

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

+ **CRL.A. 334/2004**

Reserved on: 01.11.2018

Pronounced on: 03.12.2018

IN THE MATTER OF:

PREMA DEVI & ORS.

..... Appellants

Through : Mr.Anwesh Madhukar, Ms.Prachi Nirwan, & Mr.Pranjal Shekhar, Advocates from DHCLSC.

Versus

STATE OF DELHI

..... Respondent

Through : Ms.Aashaa Tiwari, APP with SI Sandeep Yadav, PS Mehruali, Delhi.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is against the conviction of both the appellants under Section 302/34 IPC whereby vide judgment dated 21.04.2004 and order of sentence dated 21.04.2004, the appellants have been directed to undergo imprisonment for life and imposed a fine of ₹ 2,000/- each; in default whereof, undergo rigorous imprisonment for two months each.

2. The brief facts of the case are that on 24.05.1997, on receipt of *DD-No.10*, SI Uday Bir Singh (PW-10) along with Constable Balwan Singh reached at Kachi Colony, Bhati Mines, New Delhi where they came to know that a lady namely, Smt.Arbi Devi had been taken to Safdarjung Hospital by a PCR van in a burnt condition. Constable Garib Chand also reached there and he alongwith SI Uday Bir left for Safadurjung Hospital where Smt.Arbi Devi w/o Raju was found admitted in a burnt condition.

She was declared fit for making a statement on an application, Ex.PW5/DA, moved by PW10 SI Uday Bir Singh to CMO, Safadurjung Hospital, New Delhi. Telephonic information was given to the SDM, Hauz Khas but he was unavailable. However, the ACP, Hauz Khas and the SHO, Mehrauli had reached the hospital.

3. SI Uday Bir Singh (PW10), the then Investigating Officer recorded the statement of Smt.Arbi Devi wherein she alleged that *“she was harassed for dowry demand; was given beatings by her mother-in-law, Prema Devi/appellant no.1, husband Raju and her sister in law Kago/appellant no.2. and on 22.05.1997, she was shunted out from her matrimonial home and that her father brought her to his own house. On 24.05.1997, when she went out to answer call of nature at a pahari near her parental house, the appellants came from behind and poured kerosene oil on her, and set her on fire and they both ran away from the spot with a person who was waiting on a scooter for them near pahari. She extinguished fire with great difficulty and was got admitted in the hospital by PCR officials.”* Her statement is marked as Ex.PW10/A.

4. FIR, PW10/C was thus registered at PS Mehrauli, Delhi. The Crime Team also reached the spot at about 5:00PM and its Incharge issued several instructions to SI Uday Bir Singh (PW10), vide his report Ex.PW10/J.

5. The injured had received 86% anti mortem deep burns and she expired on 24.05.1997 itself at 10:30PM. The post mortem was conducted on 25.05.1997 where the cause of death was shown to be *“shock as a result of 86% anti mortem deep burns”* and the case was then converted under Section 302 IPC. The accused person were later arrested in the year

2000. The charges against the appellant no.1 and 2 were framed under Section 302/34 IPC and under Section 498A/34 IPC against all of them, including the husband of the deceased.

6. The plea of the appellants herein is that the Trial Court erred in convicting them under Section 302/34 IPC, relying purely upon the alleged dying declarations of the deceased which do not inspire confidence at all. It was argued by the defence that though a conviction can solely be based on the dying declaration(s), but the attending circumstances too cannot be overlooked. To rely upon the dying declaration, the Court must first find that it is truthful and is not a result of tutoring, vindictiveness or a figment of imagination. It was argued by the learned counsel for the appellants the attending circumstances in this case, defy the allegations made in the dying declarations since all the family members of the deceased have turned hostile.

7. Needless to state that the Trial Court has relied purely on the dying declarations *a)* made before the doctor in MLC Ex.PW5/A and *b)* before the SI Uday Bir Singh (PW10) viz. Ex.PW10/A. The Court found such dying declarations to be in consonance with each other, being truthful, since the deceased had exonerated her husband in the same breath and thus relying upon such declarations, has convicted the appellants herein under Sections 302/34 IPC and all of them, including the husband of the deceased, under Sections 498A/34 IPC.

