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

+ **CRL.A. 834/2003**

KANWAR PAL SHARMA

..... Appellant

Through

Mr.Naveen Gaur with
Mr.Kaushelnder Singh, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through

Ms.Aashaa Tiwari, APP for the State
with Inspector Adesh Kumar, H.M.
Cell.

WITH

+ **CRL.A. 224/2004**

AMIT KUMAR

..... Appellant

Through

Mr.Naveen Gaur with
Mr.Kaushelnder Singh, Advocates.

versus

STATE

..... Respondent

Through

Ms.Aashaa Tiwari, APP for the State
with Inspector Adesh Kumar, H.M.
Cell.

AND

+ **CRL.A. 469/2004**

PRAMOD KUMAR SHARMA & ANR.

..... Appellants

Through

Mr.Naveen Gaur with
Mr.Kaushelnder Singh, Advocates.

versus

STATE

..... Respondent

Through

Ms.Aashaa Tiwari, APP for the State
with Inspector Adesh Kumar, H.M.
Cell.

CORAM:**HON'BLE MR. JUSTICE MANMOHAN****HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL****J U D G M E N T****MANMOHAN, J:- (Oral)**

1. Present three appeals being Criminal Appeal Nos.834/2003, 224/2004 and 469/2004 have been filed by Kanwar Pal Sharma, Amit Kumar Sharma and Sonu Sharma along with Pramod Kumar Sharma respectively challenging the judgment dated 25th November, 2003 passed by the Additional Sessions Judge, Karkardooma Courts, Delhi in Sessions Case No. 142/2002 arising out of FIR No. 115/2002 registered with police station Gandhi Nagar, whereby all the four accused have been convicted under Section 302/34 IPC and sentenced to imprisonment for life with fine of Rs. 15,000/- each and in default of payment of fine to undergo rigorous imprisonment of one year each.

CASE OF THE PROSECUTION

2. The facts of the present case as recorded by the Trial Court are reproduced hereinbelow:-

“.....HC Shyam Lal stated that on that day he was on a emergency duty from 8 AM to 8 PM; at about 5.30 PM Ct. Sunil brought him copy of DD NO. 17A as per which Promod had caught one thief; he alongwith Ct. Sunil reached House No.9/4783 Old Seelam Pur where Promod Kumar factor owner and Kanwarpal produced Deepak saying that he had stolen two Kaaz-button machines; Deepak was not in a position to stand and it was apparent that he had been badly beaten, his both feet had swollen, neither he could walk nor sit, with great difficulty

he could tell his name and address; On being asked he told that Promod, Amit, Kanwar Pal and Sonu had brought him at 10.30 AM to make enquiry regarding machines stolen from the factory and since then they had been beating him after confining him inside factory; as it was apparent that he was given severe beating, he (HC Shyam Lal) immediately wrote an application for his medical and sent him to SDN hospital under supervision of Ct. Pratap Singh who while patrolling had reached there; in the meanwhile Promod Kumar, Kanwar Pal and Sonu were sent to police station with Ct. Sunil; subsequently he went to SDN hospital to record statement of Deepak but his condition was reported to be very serious and he was stated to be not fit for making statement, and therefore information in this regard was given to police station on telephone on which SI Adesh had reached hospital. On this statement and in view of injuries suffered by Deepak, FIR under Section 342/308/331/34 IPC was got registered. During investigation SI Adesh Kumar inspected the spot and prepared site plan at the instance of HC Shyam Lal. Deepak died in SDN hospital and hence Section 304 IPC was added. SI Adesh Kumar arrested accused Promod Kumar, Kanwar Pal and Sonu in this case on 21.5.02. They pointed out the place of incident and got recovered weapon of offence wooden dandas, Lungi, cloth which were seized. As per disclosure statements of the accused persons, Promod used to run the factory of fixing kaj buttons on pants and shirts and his brother Sonu used to look after the work and that their bother-in-law Kanwar Pal was also having factory of Kaaz Button in the adjoining premises; that a few days prior to the incident two Kaaz Button machines were stolen from the factory of Promod; accused Amit used to sleep in the factory and was quite close to Promod; that earlier deceased Deepak used to work in factory of Promod but left on account of altercation over payment of money and was at present working in factory of Chhaggan Lal alongwith Amit; as Promod, Kanwar Pal and Amit were quite thick among themselves, they suspected that Deepak had stolen the machines therefore, they made plan to call Deepak for enquiries under some pretext and to execute that plan Promod

