

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

1.

CRA-D-639-DB of 2010 (O&M)
Date of decision : 20.11.2018

...

Jagser

.....Appellant

vs.

State of Haryana

.....Respondent
2.

CRA-D-683-DB of 2010 (O&M)

...

Juna

.....Appellant

vs.

State of Haryana

.....Respondent
- 3)

CRA-AD-23-DB of 2017 (O&M)

...

Mangat Ram

.....Appellant

vs.

State of Haryana and another

.....Respondents

Coram: Hon'ble Mr. Justice A.B. Chaudhari
Hon'ble Mr. Justice H.S. Madaan

Present: Mr. J.S. Dahiya, Advocate for the appellants
in CRA-D-639-DB-2010 and CRA-D-683-2010

Ms. Tanisha Peshawaria, DAG, Haryana.

None for the appellant in CRA-AD-23-2017

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H.S. Madaan, J.

Vide this judgment, we propose to dispose of three appeals bearing CRA-D-639-DB-2010 filed by Jagser, CRA-D-683-DB-2010 filed by Juna, both of them being accused, who were tried by Additional Sessions Judge, Jind in case FIR No.338 dated 14.9.2009, registered at Police Station Safidon and vide judgment dated 4.5.2010 they were convicted and sentenced as under :-

<i>Name of the convict</i>	<i>Offence</i>	<i>Sentence</i>
Jagser	U/s 302/34 IPC	To undergo imprisonment for life and to pay fine of Rs.10,000/-. In default of payment of fine, to further undergo rigorous imprisonment for six months.
Juna	U/s 302/34 IPC	To undergo imprisonment for life and to pay fine of Rs.10,000/-. In default of payment of fine, to further undergo rigorous imprisonment for six months.

and CRA-AD-23-2017 filed by Mangat Ram- brother of the deceased against the acquittal of Pinki of the charge framed against her, vide judgment dated 27.3.2012 passed by Additional Sessions Judge, Jind.

Accused-convicts, who are appellants before this Court in CRA-D-639-DB-2010 and CRA-D-683-DB-2010, pray that the appeals filed by them be accepted, the impugned judgment of conviction and order of sentence passed against them be set aside and they be acquitted of the charge framed against them. The appellant in CRA-AD-23-2017 prays that the impugned judgment of acquittal passed against accused Pinki be set aside and she be convicted and sentenced.

Briefly stated, the facts of the case, as per the

prosecution story are that on 13.9.2009, Jagser, father-in-law of the complainant-deceased alongwith his brother Juna, had come to the house of complainant Yashin Khan at village Budha Khera, to resolve the dispute between Yashin Khan and his wife Pinki. Jagser and Juna asked family members of Yashin Khan and other neighbours to go out of the house, so that they could find solution to the dispute between the complainant and his wife. At about 4.00 - 4.30 P.M. Jagser and Juna took the complainant Yashin Khan and his wife Pinki to a room, where Pinki handed over a can containing kerosene oil to Jagser. Thereafter, Jagser poured kerosene oil upon Yashin Khan and set him ablaze by lighting a match stick. Yashin Khan rushed out of the house while crying. On this his brother Mangat Ram, his parents and Wazir s/o Mamdeen, came and extinguished the fire. Then the culprits, namely, Jagser, Juna and Pinki ran away from the spot. Mangat Ram, brother of Yashin Khan removed him to Civil Hospital, Safidon, by arranging a vehicle. Keeping in view the serious condition of Yashin Khan, he was referred to P.G.I.M.S. Rohtak. He was accordingly taken there and got admitted in the said medical institution. Police of Police Station, Safidon was informed and a Police Party from said Police Station came to P.G.I.M.S. Rohtak and after obtaining medical opinion regarding the fitness of Yashin Khan to make statement, his statement in that regard was recorded, wherein Yashin Khan narrated the incident, stating that his wife Pinki alongwith her father Jagser and Jagser's brother Juna had set him on fire after pouring kerosene oil upon him, in order to murder him. That statement was thumb marked by Yashin Khan and his left thumb

impression was attested by SI Dilawar Singh (hereinafter to be referred to as 'the Investigating Officer'). SI Dilawar Singh, put his endorsement below such statement of the complainant Yashin Khan and sent *ruqa* to the Police Station, on the basis of which formal FIR was recorded. Yashin Khan died during treatment at P.G.I.M.S. Rohtak. As such offence under Section 302 IPC was added.

After registration of the FIR, the investigation in the case began. Accused Jagser and Juna were arrested in this case, whereas accused Pinki could not be arrested and she was declared a proclaimed offender.