8. In arriving at the said conclusion, the trial court had relied upon the testimony of PW5, Dr.J.S.Kohli, being an independent witness, observing that there is no reason why this witness would record the statement of the deceased falsely in the MLC; *b)* the testimony of PW5, Dr.J.S.Kohli being

corroborative to the testimony of PW10, SI Uday Bir Singh before whom the second dying declaration was made; *c*) no family member of the deceased was present at the time of recording of her statement hence chances of her being tutored were completely ruled out; *d*) nothing would turn on not calling the SDM at the time of recording the dying declaration of the deceased and *e*) though the ACP and SHO had not attested such a dying declaration, but since SI Uday Bir Singh Ex.PW10 had withstood the rigors of cross-examination, there was no reason to disbelieve the version of the prosecution.

9. Before proceeding to examine the two dying declarations, we may refer to the relevant observations made by the Supreme Court in *Sharad Birdichand Sarda vs. State of Maharashtra* [(1985) 1 SCR 88] a summary whereof is culled out as follows viz. (*a*) the prosecution has to stand on its own legs and cannot derive anything from the weakness of the defence; (*b*) before using the additional link, it must be proved that all the links in chain are complete and do not suffer any infirmity; (*c*) the circumstances from which conclusion of the guilt is to be proved, should be fully established; *d*) the facts so established should be consistent only the hypothesis of the guilt of the accused that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; and *e*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused. Thus the circumstances must show that in all human probability, the act in question was done by the accused and there

should be no conviction on moral grounds. The fouler the crime, higher the proof.

10. Hence the dying declaration needs to be of such a nature, as to inspire full confidence of the Court as to its correctness. The Court is obliged to rule out the possibility of the statement being either tutored, prompted, vindictive or a product of the imagination and before relying upon the dying declaration, the Court must also conclude that the deceased was in a fit state of mind to make such statement. Once the Court is satisfied that the dying declaration was voluntarily and truthful, it can be relied on without any corroboration. This is not a rule of law, but a rule of prudence.

11. Guided by the above parameters, we may now proceed to test the dying declarations made by the deceased to examine if those satisfy the tests laid down above.

12. To find if the deceased was fit to make a dying declaration, certain safeguards are required to be taken by the Investigating Officer while recording the statement. Chapter-13A-Dying Declaration, of the Delhi High Court Rules (Vol. V) lays down certain guidelines which are relevant for the said purpose and are extracted below:

“3. Fitness of the declarant to make the statement should be got examined—Before proceeding to record the dying declaration, the Judicial Magistrate shall satisfy himself that the declarant is in a fit condition to make a statement, and if the medical officer is present, or his attendance can be secured without loss of time, his certificate as to the fitness of the declarant to make a statement should be obtained. If, however, the circumstances do not permit waiting or the attendance of the Medical Officer, the Judicial Magistrate may in such cases proceed forthwith

to record the dying declaration but he should note down why he considered it impracticable or inadvisable to wait for a doctor's attendance.

x x x

6. Recording of Dying declarations at a place away from the District Headquarters—Where in an emergency a dying declaration has to be recorded at a place away from the District Headquarters the investigated officer or the medical officer attending upon the dying man shall apply the nearest Judicial Magistrate to record the dying declaration, and the Judicial Magistrate shall immediately proceed to the spot and take the statement of the dying man in the manner stated above. This, however, would not prevent the medical officer or the police officer connected with the investigation of the case from recording the dying declaration if he is of the opinion that death is imminent and there is no time to call a Judicial Magistrate. In such cases the police to the medical officer concerned must note down why it was not considered expedient to apply to a Judicial Magistrate for recording the dying declaration or to wait for his arrival.

7. Recording of a Dying declaration by a Police Officer or Medical Officer—Where a dying declaration is recorded by a Police Officer or a Medical Officer, it shall, so far as possible, be got attested by one or more of the persons who happen to be present at the time.

8. Fitness of the Declarant to make a statement to be certified by the Judicial Magistrate or other officer concerned—The Judicial Magistrate or other officer recording a dying declaration shall at the conclusion of the dying declaration certify that the declarant was fit to make a statement and it contained a correct and faithful record of the statement made by him as well as of the questions, if any, that were put to him by the justice recording the statement. If the accused or his counsel happens to be present at the time the dying declaration is recorded, his presence and objection, if any, raised by him shall be noted by the Judicial Magistrate or the

officer recording the dying declaration, but the accused of his counsel shall not be entitled to cross examine the declarant.”