and Kanvarpal called Deepak at 10.30 AM on 21.5.02 from factory of Chhagan Lal saying that enquiries regarding stolen machines were to be made from him and alongwith them Amit also came and thereafter, after locking him inside the factory, all the four persons tried to make him confess by scolding threatening him but Deepak declined and then all the four accused persons mercilessly beat him with kicks, fists, dandas and lathies after tying his feet and when his condition became serious, then the accused persons became perplexed and informed police that they had caught one thief. During investigation SI Adesh Kumar got conducted post mortem on the body of Deepak and handed over the same to his heirs. His blood clothes were seized. The accused Amit was arrested on 16.6.02. He pointed out the place of occurrence and made disclosure about having committed this offence along with his co-accused. Statement of witnesses were recorded. Post mortem report was obtained as per which cause of death was hemorrhagic shock consequent upon about 2/3rd of body surface being bruised carrying sub-cutaneous collection of blood by hard blunt object, directed upon the body by other party. Hence the case.”

FINDING OF THE TRIAL COURT

3. The conclusions given by the Trial Court in the impugned judgment are reproduced hereinbelow:-

“23. For the reasons stated above, I come to the conclusion that it is duly established on record that the accused persons have caused death of Deepak by giving him beating and their act amounts to culpable homicide as defined in Section 299 I.P.C. which covers cases where death is caused by doing an act with intention of causing such body injury as is likely to cause death or with knowledge that he is likely by such act to cause death. Exception given under section 300 IPC enumerate the circumstances when culpable homicide is not murder. First is when offender is deprived of power of self control by grave and sudden provocation. The second is if it is done in exercise in good faith of the right of private defence but exceeds the

power given to him by law. The third is when power given for advancement of public justice is exceeded by public servant or person aiding public person. The fourth is if it is committed without pre medication in sudden fight in fit of passion upon sudden quarrel and last is when the adult person suffers death or takes the risk of death with his own consent. The facts of the case are not covered under any of those Exceptions, so as to reduce the offence of culpable homicide as not amounting to murder, punishment for which is provided under section 304 IPC. The material brought on record makes out offence of murder defined in section 300 IPC in view of 'thirdly' thereof which is reproduced below:

Section 300 :

Except in the cases hereinafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or-----

2ndly

3rdly....If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or-----

4thly.

In the case under consideration, the accused persons have caused death by giving beatings to Deepak with the intention of causing bodily injury to him and the injuries inflicted intentionally to him were collectively sufficient to cause his death in ordinary course of nature as per post mortem report. Thus the alleged offence committed is murder as per section 300 IPC punishable under section 302 I.P.C. and is not covered in any of the circumstances enumerated in Exceptions given thereunder. Though details of beatings, as to which of the accused had caused which injury is not available but the victim has named them all and it is evident that all the accused were acting in furtherance of their common intention.

Hence they are guilty of having committed offence punishable under section 302/34 IPC. The accused No.1 and 2 are real brothers. Factory of accused No.3 (stated to be their brother in law) is situated in the same building and the accused No.4 is co-worker of the deceased.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICTS

4. Mr. Naveen Gaur, learned counsel for the appellant-convicts states that in the present case the prosecution had tried to prove the circumstance of ‘last seen’ by leading evidence of Chagan Lal (PW-1), Lakhan Singh (PW-2), Swaraj Jain (PW-4) and Raj Pal Singh (PW-5). However, learned counsel for the appellant-convicts states that all the aforesaid witnesses did not support the story of the prosecution, despite being cross-examined by the learned APP at length.

5. Learned counsel for the appellant-convicts contends that the dying declaration hypothesis was contrary to the facts as in the death summary being Ex. PX, Dr. R. P. Acharya had mentioned, “*A pt Deepak Sharma 20 years/Male came to the casualty with Polytrauma beaten by public....*”

6. Mr. Naveen Gaur however admits that though in the MLC being Ex. PW-6/A prepared by Dr. Kailash Ram it is mentioned, “*...Alleged history of beaten by public on 21/5/02 & Promod as told by pt...*”, yet he contends that the name of the appellant-Pramod Kumar Sharma had been inserted by a different pen in a different handwriting.