After completion of investigation and other formalities, challan against the accused Jagser and Juna was filed in the Court. Initially it came out that Yashin Khan had committed suicide by setting himself on fire, as such Section 302 IPC was deleted and accused were challaned for offence under Section 306 read with Section 34 IPC.

On presentation of challan in the Court of Sub Divisional Judicial Magistrate, Safidon, copies of documents relied upon therein were supplied to the accused free of cost, as provided under Section 207 Cr.P.C. Then finding that offence under Section 306 IPC is exclusively triable by the Court of Sessions, he vide order dated 8.12.2009 committed the case to the Court of learned Sessions Judge, Jind and then it was assigned to the Court of Additional Sessions Judge, Jind.

On receipt of case file in his Court, learned Additional Sessions, Jind, finding a prima facie case, charge sheeted both the

accused for offences under Sections 306 IPC read with Section 34 IPC, in the alternative under Section 302 IPC read with Section 34 IPC, to which they pleaded not guilty and claimed trial.

The case was fixed for evidence of the prosecution, during the course of which, the prosecution examined 13 witnesses, i.e. PW-1 Mangat Ram, PW-2 Ruldu, PW-3 MHC Ram Roop, PW-4 EASI Ramphal, PW-5 Constable Ramkesh, PW-6 SI Jagphul Singh, PW-7 SI Dilawar Singh, Investigating Officer, PW-8 Dr. Gaurav Kumar, PW-9 Dr. Deepak Gulia, PW-10 Dilbagh Singh Draftsman, PW-11 Wazir, PW-12 Inspector Rohtash and PW-13 Dr. Sneh Singh.

After closure of prosecution evidence, statements of accused were recorded under Section 313 Cr.P.C. in which all the incriminating circumstances appearing against such accused were put to them, but they denied the allegations pleading false implication and claiming innocence. During their defence evidence, the accused examined Surjit as DW-1.

After hearing the arguments, learned trial Court convicted and sentenced accused Jagser and Juna as mentioned above, which left them aggrieved and they have filed CRA-D-639-DB-2010 and CRA-D-683-DB-2010.

So far as CRA-AD-23-2017 is concerned, accused Pinki was arrested subsequently and supplementary challan was filed against her in the Court of Sub Divisional Judicial Magistrate, Safidon. After complying with the requisite requirements, learned Sub Divisional Judicial Magistrate, Safidon, committed the case to the Court of Sessions on 11.5.2011, which was entrusted to the Court

of Additional Sessions Judge, Jind, who vide judgment dated 27.3.2012, acquitted the accused – Pinki of the charge framed against her. Feeling aggrieved with the abovesaid judgment of acquittal, Mangat Ram- brother of Yashin – deceased, has filed the present appeal.

We have heard learned counsel for the appellants, learned State counsel, besides going through the record and we find that it stands established on the file that Jagser and Juna accused are responsible for the unnatural death of Yashin Khan.

The most important piece of evidence in this case is statement of complainant Yashin Khan made to SI Dilawar Singh, Investigating Officer, on 14.9.2009. A perusal of the said statement goes to show that he has supported the prosecution story on material aspects. This statement bears left thumb impression of Yashin Khan, which has been attested by SI Dilawar Singh. This statement has been duly proved by SI Dilawar Singh. While appearing as PW-7 inter alia he had stated that on 13.9.2009 he had received *ruqa* Exhibit PG from General Hospital, Safidon, regarding bringing of Yashin Khan in the hospital and thereafter referred to P.G.I.M.S. Rohtak alongwith copy of MLR. However due to odd hours he could not go to P.G.I.M.S. Rohtak, on the same day and on the next day i.e. 14.9.2009, he visited there and moved an application Exhibit PH, before the doctor for seeking his opinion whether patient Yashin Khan was fit to make his statement or not and vide his endorsement Exhibit PH/1, doctor declared Yashin Khan fit to make the statement and as such he recorded statement of Yashin Khan Exhibit PF, as

deposed by him word to word, without any addition or omission on his part. That he had read over and explained the statement over to Yashin Khan, who had thumb marked the same after admitting the contents to be correct. Therefore, from the testimony of PW-7, SI Dilawar Singh, it comes out that injured Yashin Khan had made statement Exhibit PF to the police in a fit state of mind and without any threat, inducement etc. and we find it to be trustworthy of reliance. The trial Court referring to the case law on the subject has come to the conclusion that dying declaration needs to be relied upon. This statement made by the deceased to the police comes within the definition of dying declaration in terms of Section 32 (1) of the Evidence Act.