13. In the instant case, admittedly, an application dated 24.05.1997, Ex.PW5/DA was moved by PW10, SI Uday Bir Singh to the CMO, Safdurjung Hospital, New Delhi making a request to record the statement of the injured. Such an application bears an endorsement ‘*fit for statement*’ allegedly signed by a doctor on 24.05.1997, at about 1:30pm. It was only after such an endorsement, that SI Uday Bir Singh PW10 had proceeded to record the statement of the injured, Ex.PW10/A. However, PW5, Dr.J.S.Kohli in his cross-examination had categorically stated that the signatures on the endorsement ‘*fit for statement*’ on PW5/DA, at point A, were not his signatures and that he did not know as to whose signatures those were. Rather, PW5, Dr.J.S.Kohli checked the patient at 12:25 pm on 24.05.1997 and had prepared the MLC, Ex.PW5/A. The doctor who had made the alleged endorsement on the application, Ex.PW5/DA, was never produced by SI Uday Bir Singh (PW10). Hence, there appears to be some doubt about the fitness of the injured at the time her statement, Ex.PW10/A was being recorded.

14. PW10, SI Uday Bir Singh admitted in his deposition that the ACP and SHO were present while he had recorded the statement of the injured (Ex.PW10/A). As per Rule 7 of the Delhi High Court Rules, if the ACP and SHO were present at the time of recording the dying declaration, then to give credence to such dying declarations, PW10 ought to have got them duly attested by the SHO or the ACP, which he failed to do. It is thus apparent that PW-10 did not observe the guidelines under Chapter 13A (supra).

15. Further, admittedly, the Crime Team had visited the spot between 5pm-5:35pm on 24.05.1997. The Incharge, Crime Team had advised the investigating officer (PW10) to take the following step :-

- a) The fitness from the doctor be obtained before obtaining the dying declaration;*
- b) the public witness if any be examined;*
- c) the site be photographed;*
- d) the SDM be informed etc.*

16. It is the version of PW10, SI Uday Bir Singh that he tried to contact the SDM but could not succeed. However it is not evident from the record as to at what time did he contact the SDM or if he ever tried to contact him again after the spot was examined by the Crime Team, despite specific direction(s) by the Incharge, Crime Team to inform the SDM. Admittedly, the deceased was alive till 10:30pm and the record shows that no efforts were made by PW-10, SI Uday Bir Singh to call the SDM till the evening for recording the statement of the injured in his presence, in compliance with Rule 3 of the Delhi High Court Rules.

17. Coming to the site plan, Ex.PW10/E, admittedly it was prepared by PW10, SI Uday Bir Singh on 24.05.1997. A bare perusal of the said site plan would reveal *Mark-E* to be the place from where the accused person had allegedly entered into the jungle where the injured had allegedly gone to attend the call of nature. It is not clear at whose instance PW10 had marked place "E", since it is an undisputed position that the incident did not happen in the presence of anyone and there was no occasion to take the injured to the spot by SI Uday Bir Singh (PW10). Further, the site plan was prepared on the date of the incident itself, without the arrest of the

accused persons and hence it cannot be said that the site plan was prepared at their instance. Though SI Uday Bir Singh (PW10) had later on deposed that the site plan was prepared at the instance of Hunda Ram, father of the injured (PW-1), but he did not corroborate this fact. Even otherwise, he could not have given the location at mark "E" since he was not present on the spot, at the time of the incident.

18. Further, though the seizure memo, Ex.PW10/H reveals that a match box with few sticks had been recovered from the site, but the site plan does not depict any such place where the match box in question was found lying. In his deposition, PW-10 had admitted the place of occurrence to be a bird sanctuary and a notified area and stated that there were 15-20 houses near house of the Hundal Ram (PW-1) and the wall of the bird sanctuary was broken at several places and vehicles, including cars, could enter into the bird sanctuary from such places. However, the site plan did not show the location of the wall of the bird sanctuary; places from where it was broken; location of the nearby houses, the distance between the wall and the place of the incident and the houses so as to have a fair idea as to whether the place of the incident could be visible to passersby/public. Pertinently, despite directions issued by the Incharge, Crime Branch, no photographs were taken by PW10. Admittedly, the area in question was accessible to the general public as cars etc. could enter into the said place through the broken walls. It is indeed strange and rather hard to believe that two person had allegedly poured kerosene oil upon a lady in stark daylight; set her on fire and had fled from the spot with a third person on a two wheeler and no one had even heard the shrieks of the injured or had witnessed the incident.