7. Learned counsel for the appellant-convicts also contends that the recovery of the weapons of offence i.e. *Danda* and *Lungi* in the present case were highly doubtful as in cross-examination Head Constable Shyam Lal (PW-3) had stated, “*.....The danda Ex. P 1 and P 2 were not sealed, even*

lungi was not sealed.....”. He further points out that Head Constable Om Prakash (PW-15) in his cross-examination had stated, “ *...The case property which was given to me in this case are One danda of Bamboo and one danda was made of wood and were tied with the piece of lungi. These dandas were not sealed. No special mark of identification was put on these. I cannot say whether these dandas were blood stained or not.*”

ARGUMENTS ON BEHALF OF THE STATE

8. *Per contra*, learned APP for the State contends that Head Constable Shyam Lal (PW-3), Constable Pratap Singh (PW-10) and Constable Sunil Kumar (PW-11) had categorically stated in their testimonies that the deceased Deepak had told them that he was beaten by the four appellant namely Kanwar Pal Sharma, Sonu Sharma, Amit Sharma and Pramod Kumar Sharma. The relevant portion of the testimonies of Head Constable Shyam Lal (PW-3), Constable Pratap Singh (PW-10), and Constable Sunil Kumar (PW-11) are reproduced hereinbelow:-

a) Testimony of Head Constable Shyam Lal (PW-3)

“.....I alongwith Ct. Sunil reached the spot where the factory owner Pramod Kumar and one Kanwar Pal met us. They produced a person namely Deepak and told that the said person Deepak had committed theft of two machines of kaaz button. I observed that the said Deepak was not in a position to stand and further I observed that he was badly beaten. I observed swelling on both the legs and he was not able to walk. With difficulty he disclosed that on that day Promod, Kunwar Pal, Amit and Sonu had given him beating and forcibly confined him in the said factory on the false allegations of theft.....”

b) Testimony of Constable Pratap Singh (PW-10)

“On 21.5.2002 I was posted at PS Gandhi Nagar. On that day at

about 5.45 p.m. I reached at main road Seelampur 9/4783 while patrolling. There were huge gathering of people. HC Shyam Lal and Ct. Sunil Kumar were also present there. One Deepak s/o Ramesh Kumar was also there in a badly injured condition. Accused Pramod, Sonu, Amit and Kanwar Pal were also present there who are present in the court today and HC Shyam Lal enquired from Deepak. He told that he was beaten by four persons namely Kanwar Pal, Sonu, Amit and Pramod in front of 9/4783. He further informed HC Shyam Lal that those persons has levelled theft allegation on him and due to that reason he was beaten.... ”

c) Testimony of Constable Sunil Kumar (PW-11)

“.... I had accompanied HC Shyam Lal and reached at house no. 9/4783. There Pramod and Kanwar Pal accused present in the court had produced one person Deepak who was having swelling on his both legs and it was clearly visible that he was severely beaten. He was not in a position to stand and walk. Hardly he could speak that he was beaten by Pramod, Sonu, Amit and Kanwar Pal reg. theft of a machine while they were enquiring about the same.... ”

COURT'S REASONING

CHAGAN LAL (PW-1), LAKHAN SINGH (PW-2), SWARAJ JAIN (PW-4) AND RAJ PAL SINGH (PW-5) HAVE NOT SUPPORTED THE CASE OF THE PROSECUTION WITH REGARD TO THE 'LAST SEEN' CIRCUMSTANCE. FURTHER, THERE HAS BEEN NO RECOVERY IN THE PRESENT CASE.

9. Having heard learned counsel for the parties and having perused the paper book, this Court finds that Chagan Lal (PW-1), Lakhan Singh (PW-2), Swaraj Jain (PW-4) and Raj Pal Singh (PW-5) have not supported the case of the prosecution with regard to the 'last seen' circumstance. Further, there has been no recovery in the present case at the instance of any of the appellant-convicts.

THE POLICE OFFICIALS WHO HAD RECORDED THE DYING DECLARATION OF THE DECEASED-DEEPAK HAD NOT SATISFIED THEMSELVES THAT THE DECEASED WAS IN A FIT STATE OF MIND TO MAKE THE DECLARATION. ON THE CONTRARY, DR. KAILASH RAM WHO HAD PREPARED THE MLC HAD SPECIFICALLY DEPOSED THAT THE PATIENT DEEPAK, AT THAT STAGE WAS MEDICALLY FIT TO MAKE THE STATEMENT.

