HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

D.B. Criminal Appeal No.984/2011

Gopal Tank Son of Shri Ghasi, by Caste Khatik, Resident of Kumharon Ka Mohalla, Police Station Harmada, District Jaipur (Appellant in judicial custody at Central Jail, Jaipur)

Appellant

Versus

State of Rajasthan through P.P.

Respondent

For Appellant(s) : Shri Santosh Kumar Jain

For Respondent(s) : Smt. Sonia Shandilya, P.P.

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ

HON'BLE MR. JUSTICE KAILASH CHANDRA SHARMA

Judgment

23/11/2017

(PER HON'BLE MOHAMMAD RAFIQ, J.)

This appeal is directed against the judgement dated 28.6.2011 passed by the Additional Sessions Judge (Fast Track) No.1, Jaipur District, Jaipur in Sessions Case No.117/2010 by which accused-appellant Gopal Tank has been convicted for offence u/s.302 IPC and sentenced to undergo imprisonment for life with a fine of Rs.2,000 and in default whereof to further undergo simple imprisonment of one month.

Brief facts giving rise to this appeal are that Shri Dharmveer Singh, SHO, Police Station Harmada, Jaipur lodged an FIR at Police Station Harmada, Jaipur on the basis of the parcha bayan

recorded on 01.10.2010 of deceased Smt. Sunita at Burn Ward, S.M.S. Hospital, Jaipur under Sections 498A, 307 IPC as FIR No.412/2010. After investigation, the police submitted challan under Section 304-B read with Section 302 IPC before the Judicial Magistrate, Chomu, District Jaipur and the case was committed to the learned Sessions Judge, Jaipur, District Jaipur on 27.11.2010 for trial. Prosecution produced ten witnesses and exhibited 15 documents in support of its case. The statement of the accused appellant was recorded under section 313 Cr.P.C. and for his defence three witnesses were examined. On the basis of the evidence available on record and after hearing both the parties, the learned trial court convicted and sentenced the accused-appellant by its judgment dated 28.06.2011 in the manner as stated above.

Shri Santosh Kumar Jain, learned counsel for the accused-appellant has argued that the impugned judgment, being against the material and evidence available on record, is illegal, arbitrary, unjust and improper. The prosecution witnesses PW1 to PW10 have not stated in their statements that the appellant has committed offence under Section 302 IPC. Their statements are contradictory to each other. Not even a single witness has proved the offence of Section 302 IPC against the appellant. The appellant had no intention to murder the deceased and they loved each other. There is no proof of any dispute between them and even the mother of deceased and house owner have not stated anything regarding any dispute between them.

It is contended that the prosecution had not produced Sub-Divisional Officer as witness before the trial court and had not proceeded under Section 176 Cr.P.C. It had also not submitted panchnama regarding her burning by the husband while the father of the deceased was present at the time of panchnama. It is contended that the house owner of the accused was not present on the spot. Initially the deceased was admitted for treatment under the control and supervision of Dr. Asha Ram (PW4), who has stated in his statement that deceased had burnt herself in the house but the SHO has wrongly recorded the statement of the deceased. No witness has stated in his statement regarding date and time when mother of the deceased and police was present. It is also not mentioned that before recording the statement the deceased was competent to give statement. It is contended that the prosecution has not produced the Doctor who has written that the deceased was able to give her statement and she was conscious and her mouth and eye were tied by bandage. After investigation, Section 302 IPC was added by the Investigation Officer while the FIR was lodged under Sections 498-A and 307 IPC.

Learned counsel for the accused-appellant submitted that as per the statements of the witnesses, it is not clear that the intention of the appellant was to commit murder of deceased. Therefore, without proving intention to commit murder, the trial court cannot convict the appellant under Section 302 IPC.

Smt. Sonia Shandilya, learned Public Prosecutor opposed the appeal and submitted that on the basis of evidence on record, the

accused-appellant has rightly been convicted for the alleged offences and there is no justification for interference by this Court. She in support of his arguments has relied on the judgements of the Supreme Court in Prempal vs. State of Haryana-(2014) 10 SCC 336 and Rajeev Kumar vs. State of Haryana-(2013) 16 SCC 640. It is therefore prayed that the appeal be dismissed.

