21 (Sh.Manjeet Singh) Tehsildar / Executive Magistrate, Najafgarh, who was promptly informed about the occurrence recorded victim's statement (Ex.PW-21/A) on 09.03.2009. Again on receipt of a call from Delhi Commission For Women on 14.03.2009, he recorded victim's statement (Ex.PW-21/B). PW-1 (Sodan Singh) – deceased's father produced CD (Ex.P1). This CD on judicial record was played on the personal laptop of the Presiding Officer on 12.11.2013 in the Court. It contained recording of victim's dying declaration. To

ascertain its authenticity, the Presiding Officer ordered to send the CD to Forensic Science Laboratory. Report Ex.PW29/A was subsequently collected.

6. At the outset, it may be mentioned that the prosecution case hinges entirely upon circumstantial evidence. There was no eye witness to the incident. During investigation, statements of PW-7 (Ashok Kumar) and PW-8 (Ramesh Kumar) were recorded under Section 161 Cr.P.C. in which they claimed to have seen Ajay Singh, Kamlesh and Deepak coming out of the rented accommodation where the victim lived in the morning hours on 09.03.2009. They further informed that they had seen smoke coming out from the said house that time. Their statements / versions were rejected out-rightly by the Trial Court. No valid reasons prevail to deviate from the findings recorded by the Trial Court in this regard. PW-7 (Ashok Kumar) and PW-8 (Ramesh Kumar) were related to the complainant. Their presence at the spot was highly unnatural and improbable. They did not inform the police about the incident; they did not go to the spot to verify if any fire had taken place in the rented accommodation; they did not take the victim to the hospital. Their sole motive was to implicate the appellant's family members which they miserably failed to do so. PW-3 (Anita) is the landlady. She in her Court

statement deposed that at around 07.00 a.m. on hearing Mamta's cry, she rushed towards the 1st floor. When she had taken two or three steps upstairs, she saw Kamalkant bringing Mamta downstairs; she had sustained burn injuries. She did not know anything more about that. She was cross-examined by the learned Addl. Public Prosecutor after seeking Court's permission. In the cross-examination, she denied if she had seen Mamta burning and her husband pouring water on her. She denied the suggestion that Mamta was telling the accused that he would have to save her as he had put her on fire. The landlady did not claim if she had gone to the spot.

7. Indisputably, three dying declarations of the victim have surfaced on record. First dying declaration (Ex.PW-21/A) was disbelieved by the Trial Court considering that it was made by the victim being under pressure from her husband who had taken her to the hospital. In this dying declaration (Ex.PW-21/A), Mamta had told that on the previous night, she had applied kerosene on her body to get rid of her pain. When in the morning she went to prepare tea and lit the stove, she caught fire. This dying declaration seems unbelievable as nothing has emerged on record if the victim was suffering from any severe disease to apply kerosene on her body. No medical document has been placed on

record showing if any treatment taken by the victim in this regard had failed. The Trial Court has rightly observed that inflammability of the kerosene would subside within an hour or so if exposed to air. It was highly improbable that kerosene applied at night on the body would catch fire on the next morning resulting in severe burns covering almost the whole body. Apparently, the victim who had performed love marriage with the appellant did not wish to implicate him or anybody else at that time.

8. The third dying declaration purportedly given by her is recorded in CD (Ex.P1), the transcript of which is Ex.P1/X. The Trial Court has suspected its authenticity. PW-1 (Sodan Singh) – victim's father deposed that on 16.03.2009 when her daughter informed him that there was some bungling in the recording of her statement, he brought a videographer in the hospital and got her statement recorded through videography. The said videographer handed over to him the CD (Ex.P1) of the said recording. In the cross-examination, he disclosed that it had taken more than an hour in getting the videography done. It was not handed over to the police on the same day and he was not aware as to when it was handed over to the police. He was unable to reveal the name of the videographer, his address and shop number.

9. No reliance can be placed on this CD containing victim's alleged dying declaration as the videographer who had allegedly prepared it has not been produced and examined. The circumstances in which this dying declaration was recorded are also doubtful as no permission was taken from the doctor before recording it. It is unclear if she was mentally fit to make any such comprehensive statement. No intimation was given to the police before recording the dying declaration. It was not recorded in the presence of any hospital staff. It cannot be inferred if the contents in the statement were made by the victim with her free consent or she was not under any influence or pressure from her parents. The detailed facts mentioned in this dying declaration reflect that she was aware of day-to-day activities / progress of the case and was irritated for not adhering to the advice of her parents to investigate the case properly. She even levelled allegations of partisan against the police officials and the doctors. The contents of this dying declaration are entirely at variance with her previous two dying declarations. No explanation has been offered as to why there was major deviation from her earlier two versions.

