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

+ CRL.A. 1075/2017

MAHESH RAI

..... Appellant

Through: Mr.C.L.Gupta, Advocate.

versus

THE STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State with
SI Sandeep Shrivastava, PS Bharat
Nagar.

WITH

+ CRL.A. 31/2018

HORI LAL

..... Appellant

Through: Mr. Ajay Kumar Pipaniya, Advocate
with Ms. Mahima Chaudhary, Advocate.

versus

THE STATE GOVT. OF NCT OF DELHI & ANR. Respondents

Through: Ms. Aashaa Tiwari, APP for State.
Mr. C.L.Gupta, Advocate for R-2.

AND

+ CRL.A. 292/2018

STATE (NCT OF DELHI)

..... Appellant

Through: Ms. Aashaa Tiwari, APP for State

versus

MAHESH RAI

..... Respondent

Through: Mr.C.L.Gupta, Advocate.

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Date of Decision: 13th May, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. While CrI.A.No.1075/2017 has been filed by the appellant-accused challenging the judgment dated 29th November, 2016 convicting him under Sections 452 and 302 IPC as also the order on sentence dated 26th September, 2017 by which the appellant-accused had been directed to undergo R.I. for three years for offence committed under Section 452 IPC along with a fine of Rs.10,000/- and to undergo R.I. for offence under Section 302 IPC along with a fine of Rs.5,00,000/-, CrI.A.No.292/2018 and CrI.A.No.31/2018 have been filed by the State as well as by the father of the deceased-victim respectively seeking enhancement of the sentence.

FINDINGS OF THE TRIAL COURT

2. The relevant findings in the impugned judgment are reproduced hereinbelow:-

“13. Admission of Shivani in the hospital and preparation of her MLC:-

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(c) The matter written in MLC Ex. PW10/A does not exhibit any word or sentence having been incorporated therein subsequently. No question about subsequent addition of last line in the history of injuries in MLC Ex. PW10/A was put either to PW-2 Leelawati or PW-10 Dr. Ajay Kumar. When there is no interpolation manifest in the document, the content, the contention raised by way of an after thought has to be repelled.

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(d) The related contention of Ld. Defence counsel that the name of accused was not disclosed when the incident was informed to Police Control Room reflects that PW-2 Leelawati, who claimed to

have informed at no.100 from hospital was not aware of the assailant and had subsequently got the name of the accused added in the MLC. It is true that PW-2 Leelawati had stated that she had informed the Police at No.100 from the hospital in her examination-in-chief. She had however corrected herself when related questions were put to her in cross-examination and stated that she had not reported the matter to the Police. The call at no.100 was made by her husband in her presence. Even otherwise, the SOS call to Police Control Room are made by people in distress calling for immediate help / assistance. The information is generally short, may be one or two liner so that precious time is not lost in detailing the entire events, which can be appropriately collected by the local Police subsequently. The PCR call of the incident was, thus, meant for alerting the Police and triggering necessary proceedings. Non-mention of name of accused therein, even if, the caller PW-4 Hori Lal may have been informed of his involvement by his wife, PW-2 Leelawati, is inconsequential.

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15. **Non-recording of statement of deceased by Magistrate:-**

(a) It has vehemently been argued by Sh. Gupta that despite the availability and opportunity, IO did not call the Sub-Divisional / Executive Magistrate for recording statement of injured. The statement Ex. PW2/A now being projected as dying declaration of deceased Shivani, cannot be taken into consideration for want of adequate explanation. It has been stressed that the lapse is also in breach of the instructions circulated by Commissioner of Police to all investigation agencies, prosecution under him vide no.2251-2350/Record Branch/PHQ, dated 19.04.2011. Reliance in this behalf has been placed on the ratio in **Jagdish Lal Malhotra V. State, 1984 (1), RCR 332**, that dying declaration recorded by I though he had time and facility to fetch the Magistrate, as the victim survived for 24 days, should be excluded from evidence. In '**State (Delhi Administration) V. Laxman Kumar, 1986 (1) RCR 184 SC**', it was held that dying declaration recorded by the IO without explaining the non-availability of magistrate and doctor and further the declaration not recorded in question –

answer from nor signed by the deponent was held unacceptable. Further reliance on the same lines is placed on '**Kaushalya V. State, 1988 (1) RCR, 475** Where dying declaration of deceased with 80% burn injuries was recorded by the IO in hospital. Pathedin injection had been given to the patient. It was held that dying declaration recorded four hours thereafter cannot be relied upon as the patient would not have normal alertness. The additional reason for excluding the dying declaration from consideration was that the IO had not even contacted the Magistrate for recording the statement and he himself had not recorded it in question-answer form, in violation of rules of caution applicable in Delhi. Further it was held in '**Surender Singh Vs. State, 1990 (1) RCR 318**', it was held by referring to Rules and Orders of Punjab High Court that dying declaration recorded by a doctor but not got attested by any other persons though another doctor, nurse attendant were on duty. It was held that the statement having not been recorded in accordance with Rule 7 is not reliable.