19. It is also not clear as to who had informed the police and who had moved the injured to the hospital. The prosecution has neither proved who made the PCR call, nor have they examined any PCR official in this regard.

20. The postmortem report shows no burn on the face or on the right forearm of the deceased which gives credence to the submissions made by Mr. Anwesh Madhukar, learned defence counsel that if a person commits suicide, he/she would normally not pour kerosene oil on his/her face and in those circumstances, the arm being used for pouring kerosene oil, would not be charred.

21. Now, admittedly, the PCR form was never produced before the Trial Court, so also DD-10A, which was the starting point of the investigation. Even the Incharge, Crime Team who had examined the place of the incident, was never examined. Neither the police officials accompanying PW10, SI Uday Bir Singh, nor the PCR official who had shifted the deceased to the hospital from the spot, were produced. With these missing links, the Court needs to be extra cautious. In the course of arguments, we went through the trial court record and with great difficulty could lay our hands on DD-10A, which was never filed nor proved by the prosecution and it read as under:-

“Time 10:57 am PW10 came at reporting room and told lady Constable Sunita No.1773/PCR has reported one lady has set herself on fire in a house at Bhati Mines, Sanjay Colony. Message recorded in Roznamcha and a copy is given to Constable Balwan Singh 2814/SD be given to SI Uday Bir Singh.”

It is note worthy that neither this DD No.10A, nor lady Constable Sunita was ever examined by the prosecution.

22. These lapses have seriously dented the prosecution story. We are compelled to note that the investigation has been extremely shoddy and discreditable. To our mind, the very fact that DD No.10A gives a diametrically opposite version of the entire incident, was probably the reason that it was never placed on record.

23. In the dying declaration (PW10/A), the deceased had also made various allegations against her in-laws regarding dowry demands/beatings etc. The parents of the deceased were examined as PW1 and PW2; her brother as PW4 and one Mr.Wazir Chand, her neighbour, as PW3. All the said witnesses have deposed that the marriage of the deceased was a *Badla* marriage i.e. while she was married in the family of the accused; her husband's sister was married to her brother and in the given circumstances, there was no question of any dowry demand. All these public witnesses have categorically stated there was never any demand of dowry from the accused persons and rather, they have deposed that the injured was mentally disturbed and had committed suicide in the jungle.

24. The depositions of her family members do not support the dying declarations of the deceased. On the contrary, they falsify the motive attributed to the accused persons of committing her murder. It is settled law that since the maker of the dying declaration cannot be subjected to cross-examination, it needs to be accepted with utmost caution.

25. In *P.V.Radhakrishna vs. State of Karnataka* reported as AIR 2003 SC 2859 the Supreme Court has held as follows:

“13. xxxx.... This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in

Paniben v. State of Gujarat [(1992) 2 SCC 474 : 1992 SCC (Cri) 403 : AIR 1992 SC 1817] :

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P. [(1976) 3 SCC 104 : 1976 SCC (Cri) 376 : (1976) 2 SCR 764])

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552 : 1985 SCC (Cri) 127 : AIR 1985 SC 416] and Ramawati Devi v. State of Bihar [(1983) 1 SCC 211 : 1983 SCC (Cri) 169 : AIR 1983 SC 164] .)

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618 : 1976 SCC (Cri) 473 : AIR 1976 SC 1994] .)

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P. [(1974) 4 SCC 264 : 1974 SCC (Cri) 426])

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P. [1981 Supp SCC 25 : 1981 SCC (Cri) 645 : AIR 1982 SC 1021])

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P. [(1981) 2 SCC 654:1981 SCC (Cri) 581])

(vii) *Merely because a dying declaration does not [Added by official Corrigendum No. F.3/Ed. B.J./107/2003 dated 28-10-03] contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu [1980 Supp SCC 455 : 1981 SCC (Cri) 364 : AIR 1981 SC 617] .)*

(viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar [1980 Supp SCC 769 : 1979 SCC (Cri) 519 : AIR 1979 SC 1505] .)*

(ix) *Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram v. State of M.P. [1988 Supp SCC 152 : 1988 SCC (Cri) 342 : AIR 1988 SC 912])*

(x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan [(1989) 3 SCC 390 : 1989 SCC (Cri) 585 : AIR 1989 SC 1519].)*

(xi) *Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra [(1982) 1 SCC 700 : 1982 SCC (Cri) 334 : AIR 1982 SC 839] .)”*

26. In the instant case, the attending circumstances assume much more importance and it becomes incumbent for the Court to examine each and every content of the dying declaration cautiously and if some of the

allegations made therein are found to be untrue, then it would be appropriate to rely upon a part of the remaining allegations to indict the accused, when there is no eye witness. The rejection of a part of the dying declaration would certainly put the court on a guard and induce it to apply a rule of caution. There are cases where a part of the dying declaration which is not found to be correct is so inextricably linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event, the court would well be justified in rejecting whole of the dying declaration.