10. It is settled law that the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant [See: *Laxman vs. State of Maharashtra AIR 2002 SC 2973*].

11. This Court is of the view that the police officials who had recorded the dying declaration of the deceased-Deepak had not satisfied themselves that the deceased was in a fit state of mind to make the declaration. In fact, Head Constable Shyam Lal (PW-3) had himself stated in his testimony that the deceased “*Deepak was not in a position to stand and further I observed that he was badly beaten. I observed swelling on both the legs and he was not able to walk. With a difficulty, he disclosed.....*” Similarly, Constable Pratap Singh (PW-10) had testified “*I took Deepak to SDN hospital. His condition was very bad*”. Even Constable Sunil Kumar (PW-11) in his deposition stated “*He was not in a position to stand and walk. Hardly he could speak...*” Consequently, this Court is of the view that it has not been

proved beyond doubt that the deceased Deepak was in a fit state of mind when he had made the alleged dying declarations to Head Constable Shyam Lal (PW-3), Constable Pratap Singh (PW-10) and Constable Sunil Kumar (PW-11).

12. On the contrary, Dr. Kailash Ram who had prepared the MLC had categorically deposed that the deceased-Deepak had told him that he had been beaten by public and Pramod Kumar Sharma on 21st May, 2002. The Doctor had further specifically deposed that the patient Deepak, at that stage was medically fit to make the statement. Consequently, it is proved beyond doubt that when the dying declaration was made to Dr. Kailash Ram by deceased-Deepak, he was in a fit state of mind.

IN THE PRESENT CASE, THERE ARE TWO SETS OF DYING DECLARATIONS; ONE BEFORE THE DOCTOR KAILASH RAM AND ANOTHER BEFORE THE POLICE OFFICIALS. CONSEQUENTLY THIS IS A CASE OF MULTIPLE DYING DECLARATIONS.

13. This Court further finds that in the present case, there are two sets of dying declarations; one before the Doctor Kailash Ram and another before the police officials. While in the dying declaration made to police officials – Head Constable Shyam Lal (PW-3), Constable Pratap Singh (PW-10) and Constable Sunil Kumar (PW-11) –the deceased-Deepak had stated that all the four appellant-convicts had given him a beating, yet in the dying declaration, as recorded in the MLC by Dr. Kailash Ram, the deceased had stated that the appellant-Pramod Kumar Sharma and public persons had given him beating. The deceased-Deepak did not name either Kanwar Pal Sharma, Amit Kumar Sharma or Sonu Sharma as his assailants in the dying

declaration to Dr.Kailash Ram.

14. Consequently this is a case of multiple dying declarations. The Supreme Court in ***Jagbir Singh vs. State (NCT of Delhi); (2019) 8 SCC 779***, after analysing previous judgments relating to multiple dying declarations has held as under:-

“30. In the second dying declaration, the deceased had stated that she was burnt by her in-laws. It was stated that her father-in-law, mother-in-law and sister-in-law poured oil on her and burnt her. She further stated that her husband was not with her but in the next sentence, she stated that there were four. The fourth person was her husband. She further stated that they had stated that unless she made a wrong statement, they would not take her to the hospital. It was thereafter that she made a third declaration. The Court went on to hold as follows: (Sher Singh case, SCC p. 272, para 17)

“17. In the present case, the first dying declaration was recorded on 18-7-1994 by ASI Hakim Singh (DW 1). The victim did not name any of the accused persons and said that it was a case of an accident. However, in the statement before the court, Hakim Singh (DW 1) specifically deposed that he noted that the declarant was under pressure and at the time of recording of the dying declaration, her mother-in-law was present with her. In the subsequent dying declaration recorded by the Executive Magistrate Rajiv Prashar (PW 7) on 20-7-1994, she stated that she was taken to the hospital by the accused only on the condition that she would make a wrong statement. This was reiterated by her in her oral dying declaration and also in the written dying declaration recorded by SI Arvind Puri (PW 8) on 22-7-1994. The first dying declaration exonerating the accused persons made immediately after she was admitted in the hospital was under threat and duress that she would be admitted in the hospital only if she would give a statement in favour of the accused persons in order to save her in-laws and husband. The first dying declaration does not appear to be coming from a person with free mind without there being any threat. The second dying declaration was more probable and

looks natural to us. Although it does not contain the certificate of the doctor that she was in a fit state of mind to give the dying declaration but the Magistrate who recorded the statement had certified that she was in a conscious state of mind and in a position to make the statement to him. Mere fact that it was contrary to the first declaration would not make it untrue. The oral dying declaration made to the uncle is consistent with the second dying declaration implicating the accused persons stating about their involvement in the commission of crime. The third dying declaration recorded by the SI on the direction of his superior officer is consistent with the second dying declaration and the oral dying declaration made to her uncle though with some minor inconsistencies. The third dying declaration was recorded after the doctor certified that she was in a fit state of mind to give the statement.

