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

+ **CRL.A. 70/2003**

RAJESH KUMAR Appellant

Through: Mr. M.L.Yadav, Advocate.

versus

STATE Respondent

Through: Mr. Hirein Sharma, APP for the
State along with Insp. Avtar
Singh, P.S. Nand Nagri, Delhi.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT
12.07.2018

VINOD GOEL, J.:

1. This is an appeal under Section 374 of the Code of Criminal Procedure, 1973 (Cr PC) against the impugned judgment dated 15th January 2013 passed by the Court of Learned Additional Sessions Judge, Karkardooma Courts, Delhi, (ASJ), in Sessions Case No.37/2001 arising out of FIR No.89/1997 at PS Nandnagri, Delhi registered under Section 302/452 Indian Penal Code, 1860 (IPC) convicting the appellant for the offences punishable under Section 302 and 452 of IPC and order on sentence dated 16th January 2003 by

which the appellant was sentenced to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs.2,000/- and in case of default to undergo RI for one year for the offence punishable under Section 302 IPC. The appellant was also sentenced to undergo RI for three years and to pay a fine of Rs.500/- and in case of default to undergo RI for three months for the offence punishable under Section 452 IPC. The learned ASJ also directed that both the substantial sentences shall run concurrently and the appellant shall be entitled to the benefit of Section 428 Cr PC.

2. As per the case of the prosecution, the deceased Smt. Richa Tiwari was married to Yogesh Kumar (PW1) on 22nd November 1992. This was the second marriage of Yogesh Kumar, who had two children from his previous wedlock. The appellant, who was the neighbor of the deceased and her husband, wanted to marry the deceased Richa Tiwari and had on several occasions prior to the incident, threatened to kill her and her husband in case she did not marry him. The deceased had explained the threat extended by the appellant to her husband who then admonished the appellant. At about 4.20 pm, on the date of the incident i.e. on 5th February 1997, at House No.D-361, Nandnagri, Delhi, when the deceased was sleeping in her room on the ground floor covered in her quilt, the appellant came inside her bedroom along with petrol and threw petrol on her and set her on fire before running away. The deceased came out crying, engulfed in flames and upon hearing her cries, her husband and her brother, who were on the

roof of the said house, came down and extinguished the fire and took her to GTB Hospital, Shahdara, where the medical officer opined that the victim had suffered 100% burn injuries. Her statement was recorded by Investigating Officer (IO) SI Ishwar Singh (PW-19) in the presence of Dr.Puneet Dargan at 5.05 pm on the same day at GTB Hospital. She was declared fit to make a statement by the Medical Officer at 6.30 pm and her statement was recorded by Shri Kuldeep Singh Gangar, SDM Seelampur/Seemapuri, Shahdara, Delhi. The victim succumbed to her burn injuries on 11th February 1997.

3. The criminal justice machinery was activated at PS Nand Nagri when DD No.9A was recorded at 4.25 pm on the basis of information received from some unknown person that a person by the name of Rajesh has burnt a lady at House No.D-361, Nandnagri, Delhi. Another DD No.10A was recorded on the same day at PS Nandnagri at 4.55 pm on receiving information on telephone that the deceased has been admitted in burnt condition by her husband in GTB Hospital, Shahdara. FIR No. 89/1997 (Ex.PW11/A) was registered on the same day with PS Nand Nagri under Section 452/307 IPC.

4. During the course of investigation, the appellant was arrested on the same day i.e. 5th February 1997. The appellant made a disclosure statement to the IO and based on that statement, the police recovered a sword, a plastic can containing petrol and a photo of the appellant with

the deceased from his house. The hands of the appellant were also found to be burnt. Statements of witnesses were recorded by the IO and the *challan* was filed against the appellant on 3rd May, 1997. The learned MM committed the case to the Sessions by an order dated 8th May, 1997.

5. On 6th November, 1997, charges under Section 302 and 452 IPC were framed against the appellant by the learned ASJ. The appellant pleaded 'not guilty' and claimed trial.

6. In support of its case, the prosecution has examined 19 witnesses in all. The statement of the appellant under Section 313 Cr PC was recorded by the learned ASJ on 11th October, 2001. While replying to Question No.21, the appellant stated that the husband and the brother of the deceased, namely, Yogesh Kumar and Banmali Mishra respectively, have committed the murder of the deceased causing burn injuries on her body. He also stated that the deceased made a statement in the presence of some neighbours and public witnesses before becoming unconscious. She was never fit for making a statement. He further added that after hearing the noise he went in the *gali* where the deceased was crying for help and he helped her in setting off the fire while she was in the *gali*. He added that he was present when she gave the statement.

