

In the High Court of Punjab and Haryana at Chandigarh.

(I)

Criminal Appeal-D No.911-DB of 2012

Date of Decision:- January 17, 2018

Gule Ram

.....Appellant

Versus

State of Haryana

....Respondent

(II)

Criminal Appeal-D No.987-DB of 2012

Babita

.....Appellant

Versus

State of Haryana

....Respondent

CORAM: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice Gurvinder Singh Gill

Present : Mr. Bhupender Singh Saroha, Advocate,
for the appellant in CRA-D No.911-DB of 2012.

Mr. Manjeet Singh, Advocate with
Mr. Ranvijay Singh, Advocate,
for the appellant in CRA-D No.987-DB of 2012.

Mr. Ankur Mittal, Additional Advocate General, Haryana with
Mr. Manoj Dhankhar, Assistant Advocate General, Haryana.

Gurvinder Singh Gill, J.

1. Gule Ram and Babita have filed the above mentioned appeals challenging judgment dated 23.8.2012 passed by learned Additional Sessions Judge, Hisar holding them guilty for committing offence punishable under Section 302 read

with Section 34 of Indian Penal Code, 1860 (for short, 'IPC'). Vide order dated 27.8.2012 both the appellants have been sentenced to undergo rigorous imprisonment for life and also to pay fine of ₹5,000/- each.

2. The case of prosecution, in nutshell is that on 16.4.2010 upon receipt of intimation from Government Hospital, Hisar regarding admission of Kavita due to burn injuries, ASI Om Parkash along with other police officials went to the hospital but Kavita succumbed to her injuries before her statement could be recorded. Kavita's mother namely Beermati and brother Sunil Kumar were present in the hospital. Statement (Ex.PA) of Beermati was recorded by the police leading to registration of FIR. The translated gist of the said statement reads as follows:

“I have four children. The eldest is son Sunil, younger to him is daughter Sushila, younger to her is Kavita and my son Vijay is youngest. Today i.e. on 16.4.2010, I along with my sons Sunil and Vijay went to fields to reap wheat crop. My daughter Kavita brought meals for us and went back home after delivering the same. Upon returning home, when Kavita opened door of the house, she saw Babita wife of Rajesh and Gule Ram son of Karambir in a compromising position. Kavita confronted them and said that she will inform her mother about the same upon which the aforesaid persons asked Kavita not to disclose anything to her mother. Since Kavita insisted that she would disclose about the incident to her mother, Babita became furious. While Gule Ram caught hold of Kavita, Babita poured kerosene oil on Kavita. Gule Ram, then, set Kavita on fire. Kavita raised alarm '*bachao*

bachao' (save – save) which attracted my son Sunil at the spot, upon which both Gule Ram and Babita fled away from the spot. The said occurrence took place at 10 - 10.30 AM. Then I and my son Sunil, after arranging for a vehicle took Kavita to Civil Hospital, Hisar where her treatment was started but she succumbed to her burn injuries. Action be taken. I have got my statement recorded in the presence of my son Sunil. All the facts had been disclosed to me by my daughter while she was alive.”

3. Pursuant to the aforesaid statement (Ex.PA) of Beermati, the police recorded FIR (Ex.PA/1). The dead body of Kavita was subjected to post mortem examination. Inquest proceedings were conducted. The police visited the place of occurrence and prepared a rough site plan and also recorded statements of witnesses. A plastic can containing kerosene oil, a match box, a burnt piece of '*darri*' (thin mattress) and some burnt '*toori*' (straw fodder) and soil were recovered from the spot and taken into possession vide recovery memo (Ex.PP). While accused Gule Ram was arrested on 17.4.2010, Babita was arrested on 19.4.2010.
4. Upon conclusion of investigation, challan was presented against accused Gule Ram and Babita in the Court of Judicial Magistrate 1st Class, Hisar on 27.5.2010 which was committed to the Court of Sessions vide order dated 8.7.2010. The case was assigned to Court of Additional Sessions Judge who framed charges against the accused on 2.8.2010 for offence punishable under Section 302 read with Section 34 of IPC to which accused pleaded not guilty and claimed trial.
5. The prosecution in order to establish charges framed against accused