27. Here, the subject of the dying declarations, if read in conjunction with DD *No.10A*, clearly destroys the prosecution case, because DD *No.10A* not only narrates a different place of the incident, but also goes to record that the case is one of suicide and not of murder. There are several unanswered questions that are thrown up. Why was this DD kept away from the Trial Court ? Why were lady constable, Sunita (PCR), Constable Balwan, Constable Garib Chand, and Incharge Crime Team never produced/ examined? This is not understandable as they all could have thrown light on some vital aspects of the case. A bare perusal of *DD-10A* would reveal the facts being wholly contrary to the dying declarations made by the deceased before the doctor in MLC Ex.*PW5/A* and in Ex.*PW10/A*, as recorded by PW10, SI Uday Bir Singh. Rather, this explains as to why these officials, who though were a part of the investigation with PW10, were never produced before the Court, as that would have completely destroyed the story set up by the prosecution.

28. In these attending circumstances, we have grave doubt about the truthfulness of the dying declarations. The deceased having suffered

injury in her parental house as per DD No.10A, her statements appear to be vindictive and probably a result of tutoring by her parents. In the given facts and circumstances, the dying declarations of the deceased cannot form the sole basis for conviction. Though we agree that there is no requirement that the dying declaration must necessarily be made to a Magistrate as the initial value or weightage attached to it necessarily depends on the facts and circumstances of a particular case, but the facts of the instant case, wherein the contents of the dying declaration are wholly contrary to the deposition of the parents of the deceased and to *DD-10A* that was withheld from the Court, coupled with other factors as observed above have cautioned us. We are of the considered opinion that non-examination of the Magistrate, especially when PW10 the Investigating Officer had sufficient time and facility to fetch the Magistrate since the victim had survived for a few hours even after her statement, (Ex.*PW10/A*) was being recorded by the Investigating Officer, would be fatal in this case.

29. We are therefore not inclined to accept the dying declarations of deceased as they do not inspire confidence. As a result, the conviction of the appellants is set aside and both of them are acquitted of the charges under Section 498A/302/34 IPC.

30. Admittedly, the accused husband also stands convicted under Section 498A IPC and he had even completed the period of his sentence. The appellants herein have also suffered more than four years of RI, Thus, we are of the opinion that both of them deserve to be compensated by the State in monetary terms for being made to go through the rigors of trial, spanning over fourteen long years, during which period, they remained

incarcerated for over four years before their sentence was suspended. In *Sube Singh vs. State of Haryana and Others* reported as (2006) 3 SCC 178, the Supreme Court held as follows:

“It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure.”

31. We direct the Government of NCT of Delhi to pay a sum ₹ 1,00,000/- (₹ One lac) to each of the appellants as compensation for false prosecution, as per the dictum in the case of *Sube Singh (supra)*. This being a case of false prosecution of the appellants under Section 302/34 IPC, we also deem it appropriate to direct the Commissioner of Police, Delhi to hold an enquiry into the incident, fix the responsibility and file a report of the action taken within two months from the date of this decision.

32. The appeal is allowed and disposed of on the above terms. The appellants are on bail in this case. Their bail bonds and surety bonds stand cancelled. However, as per Section 437A Cr PC, both the appellants are directed to furnish their personal bonds in the sum of ₹ 25,000/- each with one surety of the like amount to the satisfaction of the learned Trial Court

within a period of two weeks from today, for them to appear before the Supreme Court, as and when the said Court issues notice in respect of the appeal or petition filed against this judgment. The bail bonds shall remain in force for a period of six months.

33. A copy of this judgment along with the TCR be remitted to the learned Trial Court forthwith. The Registry shall also forward a copy of this judgment immediately to the Commissioner of Police for perusal and compliance.

34. List before the Roster Bench on 18.02.2019, to await the action taken report, as directed above.

(YOGESH KHANNA)
JUDGE

(HIMA KOHLI)
JUDGE

DECEMBER 03, 2018

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