7. The appellant did not adduce any evidence in defence.

8. By the impugned judgment dated 15th January 2003, the learned ASJ took note of the two dying declarations; one dying declaration (Ex.PW2/B) recorded by IO SI Ishwar Singh (PW-19) and the other dying declaration (Ex.PW2/A) recorded by the SDM Shri Kuldeep Singh Gangar (PW2) and found both the dying declarations to be consistent in nature. The deceased stated that she was lying on the bed under the cover of her quilt when she saw the appellant throwing petrol upon her and setting her on fire with help of a flambeau like object. She further stated that it was the appellant who had set her on fire before running away. She stated that the accused was putting pressure on her to marry him and was threatening to kill her and her husband in case she did not marry him.

9. The learned ASJ has also taken note of the fact that once the deceased was declared fit to make a statement by Dr.M.V.Shekhar (PW15), GTB Hospital, at 6.30 pm, the statement of the deceased was recorded by Shri Kuldeep Singh Gangar, SDM Seelampur/Seemapuri, Shahdara, Delhi (PW2). Prior to recording of the statement by the SDM, the IO SI Ishwar Singh (PW19) had also recorded the statement of the deceased at 5.05 pm in the presence of Dr.Puneet Dargan wherein also the same facts were stated by the deceased as informed to the SDM. Dr.Puneet Dargan has left the GTB Hospital and his whereabouts are not known, however, signatures on the statement of the deceased (Ex.PW2/B) have been proved by Sh. R.P.Singh (PW9),

record clerk at the GTB Hospital, as he had seen Dr.Puneet Dargan writing and signing on the initial statement in his official duty.

10. The learned ASJ found that both the dying declarations, i.e. Ex.PW2/A and Ex.PW2/B, are consistent, reliable and trustworthy and supported by the statement of the husband and brother of the deceased. Further, the learned ASJ found that Dr. T.R.Ramtek (PW8) who prepared the MLC of the appellant (Ex.PW8/A) found some superficial burns over the base of both the thumbs on the dorsal side of the appellant, which proves that when the appellant was trying to burn the victim, he also sustained injuries by the flames of the fire in which he himself received superficial burns over the base of both the hands on the dorsal side and had he not been at the spot, he would not have sustained these superficial burns.

11. The learned ASJ also found that the appellant also helped recover from a room in his house, a plastic can of 5 litre (Ex.P6) and a sword (Ex.P9) on the handle of which a cloth was tied that reeked of petrol. It is clear that the recovery of these items corroborates the case of the prosecution to the effect that it was the appellant who had used the petrol in burning the deceased, with the help of a sword after tying the cloth on it. The Trial Court also noted that post-mortem report of the deceased (Ex.PW10/A) proves that the deceased had died due to septicemia shock due to 95% ante mortem deep wounds of burns likely to be produced by flames.

12. Learned counsel for the appellant contends that as per the case of the prosecution, the deceased had suffered 100% burn injuries and in such a condition the deceased could not have put her left thumb impressions on both the dying declarations and as such these are fabricated statements, and consequently, there was no occasion either for the IO or for the SDM to obtain the left thumb impressions of the deceased. He further submits that in case of females, impression of right thumb is always taken but these dying declarations i.e. Ex.PW2/A and Ex.PW2/B show that left thumb impressions of the victim were taken. He submits that there is no evidence on record which specifies that before the said two dying declarations were recorded, the deceased was in a fit state of mind for making any such statement. He submits that the police officer has recorded the statement (Ex.PW2/B) of the deceased at 5.05 pm on the date of the incident, whereas the fitness certificate was obtained at 6.30 pm. He urges that Shri Kuldeep Singh Gangar, SDM failed to secure the presence of any doctor at the time of recording the statement of the victim. He emphasised on his submission that the statement (Ex.PW2/A) was recorded much later after the registration of the case so that it can be used as a tool to give credence to the case of the prosecution. He submits that the medical evidence does not support the case of the prosecution.

13. Per contra, the learned APP for the State submits that the Trial Court has passed the judgment after due appreciation of the evidence on record. He submits that the Trial Court has not committed any infirmity or illegality in recording the conviction of the appellant under Sections 302 and 452 IPC and passing the order of sentence.

14. We have heard the learned counsel for the appellant and the learned APP for the State.

15. The deceased was brought to the GTB Hospital, Shahdara, Delhi immediately after the incident at 4.20 pm. She was examined by Dr.Arjun Singh Sengar (PW17) vide MLC (Ex.PW17/A) with 100% burn injuries all over her body. Dr. Arjun Singh Sengar (PW17) has proved the MLC of the deceased. There is an endorsement by Dr.M.V.Shekhar (PW15) who had stated that he examined the deceased Richa Tiwari on 5th February, 1997, and found her fit for making a statement and his endorsement is exhibited as Ex.PW10/D on the MLC (Ex.PW17/A). In his cross-examination, he stated that he was satisfied that the patient was fit for making a statement as at that time she was conscious and oriented with regard to the time and place.