examined 12 witnesses. PW-1 ESI Om Parkash stated that on 16.4.2010 upon receipt of ruqa (Ex.PA) he recorded FIR (Ex.PA/1) and sent special report to Ilaqa Magistrate and higher police officers. PW-2 Raju, Draftsman deposed that on 4.5.2010 he visited the place of occurrence and prepared scaled site plan (Ex.PB). PW-3 EHC Surrender deposed that on 16.4.2010 he delivered special reports to Ilaqa Magtistrate and higher police officials without any delay on his part. PW-4 SI Krishan Lal stated that upon completion of investigation he prepared report under Section 173 Cr.P.C. PW-5 HC Labh Singh deposed that on 16.4.2010 while he was posted as MHC at Police Station Barwala, ASI Om Parkash deposited the case property with him. He further deposed that on 29.4.2010 the same was handed over to EHC Satpal for depositing the same in FSL, Madhuban which was deposited on the same day. He further stated that as long as case property remained in his possession, the same was not tampered with. PW-6 EHC Satpal Singh deposed that on 29.4.2010, the case property was entrusted to him by MHC Labh Singh and he deposited the same in the FSL Madhuban and handed over receipt to MHC and that as long as case property remained in his possession, the same was not tampered with. PW-7 Dr. Vishal Goyal, Medical Officer who had conducted the post mortem examination on dead body of Kavita proved the post mortem report (Ex.PG). PW-8 Dr. Amit Verma deposed that on 16.4.2010 Kavita was admitted with burn injuries in hospital at 12.15 PM vide bed head ticket Ex.PH. He further stated that Kavita expired at 2.40 PM on the same day and thereafter he sent intimation to the police. PW-9 Lady C. Anita stated that on 19.4.2010 Babita was interrogated in her presence who suffered disclosure statement (Ex.PL) and in pursuance of the same led the police party to the place of occurrence. PW-10 Beermati, complainant and PW-11 Sunil Kumar

son of complainant are the two witnesses who deposed about occurrence to the effect that Kavita has been set on fire by the accused. PW-12 ASI Om Parkash, who is Investigating Officer in the present case stated in detail in respect of entire investigation conducted in the case.

6. Upon conclusion of recording of prosecution evidence, entire incriminating evidence appearing against accused was put to them to enable them to explain the same but the accused while denying the same pleaded false implication. The accused in their defence evidence examined DW-1 Sataywan who deposed that on the day of occurrence he heard cries of a girl '*jal gai - jal gai*' (caught fire - caught fire) from the house of Suraj Bhan and upon hearing the same he along with 5-7 persons rushed to the place of occurrence and extinguished the fire. He further stated that the girl was Kavita daughter of Suraj Bhan and upon inquiry she disclosed that she had set herself on fire. He further stated that mother and brother of Kavita who were away to fields were called, who came there after about one hour. He also stated that the accused were not present near Kavita. DW-2 Rajbir stated that on 16.4.2010 when he was present at Barwala then he received a message from the village regarding the incident and thereafter he reached Government Hospital, Barwala where he saw Kavita who was not able to speak. DW-3 Shamsheer Singh Malik, handwriting expert, who had examined the statement(Ex.PA) of the complainant proved his report (Ex.D-1). He stated that the last line in the statement had been added later on with a different handwriting instrument.
7. The learned Trial Court, upon appreciating the evidence, held that the prosecution had successfully established the charges framed against accused and convicted the accused for offence punishable under Section 302 read with

Section 34 of IPC, vide impugned judgement dated 23.8.2012. Aggrieved with the same, the accused have preferred the present appeals.

8. The learned counsel for the accused while assailing the impugned judgment has first of all submitted that there are interpolations/additions regarding material facts stated in the 'ruqa'(statement of complainant) which stands confirmed from the opinion of DW-3 Shamsheer Singh Malik, handwriting expert which shows that a false and concocted version has been put forth by complainant. It has also been submitted that in fact the deceased had set herself on fire and the accused had no role to play in the same. The learned counsel submitted that in fact the deceased who had sustained more than 90% burns was not in a position to make any statement as such no reliance can be placed upon statement of the complainant to the effect that it was the deceased who narrated about the incident to the complainant implicating the accused. The learned counsel has further submitted that even the presence of Sunil Kumar at the spot is not established and that in the absence of any convincing evidence, the accused cannot be held guilty for having committed any offence. The learned counsel thus prayed for acquittal of the appellants.
9. On the other hand the learned counsel representing the State submitted that in view of the consistent testimonies of PW-10 Beermati (complainant) and PW-11 Sunil Kumar, it stands duly established that it is the accused who had set Kavita on fire. Learned counsel for the State submitted that in fact the presence of the accused at the spot is virtually admitted by the accused as they have tried to build up a case that Kavita had herself brought Babita and Gule Ram to her house and when the said two were caught by the villagers and then Kavita apprehending that she would be reprimanded, set herself on fire. The

learned State counsel submitted that consistent testimonies of PW-10 Beermati and PW-11 Sunil Kumar leave no manner of doubt regarding complicity of the appellants. The learned State counsel thus prayed for dismissal of the appeals.