We have given our anxious consideration to the rival submissions and perused the material on record.

The arguments raised by the defence is that the parcha bayan of the deceased Sunita Devi (Ex.P20) and the dying declaration (Ex.P17) could not be believed as they do not inspire confidence, is noted to be rejected. The parcha bayan of Santosh Devi was recorded at 1.45 PM on 1.10.2010 on the day of incident itself in which her statement is quite categorical that after separating from her in-laws, she and her husband accused-appellant-Gopal Tank started living in a rented room. She had daughter aged about two months. Earlier her husband used to earn his livelihood by working as a Conductor in the transport bus at route no.31, but for past 3-4 months, he was not working anywhere. The deceased used to often scold her for not working and bringing the money for day to day household expenses. In the morning at about 8 am, she asked her husband to go outside and work somewhere to earn his livelihood. On this, he got infuriated and rather asked deceased to go to her mother and fetch some money. When the deceased refused to oblige, the accused became furious and poured the kerosene oil from a jerrican lying in the room over the body of the deceased and then lit the fire by match

box. When the deceased started crying, he then poured water over her body and ran away. The residents of the locality immediately took her to the hospital in an Ambulance. This statement was recorded by Investigating Officer Dharamveer Singh (PW10), who has stated that before recording the parcha bayan, he had taken the fitness certificate from the treating Doctor. Later the dying declaration of the deceased was recorded in the presence of the Judicial Magistrate after obtaining the certificate of fitness from the treating Doctor. Ex.P17 is the dying declaration, which was recorded in the presence of Bhupendra Kumar Meena (PW9), who has proved the dying declaration as also the application he gave to the Deputy Director Burn Ward Unit (Ex.P16) on which the fitness certificate has been given by him. In the dying declaration (Ex.P17), the first question was raised by Judicial Magistrate about the name, which the deceased correctly mentioned as Sunita. Second question was where she was residing, to which she answered that she was residing in a rented room in Jagdishpuri Colony in Harmada with her husband and third question was as to how the incident took place, which was answered by Sunita in the terms that her husband Gopal poured kerosene oil over her body and lit the fire and it was only Gopal, who had burnt her. Since the hand of the deceased was burnt, the thumb impression of left hand was obtained on this dying declaration.

This is evident from the aforesaid parcha bayan in which too her thumb impression of right hand was not affixed because her hand was burnt by fire and was covered by bandage. Mere non-

examination of the Doctor, who gave the fitness would not be fatal to the case of the prosecution because the Court has to find out whether the parcha bayan of the deceased, which is then corroborated and reiterated by dying declaration can be relied without corroboration and if found deficient in certain aspects, can it be relied on sufficient corroboration being found thereof. As per the settled proposition of dying declaration, if the dying declaration inspires confidence, this by itself can form basis for conviction and it can be relied even when the certificate of fitness has not been obtained by the Doctor. This Court cannot countenance the argument that the certificate of fitness given by the Doctor (Ex.P16) is not clear enough because the application given by the Judicial Magistrate contains the certificate given at 1.55 pm on 1.10.2010, which is clearly legible and states that the patient was fit to give statement. The argument has been made that since the patient was wearing oxygen mask because the Judicial Magistrate has stated that he did not know whether or not the face of the deceased was covered by bandage, such argument cannot be accepted because the statement of Judicial Magistrate Bhupendra Kumar Meena (PW9) has to be read as a whole, who has supported the case of the prosecution substantially and proved the dying declaration recorded by him. There is no reason why he would not correctly record the dying declaration.

Contention that in the medico legal report (Ex.P1), the extent of burn injuries was indicated to be 76%, whereas in the postmortem report (Ex.P3), it is as much as 93% and the benefit of this contradiction should go to the accused, is noted to be

rejected. The difference to the extent of burns may be an assessment of individual Doctor and could be incorrect on the part of one of them, but there is no dispute on the fact that deceased died of the extensive burn injuries.

