

(2014) 07 DEL CK 0161
In the Delhi High Court
Case No : Crl. A. 575/1999

Dinesh Kumar

APPELLANT

Vs

State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 18-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 176, 302, 307, 354

Citation : (2014) 07 DEL CK 0161

Hon'ble Judges : Sanjiv Khanna, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Inderjeet Sidhu, Advocate for the Appellant; Rajat Katyal, APP,
Advocate for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—Appellant Dinesh Kumar @ Dinesh impugns the judgment and order on sentence dated 30.07.1999 arising out of FIR No. 117/1996, Police Station Vivek Vihar (Sessions Case No. 191/1996) whereby he was convicted for the offence punishable under Sections 354 and 302 of the Indian Penal Code, 1860 (IPC for short). He stands sentenced to undergo imprisonment for life and pay fine of Rs. 5,000/- for the offence punishable u/s 302 IPC and in default of payment of fine, to undergo simple imprisonment for one month. He also stands sentenced to undergo rigorous imprisonment for two years and pay a fine of Rs. 5,000/- for the offence punishable u/s 354 IPC or in default of payment of fine, to undergo simple imprisonment for one month.

2. On 19.04.1996 at about 10:05 a.m., Lady Constable Neelam (PW-6) of PCR passed on information to Police Post Anaj Mandi, PS Vivek Vihar that a boy has set a girl, aged about 15 years, on fire. On the basis of the information, Constable Mukesh (PW-23) recorded DD No. 9 and handed over the same to SI Brijesh Kumar (PW-26) for necessary action. SI Brijesh (PW-26) reached the spot, i.e., House No. 232, near Railway Line, Balmiki Basti, Bhola Nath Nagar

where he was informed that the injured (Ms. Nirmala @ Nimmo) had already been removed to the hospital. Baboo (PW-1), deceased's Nirmala @ Nimmo's brother was available at the spot. SI Brijesh Kumar proceeded to record his statement Ex. PW-1/A, made an endorsement Ex. PW-8/A thereon and transmitted it to the PS for registration of a case u/s 354/307 IPC.

3. The prosecution examined Baboo as PW-1. He testified that on 16.04.1996, his parents and his grandmother went on a pilgrimage to Vaishno Devi. They returned on the morning of 19.04.1996. They were tired due to the journey and therefore, they went upstairs to the chappar to sleep. He himself also went to sleep on the cot lying in the room (on the ground floor) and his sister Nirmala @ Nimmo was fasting on that day as she used to worship Santoshi Mata and kept fast on every Friday. While her sister was worshipping in the room, he was just adjacent to her. At about 09:30 a.m., when he heard his sister crying bachao-bachao he woke up and saw the appellant (their neighbour) and his sister grappling. The appellant was hugging and clinging to his sister with bad intention. His sister was protesting vehemently. He testified that he hardly stood up from his cot when the appellant picked up a plastic can (containing kerosene oil) lying in a corner of the room and poured it upon his sister. He then lighted a match stick and put his sister on fire. The appellant thereafter ran away. He deposed that he tried to apprehend him (the appellant) but he pushed him and made good his escape. PW-1 shouted and woke up his parents. They came down. His father put a quilt upon his burning sister and extinguished the fire. After sometime, ambulance came and his father and uncle took his sister to the hospital.

4. Smt. Kiran (PW-4); Nirmala @ Nimmo's mother; Bhola (PW-9) Nirmala @ Nimmo's father; Dr. Deepak Aggarwal (PW-5); Smt. Kamla (PW-2); another Smt. Kamla (PW-7) and SI Brijesh (PW-26), investigating officer are other crucial witnesses examined by the prosecution.

5. Nirmala @ Nimmo was admitted to GTB hospital, Shahdara on the day of the incident at about 10:20 a.m. At the time of her admission vide certificate on the MLC Ex. PW-5/A she was declared unfit to make a statement. By endorsement at point X, Dr. Deepak Aggarwal (PW-5) declared her fit to make the statement after around 2 hours. SI Brijesh thereupon proceeded to record Nirmala @ Nimmo's statement at 12:45 p.m., Ex. PW-2/A in presence of earlier said two Kamlas wherein the deceased squarely blamed the appellant for molesting her and setting her on fire. Apart from deposing about the seizure of various articles including the match box Ex. P-5, some unburnt matchsticks Ex. P-6, one burnt matchstick Ex. P-7, plastic can containing some kerosene Ex. P-1, etc., SI Brijesh testified that on receipt of information vide DD No. 12 Ex. PW-21/A that Nirmala had been admitted in GTB hospital, he reached there. Nirmala was declared fit to make the statement by the doctor at 12:45 p.m. He recorded statement Ex. PW-2/A of Nirmala correctly in presence of Dr. Deepak Aggarwal and in presence of Kamla (PW-2) and Kamla (PW-7). The IO also deposed about the

apprehension and arrest of the appellant on 20.04.1996.