16. The dying declaration (Ex.PW2/B) recorded by the IO SI Ishwar Sing (PW19) has been proved by him. In his cross-examination, he had categorically stated that the right thumb and left hand of the deceased were burnt but the left thumb was safe. At the time of

recording of the statement of the deceased, Dr.Puneet Dargan was present, who put his signatures at point 'Y'. Though the prosecution could not examine Dr.Dargan, his signatures on dying declaration (Ex.PW2/B) have been proved by Shri R.P.Singh (PW9), record clerk at GTB Hospital. He identified the signatures of Dr.Dargan at point 'Y' on Ex.PW2/B as he had seen him writing and signing in his official duty. He further testified that Dr. Dargan has left the services of the GTB Hospital and his whereabouts were not available. The appellant has not disputed the presence of Dr.Puneet Dargan at the time of recording the statement of the deceased (Ex.PW2/B) in his cross-examination.

17. After the deceased was declared fit to make a statement by Dr.M.V.Shekhar (PW15) at 6.30 pm, the SDM (PW2) immediately proceeded to record the statement of the victim and has proved the same. The learned ASJ has correctly recorded the finding that there is consistency in both the statements of the deceased. We find that both the dying declarations are voluntary and worth inspiring confidence and thus reliable and trustworthy.

18. It is a settled principle of law that dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court and further the Court is satisfied that the deceased was in a fit state of mind at the time of making the statement. The Hon'ble Supreme Court in ***Pawan Kumar vs. State of Himachal Pradesh 2017 (7) SCC***

780 reiterated the principles laid down by it in its earlier judgment in *Aitbir vs. Govt. of NCT of Delhi (2010) 9 SCC 1*. Paragraphs 27, 29 & 30 of the judgment reads as under:-

“27. In *Atbir v. Govt. (NCT of Delhi) (2010) 9 SCC 1*, the Court, after noting earlier judgments, has laid the following guidelines with regard to admissibility of the dying declaration:-

“22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) 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.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) **If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.”**

“29. Tested on the anvil of the aforesaid authorities, we find that there is no reason to disregard the dying declaration. The Head Constable has recorded it as narrated by the deceased and the deceased has also written few words about the accused. The same has been recorded in presence of the doctor, PW 10, who had appended his signature. A certificate of fitness is not the requirement of law. The trial court has been swayed away by the burn injuries. It is worthy to note that there cannot be an absolute rule that a person who has suffered 80% burn injuries cannot give a dying declaration. In *Vijay Pal v. State (Govt. of NCT of Delhi)* (2015) 4 SCC 749, the Court repelled the submission with regard to dying declaration made by the deceased who had sustained 100% burn injuries stating that:-

“22. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW 1 had immediately rushed to the house of the deceased and

she had told him that her husband had poured kerosene on her. The plea taken by the appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect.

23. It is contended by the learned counsel for the appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in *Mafabhai Nagarbhai Raval v. State of Gujarat* (1992) 4 SCC 69 wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.”

30. Quite apart from the above, her dying declaration has received support from the other witnesses. In view of the corroborative evidence, we are of the considered opinion that the High Court has correctly relied upon this aspect and has reversed the finding of the trial court.”

19. There is no force in the argument of the learned counsel for the appellant that the thumb impression of the right hand of the deceased should have been taken for the dying declarations to be admissible. In this case, the burns on the body of the deceased were such, that she

was in no position to place her right thumb impression. This has been well-explained by the IO (PW19) SI Ishwar Singh that the right thumb and left hand were found burnt yet the left thumb was safe and it is for that reason the impression of left thumb was obtained. Reliance can be placed on the judgment of Hon'ble Supreme Court in the case of ***Govindappa v. State of Karnataka, (2010) 6 SCC 533***, wherein the dying declaration of the victim who had 100% burn injuries and had affixed her left thumb impression on the statement was accepted on the evidence of the doctor that the victim was in a position to talk and in a fit state of mind. Furthermore, in the cross-examination of (PW2) Shri Kuldeep Singh Gangar, SDM the defence has not sought any explanation as to why the thumb impression of right hand of the victim was not obtained.