10. We have considered rival submissions addressed before this Court and with able assistance of learned counsel have also perused record of the case.
11. Though the factum of death due to burn injuries is not in dispute, still it will be apposite to briefly refer to the medical evidence in this regard. PW-7 Dr. Vishal Goyal, Medical Officer, who had conducted post mortem examination on dead body of Kavita proved the post mortem report as Ex.PG. He described the injuries found on the dead body and cause of death is as follows:

“.....Multiple superficial to deep burns all over the body, scalds filled with clear fluid present on some parts. Anterior 3rd of sole of the foot spared, red line between burn and unburn area present. Nearly 100% burn on BSA.

.....In our opinion the cause of death was due to shock resulting from burn injuries which were ante mortem in nature and sufficient to cause death in an ordinary course of nature.....”

12. The statement of PW-8 Dr. Amit Verma is also in tune with the prosecution version regarding death of Kavita due to burn injuries. There is nothing in the cross-examination of the aforesaid two witnesses so as to doubt the factum of existence of burn injuries on Kavita or as regards the same being the cause of her death.

13. As regards contention regarding interpolations/additions in 'ruqa', a perusal of report of DW-3 Shamsher Singh Malik, handwriting expert shows that he has opined that the last line in the statement (Ex.PA) of Beermati had been added subsequently with a different writing instrument. The translated gist of said last line reads as under:

*“.....all the facts had been disclosed to me by
my daughter while she was alive.....”*

14. A perusal of the statement (Ex.PA) does show that the last line could have been added subsequently. Though such like addition puts the Court at a caution but to say that such like addition is in every case due to some motivated reason or is patently false would not be a correct approach. It needs to be borne in mind that in the present case the injured Kavita expired at 2.40 PM and the statement(Ex.PA) of complainant had been recorded by 4.30 PM on 16.4.2010. After the FIR was recorded, special reports had been received by the Duty Magistrate at 8.05 PM on 16.4.2010. There is no substantial delay in either in recording statement(Ex.PA) of complainant or in sending special reports. In case the police official who recorded the aforesaid statement(Ex.PA) had any ulterior motive, he could have very conveniently recorded the entire statement on a fresh piece of paper. In any case, the handwriting expert has not opined that the said additional line had been written by a different person or by a different hand. In these circumstances the said addition of a line even if it accepted to be correct would not dent the case of the prosecution in any manner.

15. The case of the prosecution mainly rests upon testimony of the complainant i.e. PW-10 Beermati (mother of deceased) and of PW-11 Sunil Kumar (brother of

deceased). While PW-10 Beermati claims that the deceased had disclosed about the occurrence before she breathed her last, PW-11 Sunil Kumar claims to have witnessed the incident. It is thus imperative that their testimonies be scrutinized minutely so as to ascertain the veracity of the same.

16. A perusal of the FIR shows that the complainant while narrating the incident and alleging that her daughter had been set on fire by accused Gule Ram and Babita, herself admitted therein that all the facts had been disclosed to her by her daughter while she was alive. Even from a perusal of the statement of Beermati recorded in the Court, it is evident that she had not witnessed the incident and had reached at the spot much later. Thus it transpires that in fact the statement of the complainant is based on oral dying declaration of deceased allegedly made by her to complainant.
17. Though there is no bar in relying upon oral dying declaration, but such reliance can be placed only if the same inspires confidence and stands corroborated from some other evidence on record. Hon'ble the Supreme Court in Balbir v. Vazir, (2014) 12 SCC 670 held as follows:

“It is well settled that an oral dying declaration can form the basis of conviction if the deponent is in a fit condition to make the declaration and if it is found to be truthful. The courts as a matter of prudence look for corroboration to oral dying declaration.”

18. First of all, it needs to be ascertained as to whether the deceased was fit enough and in a position to make a statement. As per bed-head ticket (Ex.PH) the deceased had been admitted in hospital with 90% burns. Though the

condition of a person who has sustained 90% burns would be serious but there are no absolute authoritative findings in medical jurisprudence that under all circumstances a person with 90% burns would be unable to speak. Thus, the state of deceased has to be ascertained on the basis of evidence available as regards his physical condition. In the intimation(Ex.PK) sent by the hospital authorities to the police, the extent of burns have been mentioned as “almost 100%” and it is stated that the patient is critical. Even as per observations recorded in post-mortem report(Ex.PG), the deceased had almost 100% burns on body surface area(BSA). The relevant extract from his statement of PW-7 Dr. Vishal Goyal, Medical Officer, who had conducted post mortem examination on dead body of Kavita reads as follows:

“.....Multiple superficial to deep burns all over the body, scalds filled with clear fluid present on some parts. Anterior 3rd of sole of the foot spared, red line between burn and unburn area present. Nearly 100% burn on BSA.”