(emphasis supplied)

31. A survey of the decisions would show that the principles can be culled out as follows:

(i) Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

(ii) If there is nothing suspicious about the declaration, no corroboration may be necessary;

(iii) No doubt, the court must be satisfied that there is no tutoring or prompting;

(iv) The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

(v) Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

(vi) However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.

(vii) In such cases, where the inconsistencies go to some matter of detail or description but are incriminatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

(viii) The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

(ix) In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?"

Our conclusion on multiple dying declarations

32. We would think that on a conspectus of the law as laid down by this Court, when there are more than one dying declaration, and in the earlier dying declaration, the accused is not sought to be roped in but in the later dying declaration, a somersault is made by the deceased, the case must be decided on the facts of each case. The court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered.”

(emphasis supplied)

15. This Court is of the view that since there are two sets of dying declarations i.e. one to the police officials and the other to the Doctor who conducted the MLC, the present case falls under the third category as mentioned in ***Jagbir Singh*** (supra).

IN THE OPINION OF THIS COURT, THERE IS NO REASON THAT THE DECEASED- DEEPAK WOULD NAME KANWAR PAL SHARMA, AMIT KUMAR SHARMA AND SONU SHARMA AS HIS ASSAILANTS TO THE POLICE OFFICIALS AND YET NOT NAME THEM AS HIS ASSAILANTS TO THE DOCTOR A FEW MINUTES LATER. ACCORDINGLY, THEY ARE GIVEN THE BENEFIT OF DOUBT AND ARE ACQUITTED. HOWEVER, THE NAME OF THE APPELLANT-PRAMOD KUMAR SHARMA FINDS MENTION IN BOTH THE SETS OF DYING

DECLARATIONS AND AS HIS NAME DOES NOT SEEM TO HAVE BEEN INSERTED BY A DIFFERENT PEN AND/OR IN A DIFFERENT HANDWRITING IN THE MLC, THIS COURT IS OF THE VIEW THAT THE APPEAL QUA HIM BEING CRL. A. NO.469/2004 IS BEREFT OF MERITS.

16. In the opinion of this Court, there is no reason that the deceased-Deepak would name Kanwar Pal Sharma, Amit Kumar Sharma and Sonu Sharma as his assailants to the police officials and yet not name them as his assailants to the Doctor a few minutes later.

17. However, the name of the appellant-Pramod Kumar Sharma finds mention in both the sets of dying declarations. Upon perusal of the MLC, this Court finds that the name of the appellant- Pramod Kumar Sharma does not seem to have been inserted by a different pen and/or in a different handwriting. In any event, the MLC had been proved by Dr.Kailash Ram and no question with regard to addition or substitution of words in the MLC had been put to him [See: *Mahavir Singh vs. State of Haryana, (2014) 6 SCC 716*]. Further, reliance by the learned counsel for appellant-convicts on the Death Summary being Ex.PX is misplaced as it does not incorporate all the contemporaneous facts and is only a gist of his medical history.

18. Keeping in view the aforesaid, this Court is of the view that it would be prudent and safe to rely upon the dying declaration made by the deceased Deepak to Dr.Kailash Ram.

19. Accordingly, the appellants i.e. Kanwar Pal Sharma, Amit Kumar Sharma and Sonu Sharma are given the benefit of doubt and they are acquitted. Their bail Bonds are cancelled and sureties stand discharged.

20. However, as the name of the appellant-Pramod Kumar Sharma finds mention in both the sets of dying declarations and his name does not seem to have been inserted by a different pen and/or in a different handwriting in the MLC, this Court is of the view that the appeal qua him being Crl. A. No.469/2004 is bereft of merits. It is accordingly dismissed. The appellant-Pramod Kumar Sharma is directed to surrender within four weeks before the concerned Jail Superintendent.

21. Copy of the order be communicated to the Jail Superintendent, Tihar Jail.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 06, 2020
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