20. We do not find any force in the argument of the learned counsel for the appellant that since the Investigating Officer (PW19) did not obtain a certificate of fitness of the victim from the Medical Officer at 5.05 pm, this declaration should not be considered. It is to be noted that this statement was recorded by PW19 SI Ishwar Singh in GTB Hospital in the presence of Dr. Dargan, Medical Officer, whose signatures have been identified by PW-9, record keeper at GTB Hospital as Dr.Dargan has left the services and his whereabouts were not known. Moreover, it is not an essential requirement in law that a certificate of fitness needs to be obtained before recording the statement of the deceased particularly when the deceased has suffered

100% burn injuries on her body. It will not be out of place to refer to a recent judgment of the Hon'ble Supreme Court in the case of *Gulzari Lal Vs. State of Haryana, (2016) 4 SCC 583*, wherein the Apex Court confirmed the conviction by placing reliance on the statement made by the deceased and recorded by a Head Constable.

Relevant paragraph of the judgment reads as under: -

“23. In reference to the position of law laid down by this Court, we find no reason to question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by the Head Constable Manphool Singh (PW 7), he was found to be mentally fit to give his statement regarding the occurrence. Further, evidence of Head Constable Manphool Singh (PW 7) was shown to be trustworthy and has been accepted by the courts below. The view taken by the High Court does not suffer from any infirmity and the same is in order.”

21. The Constitution Bench of the **Hon'ble Supreme Court** in the case of *Laxman Vs. State of Maharashtra, (2002) 6 SCC 710*, has held that **what is essentially required is that the person who records the dying declaration must be satisfied that the deceased was in a fit state of mind. A certification by the Doctor is essentially a rule of caution and where the person recording the statement finds 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. Para 3 of the judgment reads as under: -

“3...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.”

22. Apart from both the dying declarations, the husband of the victim Sh. Yogesh Kumar was examined by the prosecution as PW1, who testified that he was married with the deceased on 22nd November 1992. He stated that five days before the incident he came to know from the *mohalla* people that the appellant was having illicit relationship with his wife and he further stated that his wife told him that the appellant used to threaten her that in case she does not marry him, he would kill her and her husband. PW1 also made inquiries from the appellant who denied the illicit relations with his wife. He testified that on 5th February 1997 when he along with his brother-in-law Banmali Mishra (PW5) were in the room on the roof of his house, he heard the noise of his wife '*bachao bachao*' and then he along with his brother-in-law came down and saw his wife in burning condition. He deposed that his wife had informed them that while she was on the bed inside her room the appellant came inside the room and had

thrown the petrol on her and set her on fire with the help of a flambeau like object.

23. Thus PW1 has corroborated both the dying declarations Ex.PW1/B & Ex.PW1/A recorded by PW19 and PW2 respectively. These dying declarations have been further corroborated by PW5 Sh.Banmali Mishra, who is the brother of the deceased. He testified that on the date of incident, he was present along with his brother-in-law Yogesh in a room on the roof of the house and at that time his sister Richa was on the ground floor. He stated that he and his brother-in-law upon hearing the cries of the deceased from the ground floor, came out and saw his sister Richa engulfed in flames and lying in the *gali*. He wrapped her in blankets and brought her to GTB Hospital and got her admitted in the casualty ward. He stated that his sister remained in the hospital for 6 days and died on 11th February 1997, and during those six days she remained conscious and during a conversation she told him that when they had gone to the roof of the house, the appellant had set her on fire while she was sleeping.

24. The post-mortem of the body was conducted on 11th February, 1997 by Dr.Gaurav Aggarwal (PW10), vide Ex.PW10/A. He found external ante mortem injuries and superficial burns on the body except both her breasts, small part at the back of the chest covering 95% of the body surface area. The cause of the death was septicemia with

shock, due to 95% infected deep wounds of burns likely to be produced by flames.

25. Having considered the judgment of the Trial Court in the light of the judgments of the Hon'ble Supreme Court in the cases of ***Pawan Kumar, Gulzari Lal, Govindappa,*** and ***Laxman*** (supra), both dying declarations of the deceased with further corroborative depositions of her husband Yogesh (PW1) and brother Banmali Mishra (PW5), we find that the prosecution has proved its case beyond any reasonable doubt that it was the appellant who had caused burn injuries on the deceased by throwing petrol on her body and setting her on fire with the help of a flambeau like object.

26. We do not see any ground requiring our interference with the judgment of the Trial Court. The appeal is dismissed being devoid of any merit. Bail bonds and surety bonds furnished by the appellant stand cancelled. The appellant shall surrender not later than 19th July, 2018 failing which SHO shall take custody of the appellant forthwith.

VINOD GOEL, J.

S. MURALIDHAR, J.

JULY 12, 2018
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