19. A perusal of bed head ticket Ex.PH, proved by PW-8 Dr. Amit Verma, shows that the blood pressure and the pulse were “un-recordable” at 12.15. PM, at 12.30 PM, at 1.30 PM and also at 2.40 PM. A perusal of the bed head ticket further shows that Kavita had been admitted in the hospital at 12.15 PM and expired at 2.40 PM. The said facts show that the condition of deceased was precarious and she couldn't survive for long. There is nothing to suggest that she indeed was in a position to speak. PW-11 Sunil admitted that his sister had not made any statement to the doctor attending to her. Thus, other than the statement of complainant there is no other evidence – neither medical evidence

nor oral evidence to suggest that Kavita(deceased) was in a position to speak. Hon'ble the Supreme Court in Waikhom Yaima Singh v. State of Manipur, (2011) 13 SCC 125, while dealing with a case of oral dying declaration underlined the importance of evidence regarding fitness of declarant. The relevant extract reads as follows:

“19. It is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses, he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution. The most important circumstance about this dying declaration is that, firstly, it is oral and secondly, there is no medical evidence suggesting that the deceased was in a fit medical condition to make such a dying declaration.

20. There can be no dispute that the dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the present case also, the exact words are not available. They differ from witness to witness.”

20. Though the prosecution seeks to strengthen its case from statement of PW-11 Sunil Kumar (brother of deceased), who while in the witness box deposed that on 16.4.2010 he had gone to the fields with his mother and brother Vijay for harvesting wheat crop and that his sister Kavita had later brought meals for them and he accompanied her back to home to look after the cattle and after reaching home while he started tethering the cattle, his sister entered the

house. He has further stated that his sister saw Gule Ram and Babita in compromising position and threatened to disclose about the said fact to her mother upon which Gule Ram became angry and he along with Babita set Kavita on fire and when Kavita raised alarm he went inside and in his presence Gule Ram threw the match stick. He has further stated that he tried to extinguish the fire and in the meantime accused fled away and while fleeing accused Gule Ram said that he has done his job and he(Sunil) was free to do whatever he wanted.

21. It is however worth noticing that the aforesaid factum of Sunil Kumar having accompanied Kavita when Kavita went home after delivering meals in the fields is not mentioned in the FIR. Further in the statement of Sunil Kumar recorded under Section 161 Cr.P.C., he has come out with a different reason for going home from the fields inasmuch as he stated therein that he returned back home from the fields as he was not feeling well. Still further during cross-examination of PW-11 Sunil Kumar virtually admitted that he had not witnessed the incident. The relevant portion from his cross-examination is reproduced below:

“I was not present in my house when my sister was set on fire..... I had extinguish the fire in the door of the room. I did not get any effect of the fire of the flame.....”

22. The aforesaid categorical statement of PW-11 to the effect that he was not present in the house when his sister was set on fire shows that he is not an eye witness to the incident. It is not even the case that the deceased had disclosed anything about the incident to her brother Sunil. Had Sunil Kumar actually

witnessed the incident, then in every likelihood the police would have recorded FIR on his statement as he admittedly was present with his mother in the hospital. In these circumstances the testimony of PW-11 Sunil Kumar does not advance the case of prosecution in any manner as his presence at the spot when the incident took place is not established.

23. The evidence on record falls grossly short to establish the charges framed against the accused. The only piece of evidence i.e. the oral dying declaration made by deceased before the complainant herself is bereft of any corroboration. The presence of the other eye witnesses i.e. PW-11 Sunil Kumar (brother of deceased) is not established. Given the fact that the deceased had sustained almost 100% burns and her blood pressure and pulse was not recordable, as is evident from the head head ticket Ex.PH, and there being nothing on record to suggest that she was indeed in a position to speak, it will not be safe to base conviction solely on the statement of complainant(PW-10 Beermati) regarding the alleged oral dying declaration made by deceased.
24. As an upshot of our discussions made above, we are unable to affirm the findings of conviction of the appellants recorded by the trial Court and the same are hereby set aside. The appeals merit acceptance and are hereby accepted. Both the appellants are acquitted of all the charges framed against them.

(Rajesh Bindal)
Judge

(Gurvinder Singh Gill)
Judge

January 17, 2018

mohan

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No