As far as the fact that thumb impression of left hand had to be taken on the postmortem report (Ex.P3) is concerned, Dr. Priyanka Sharma has proved the postmortem report and stated that thumb impression of left hand as well as toe impression of the left leg was taken in the postmortem report. She has stated that there was ink visible on the thumb of the left hand and toe of the left feet. In fact, Dr. Priyanka (PW6) has stated that as per the record deceased was admitted in Plastic Surgery Ward on 1.10.2010 and the inquest report of the deceased shows that she died of the burn injuries and that this injury was sufficient in the ordinary course of nature to cause her death. In cross examination, this witness has categorically denied that nobody ever told her (this witness) that deceased put herself on fire.

No doubt Kaushliya (PW8), the landlord of the deceased in whose house, they had stayed on rent, has not fully supported the case of the prosecution and, therefore, declared hostile, but she has proved that the burn injuries was sustained by the deceased in her house as she has stated that a neighbour stated her on telephone that her woman tenant has suffered burn injuries. When she returned from the factory, she found deceased Sunita sitting outside. This witness then gave her version to the police in Ex.P13 that when she inquired from the deceased as to how she has sustained burn injuries, she remained silent and did not say

anything.

Contention of learned counsel for the appellant that since Dr. Asha Ram (PW4), who first examined the deceased has stated that she told him that she caught fire in the house does not in any manner help the accused-appellant. All that he has stated is that in the medico legal report (Ex.P1) made by him, the deceased told him "burn on 01.10.2010 at home as per self". This statement cannot be misconstrued to mean that deceased told this witness that she put herself on fire or that implies that it was a case of suicidal death. No such statement was ever given by the deceased to PW4, nor it was so mentioned in the MLR.

The Supreme Court in Prempal, supra has observed that when reliance was placed upon dying declaration, the court must be satisfied that the dying declaration is true, voluntary and not as a result of either tutoring or prompting or a product of imagination and that the deceased was in a fit state of mind. That being so, the Court can base the conviction on the dying declaration even without corroboration.

The Supreme Court in Rajeev Kumar, supra was dealing with a case where the Doctors opined that when the larynx and tracheae are in the process of being charred, the person can speak. As per evidence of ASI, Police and Judicial Magistrate, who respectively recorded statement of deceased and of medical officer concerned of hospital, at the time of recording statement deceased remained in fit condition to make statement. Ocular evidence and medical expert opinion, being not at variance, shows that deceased was in a position to speak when dying declaration

were recorded. In those facts, it was held that dying declarations can be relied on by court.

The Supreme Court in the case of Ram Sagar Yadav & Ors.- (1985) 1 SCC 552 held that it is well-settled question of law that a dying declaration can be acted upon without corroboration. There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the Court may, for its assurance, look for corroboration to the dying declaration.

In Munnu Raja and Another vs. The State of Madhya Pradesh, (1976) 3 SCC 104, this Court held:-

> "....It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated...."

It is true that in the same decision, it was held, since the Investigating Officers are naturally interested in the success of the investigation and the practice of the Investigating Officer himself recording a dying declaration during the course of an investigation ought not to have been encouraged.

In State of Rajasthan vs. Wakteng, (2007) 14 SCC 550, the view in Balbir Singh's case(supra) has been reiterated. The following conclusions are relevant which read as under:

> "14. Though conviction can be based solely on the dying declaration, without any corroboration the same should not be suffering from any infirmity.
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> 15. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person but the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction."

In Muthu Kutty & Anr. Vs. State By Inspector of Police, T.N., (2005) 9 SCC 113, the following discussion and the ultimate conclusion are relevant which read as under:

> "14. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the

exclusion of the statement would leave the court without a scrap of evidence.

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."

In view of above discussion, we do not find any infirmity in the impugned judgement. No interference is called for. The appeal is dismissed.

(KAILASH CHANDRA SHARMA)J. (MOHAMMAD RAFIQ)J.

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