(b) Ld. Addl. PP has replied that Shivani was admitted in Sunder Lal Jain Hospital on 06.05.2010 and she had succumbed to the injuries on 31.05.2010. The IO remained under an impression that Shivani being a spinster, there was no legal requirement to get her statement recorded by a Magistrate. He also clarified that since he did not anticipate her death, he did not approach the Magistrate. Reliance in this behalf has been placed by Sh. Pipaniya on '**Kansraj V. State of Punjab, AIR 2000, SC 2324**', that Section 32 of **Evidence Act** does not require that the statement sought to be admitted in evidence should have been made in imminent expectation of death. Further he has cited '**Ramwati Devi V. State of Bihar, AIR 1983 SC 164**', to stress that dying declaration recorded before Police Officer is admissible and can be relied upon for conviction. It need not be recorded before a Magistrate.

(c) Undoubtedly IO would have done better by associating SDM / Executive Magistrate in recording the statement of deceased Shivani in the hospital. But on assessment of MLC Ex. PW10/A, response to the Medical treatment and personal observation, he did not anticipate the death of Shivani till

10.05.2010, till when the investigation was with him and thereby the urgency to call the magistrate. His response in cross-examination also reflects that he had remained under an impression that Shivani being unmarried, it was not compulsory for him to get her statement recorded by the Magistrate. Although, questions have been put to PW-4 Hori Lal and IO/SI Saran Chand in cross-examination that the statement Ex.PW2/1 actually pertains to Hori Lal on behalf of his daughter in order to falsely implicate the accused. It was obviously denied by both the witnesses. It was surmised that the original FIR bears the signatures of PW-4 at the place where signatures of complainant / informant were to be obtained. Duty Officer HC Mukesh Kumar had produced the original FIR register on 20.10.2011 but the signatures of PW-4 Hori Lal were not found appended there. PW-4 had also denied the suggestion that he had forged the signatures of his daughter in collusion with Police. The witness was not shown any document bearing the signatures of deceased Shivani to relate the same to the said question. In fact, right thumb impression of Shivani had been obtained on the documents be it the MLC Ex.PW10/A or statement Ex. PW2/1. A close perusal of the contents of statement Ex. PW2/A shows that it could not have been described by one who was not himself present at the spot at the relevant time. In **Laxman V. State of Maharashtra, AIR 2002 SC 2973**, it was held that there is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such a statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.

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(h) The Investigating Officer has furnished plausible explanation for not associating Magistrate for recording statement of the deceased. Statement Ex.PW2/A categorically meets the second requirements of Circular No.20/2011 of the Commissioner of Police, Delhi as the statement of deceased was attested by her

mother / PW-2 Leelawati, who was present at that time. No material or circumstances has been put to doubt the authenticity of statement Ex. PW2/A of the deceased.

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(j) It has been a matter of experience that even when the statement of a dying man is recorded in question-answer form, multiple points of resentments are raised on behalf of defence about the formation of questions at times alleging that the recording authority resorted to roving / fishy inquiry from the declarant. The Circular No.20/2011 relied upon by the defence prescribes that the statement of declarant should be in the form of simple narrated in the language of declarant and if any, occasion arises for putting questions to the dying man, it should be recorded in question-answer form. The actual words of declarant should be taken down and not merely their substance. In the case in hand, the IO appears to have performed the job in this behalf ethically and since he did not feel any ambiguity in the narration of deceased, no question was needed to be put to her.

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19. (g). The main bone of contention of the timing of IO of recording the statement of deceased getting faux-pushed with his presence at the spot was rectified by him in his examination-in-chief by clarifying that the sequence of getting the spot inspected and photographed by Crime Team and recording of statement of Shivani are wrongly mentioned in rukka Ex.PW 19/A. That puts curtain on most of the related objections of defence. Minor contradictions in the testimonies of other witnesses do not create trough in the prosecution case.

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20. Motive:-

(a) Without spreading an edifice or spilling the background, a suggestion was given to PW-2 Leelawati in cross-examination that accused had physical relationship with Shivani. Such suggestion was not given to father of the deceased. Only to disgrace the deceased in public estimation, could have been the thought process of accused behind such suggestion.

in the DD Entry No. 34B, Ex. PW-14/A it had been recorded that an unknown person had thrown acid on PW-2's daughter. He states that in the initial history given in MLC, the assailant was not named. He alleges that few sentences while recording the history of the case in the MLC had been added subsequently. He points out that when the Investigating Officer after meeting the victim had reached the crime spot—which was being inspected by the crime team—the Investigating Officer had informed the crime officials that an unknown person had thrown acid on a girl. He states that PW-3 Prem Lata had deposed that she had been told that the appellant-accused had been called for repair of air conditioner, which fact she stated to the attending doctor, inasmuch as, the MLC recorded that some boy had thrown some liquid used for AC repairs.

4. According to learned counsel for the appellant-accused, there was a dispute between the families of appellant-accused and the deceased-victim as the appellant-accused had been in a relationship with the elder sister of the deceased-victim and they wanted to marry, but her parents did not agree.

5. Mr.Gupta further states that the claim of PW-2, mother of the deceased, that the appellant-accused had been called by her for repair of AC window does not stand to reason as the families of the deceased and the appellant-accused were not on speaking terms and further the appellant-accused was not a mason by profession, but a dealer in building materials. Thus, according to him, the name of the appellant-accused was added subsequently, at the instance of the mother of the deceased, with intent to falsely implicate him in the present case.

6. Learned counsel for the appellant-accused submits that a learned Single Judge of this Court in *Smt.Deepa Bajwa Vs. State & Ors.*, 115