Section 32 of the Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts. When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

The value of dying declaration cannot be minimized for

the reason that it has not been recorded by the Magistrate, though if it had been recorded by the Magistrate its credibility would have been much more, but simply for the reason that statement had been recorded by a Police Officer does not lessen its value, when he had recorded it after obtaining medical opinion in affirmative that patient was in a fit state of mind to make the statement. This statement has been duly proved by SI Dilawar Singh. Therefore, dying declaration of deceased by itself is enough to prove guilt of the accused. As it is commonly said truth sits upon the lips of a dying man. A person knowing that he was about to say goodbye to this mortal world, normally would not tell a wrong thing and would speak truth. Due solemnity is attached to such last words of a person in expectation of death. It is for that reason the statement is accepted as such, without being put to the test of cross examination.

In the present case, corroboration to the dying declaration comes from the statement of PW-1 Mangat Ram, brother, PW-2 Ruldu, father of the deceased, who provided eye witness account, supporting the prosecution story on material aspects. Although they do not state that the accused had set Yashin Khan on fire in their presence, since according to them both the accused had taken Yashin Khan and his wife Pinki to a room of the house, so as to resolve the dispute but they said that after some time Yashin Khan while on fire came running out of the house. Applying the principle of *res gestae*, it comes out that both accused are clearly connected with the crime. The medical evidence duly corroborates the ocular evidence. The investigation in this case has been carried out in a fair

and impartial manner. The Investigating Officer had no reason to involve the accused in this case wrongly and then to challan them falsely.

Though learned defence counsel has raised certain pleas with regard to treating statement made by the deceased to the police as a dying declaration and there being no direct evidence of the evidence, etc., but we do not find any merit in such contentions. It is nowhere required that dying declaration of an injured person is necessarily to be recorded by a Judicial Magistrate. Although if so recorded that attracts some more credibility, but then a dying declaration recorded by the Police Officer is not to be discarded simply for the said reason. It can certainly be relied upon if found to have been recorded in a proper manner without any threat or pressure. In this case no illegality or impropriety in recording the dying declaration comes out to be there. The law is well settled that a dying declaration can be oral also.

Here it is relevant to refer to the law on the subject laid down by the Apex Court in landmark authority, reported as **Laxman vs. State of Maharashtra, 2002 CriLJ 4095**, wherein it has been held as under:-

- (1) Dying declaration is accepted on the theory that person on death bed will speak the truth - But 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.

- (2) Since the accused has no power of cross-examination, the court should insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness.
- (3) Court should also see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination.
- (4) Court further satisfy that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant.
- (5) Statement of eyewitnesses that deceased was fit and conscious to make the declaration will prevail over medical opinion.
- (6) A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will sufficient provided the indication is positive and definite.
- (7) When dying declaration is recorded on oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available.
- (8) 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.
- (9) What evidential value or weight has to be attached to

such statement necessarily depends on the facts and circumstances of each particular case.

(10) 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.

The prosecution has successfully proved that both the accused had set the deceased on fire after pouring kerosene oil upon him. The trial Court has convicted the accused for offence under Section 302 IPC read with Section 34 IPC.

However, we on our part feel that the incident seems to have been occurred in a heat of moment without there being any pre-meditation or planning on behalf of the accused. A strong motive for the incident is also not established on the record. Therefore, in our view, the offence committed by the accused comes within the mischief of Section 304 (1) IPC i.e. culpable homicide not amounting to murder and not section 302 IPC read with Section 34 IPC. Accordingly, both the appeals i.e. CRA-D-639-DB-2010 and CRA-D-683-DB-2010 are allowed partly. Conviction of both the accused Jagser and Juna for offence under Section 302 IPC read with Section 34 IPC and their sentence of life imprisonment are hereby set aside and rather both the accused are convicted for offence under Section 304 (1) IPC and sentenced to undergo rigorous imprisonment for a

period of 10 years and to pay a fine of Rs.10,000/- each and in default of payment of fine, to undergo further rigorous imprisonment for six months.

As far as judgment dated 27.3.2012 passed by Additional Sessions Judge, Jind, acquitting Pinki of the charge framed against her, is concerned, we do not find any cogent and convincing reason to upset it and are not inclined to interfere with the said judgment. Counsel for the appellant has not appeared to point out any material defect or illegality therein. CRA-AD-23-2017 is accordingly, dismissed.

(A.B. CHAUDHARI)
JUDGE

(H.S. MADAAN)
JUDGE

20.11.2018
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Whether speaking / reasoned

Yes / No

Whether reportable

Yes / No