10. Appellant's conviction under Section 304 Part-I IPC is primarily based upon the second dying declaration (Ex.PW-21/B) recorded on 14.03.2009. The circumstances in which this declaration

Ex.PW-21/B came into existence are suspect. Admittedly on 09.03.2009 PW-21 (Sh.Manjeet Singh), Executive Magistrate / Tehsildar had already recorded the dying declaration (Ex.PW-21/A) at Safdarjung Hospital and had taken her thumb impression over it. He had also recorded her father's statement (Ex.PW-1/A) that time. In the said dying declaration, the victim had exonerated the appellant. She did not speak about the presence of any of her family members at the spot and did not assign or attribute any role whatsoever to them. The victim's parents did not raise any objection at that time about the authenticity and genuineness of the said statement made by the victim. In his deposition, PW-21 (Sh.Manjeet Singh) disclosed that after 3 or 4 days victim's father met and told him that Mamta wanted to make another statement. He also received a call from Women Commission in that regard. On 14.03.2009, he again went to Safdarjung Hospital and recorded her statement (Ex.PW-21/B). PW-21 (Sh.Manjeet Singh) did not enquire from the victim as to why she intended to make second dying declaration after recording her first dying declaration on 09.03.2009. He even did not seek any permission from the doctor to ascertain if the victim was physically and mentally capable to make the statement. He did not try to inform the concerned Investigating Officer / Police. Victim's father Sodan Singh did not move any specific

application to record her second dying declaration. PW-17 (Jyoti Dharmendra) from Delhi Commission for Women informed that on 13.03.2009 victim's mother Mithlesh had approached her informing that her daughter had not given complete statement before the SDM and her statement should be recorded again. She then called the SDM and told him to record victim's statement again. In the cross-examination, she admitted that everything was verbal and no directions in writing were given to the Executive Magistrate. This procedure followed by PW-17 (Jyoti Dharmendra) cannot be accepted as no complaint in writing was received by her from the victim or her parents. She, on her own, had without verifying the allegations by the victim's mother orally directed the Executive Magistrate, a responsible Officer, to record the statement of the victim again without informing the police / Court. PW-21 (Sh.Manjeet Singh) was also not expected to follow the verbal directions. It is unclear if the dying declaration (Ex.PW-21/B) was made by the victim with her free consent voluntarily. Apparently, her parents were in her company in the hospital from the very inception and were taking care of her. She herself did not complain if the statement given by her on 09.03.2009 was deficient and she wanted to make additional dying declaration. In the statement (Ex.PW-21/B), she did not give any reason for changing her

previous version (Ex.PW-21/A). She did not claim if at that time, she was under appellant's pressure or that the facts disclosed by her at that time were incorrect. This dying declaration was apparently recorded when victim's parents were present with her. So possibility of the victim to be under the influence of her parents cannot be ruled out. It is so because subsequently the victim's parents produced another dying declaration contained in the CD (Ex.P1) where she improved her version and implicated not only the appellant but his family members also.

11. Even if the facts disclosed in the second dying declaration (Ex.PW-21/B) are taken as correct, in my considered view, these are not sufficient to conclude that the appellant was guilty of committing offence under Section 304 Part-I IPC. The victim herself had disclosed in this dying declaration that the incident was an 'accident' and the appellant had no 'intention' whatsoever to put her on fire. A quarrel had taken place between her and the appellant on the previous day of the occurrence forcing him to leave the house. It was the victim who brought him back to the house at around 11.30 p.m. Again, on the next morning allegedly there was an altercation between the two. Allegedly to put an end to all the problems, the appellant poured kerosene on the victim when she was preparing tea. In the dying declaration, no further overt act was attributed

to the appellant. He did not put the victim on fire; he did not instigate her to commit suicide. He was not having any match stick to set her ablaze. The appellant went to the bed and started packing/picking clothes with intention to leave the house. Apparently, the victim had no intention to put the victim on fire. It was only when the victim tried to snatch the clothes from him, she was slapped and pushed as a result of which, she fell on the gas inside the room and caught fire. Needless to say, the appellant's had no intention whatsoever to push her on the fire with an intention to burn her. His post-event conduct is quite natural. Soon after the victim caught fire, he tried to extinguish it with the help of quilt; made her to sit under a tap. After extinguishing the fire, he wrapped her in the bed-sheet and immediately took her to the hospital. In the process, he also sustained burn injuries. Obviously, he had tried his best to save the victim. She also disclosed that it was an 'accident' and the appellant had no intention like that. In my view, the contents of second dying declaration do not establish commission of any offence of culpable homicide.

12. On perusal of the record, it reveals that victim's parents at all costs wanted the appellant and his family members to be implicated in the case. They had lodged number of complaints levelling various allegations

before various authorities repeatedly. Since the victim had dared to marry the appellant against her parents' wishes and it was an elopement with consent, apparently, victim's parents were annoyed and did not approve the appellant's action. They succeeded to implicate the appellant and his family members by lodging various complaints. They relied upon contradictory and conflicting dying declarations purportedly made by the deceased.

13. In '*Mehiboobsab Abbasabi Nadaf vs. State of Karnataka*', 2007 (13) SCC 112, Hon'ble Supreme Court held that conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They therefore, should not be accepted on their face value.

14. In '*Amol Singh vs. State of M.P.*', 2008 (5) SCC 468, the Supreme Court held :

"Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality

of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

15. Conviction on the basis of second dying declaration which is in contradiction to the first and third dying declarations cannot be sustained. There is no other material on record to show the complicity of the appellant in the crime. Contents of the second dying declaration have not been corroborated by any other independent source.

16. In the light of above discussion, conviction and sentence recorded by the Trial Court are unsustainable and are set aside. The appeal is allowed. The appellant shall be released forthwith if not required to be detained in any other case.

17. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information / compliance.

18. While going through the Trial Court record it came across that certain documents at page Nos.671 to 698 pertain to some other case / FIR. It appears that due to gross negligence, the concerned Ahlmad has attached / tagged these papers including original ones in this file. The concerned official be directed to remain careful. The said papers shall be detached and placed in the proper file(s).

(S.P.GARG)
JUDGE

MARCH 29, 2016 / tr