6. Dr. Deepak Aggarwal (PW-5) who gave the fitness certificate at point X on MLC Ex. PW-5/A deposed that the dying declaration Ex. PW-2/A of the deceased was recorded in his presence correctly and was attested by him as a witness at point C.

7. Kamla (PW-2) corroborating prosecution version as to the making of the dying declaration by deceased Nirmala, testified that on 19.04.1996 at about 10:30 a.m., she came to know that her granddaughter Nirmala was burnt by Dinesh (the appellant) after pouring kerosene oil on her. On receiving the message, she reached GTB hospital. Statement Ex. PW-2/A of Nirmala was recorded by the IO in her presence. Nirmala had stated that at about 10:30 a.m., she was worshipping Santoshi Mata, in the meanwhile Dinesh, their neighbour came to their house and tried to molest her. She (Nirmala) objected to this and thereupon the appellant poured kerosene oil upon her and set her ablaze.

8. To the same effect is the testimony of second Kamla (PW-7) who used to treat PW-2 as her sister.

9. In cross-examination of Baboo (PW-1), a suggestion had been given on appellant's behalf that Nirmala had committed suicide on account of her father PW-9's habit of taking liquor and consumption on return from Vaishno Devi, which was denied by the witness.

10. The prosecution relies on another dying declaration purported to have been made by the deceased to her parents when they came down stairs on hearing the shrieks bachao-bachao.

11. In his examination u/s 313 Cr.P.C., a different line of defence was sought to be taken by the appellant when he stated that the Pradhan of their mohalla wanted him (the appellant) to do his political work and on his refusal to do so, he was implicated in the present case falsely. In reply to question No. 44, the appellant stated that earlier said Pradhan got the police official bribed from deceased Nimmo's father Bhola and he was implicated falsely as he had friendship with deceased Nimmo.

12. On appreciation of evidence, the Trial Court declined to believe the first dying declaration purported to have been made by the deceased to her parents when they came downstairs primarily on the ground that the deceased could not have been in a fit state of mind to make a statement as she was found unfit to give a statement at 10:20 a.m. by the doctor when she was admitted in GTB hospital. At the same time, the Trial Court believed the second dying declaration Ex. PW-2/A made to the IO in presence of Dr. Deepak Aggarwal (PW-5) and in presence of Kamla (PW-2) and another Kamla (PW-7). The Trial Court further found PW-1's testimony to be credible and reliable who was an eye witness to the gruesome act of setting the deceased ablaze. Thus, the Trial Court opined that the prosecution case against the appellant was established beyond all reasonable

doubt. Hence, the appellant was convicted and sentenced as stated earlier.

13. Therefore, apart from seizure of various articles, there are three material incriminating pieces of evidence against the appellant:-

(i) Ocular account of the incident given by the deceased's brother PW-1 implicating the appellant;

(ii) Oral dying declaration made by the deceased to her parents (PW-4 and PW-9); and

(iii) Dying declaration Ex. PW-2/A made to the IO in presence of Dr. Deepak Aggarwal (PW-5), Kamla (PW-2) and Kamla (PW-7).

14. Criticising the impugned judgment, Ms. Inderjeet Sidhu, learned Amicus Curiae for the appellant has urged that the Trial Court committed a manifest error in relying upon PW-1's testimony as an eye witness to the incident. PW-1 was a child aged about 13 years. Had he been present in the room where the incident allegedly occurred, he would have tried to save his sister and should have suffered some burn injuries in the process. The learned counsel urges that PW-1 was tutored and planted as a witness of the actual occurrence and it would be dangerous to rely on his testimony for appellant's conviction. The learned counsel contends that the Trial Court rightly rejected the alleged oral dying declaration purported to have been made by the deceased to her parents not only on the grounds as given by the Trial Court but also on account of the fact that PW-1 was completely silent about the same. She very vehemently canvassed that the Trial Court ought to have rejected the dying declaration Ex. PW-2/A on several grounds. First, once the deceased was declared unfit to make the statement at 10:20 a.m., there was nothing intervening to show that she regained consciousness and became fit to make a statement at 12:45 p.m. just within two hours and 25 minutes. Moreover, as per the MLC, the deceased had been administered Pethidine and Phenergan which admittedly cause sedation and in the circumstances, merely on the basis of the endorsement given by Dr. Deepak Aggarwal (PW-5), the Court ought not to have believed that the deceased was fit to make the statement particularly when Dr. Sharat, another treating doctor was not produced by the prosecution. The learned counsel argues that otherwise also, it is unsafe to rely on the statement (dying declaration) recorded by the police officer particularly when no reliable evidence was produced that any Magistrate was not available to record the dying declaration. It is also pointed out that PW-2 and PW-7 (both Kamlas) were employees of the MCD. They were on duty on that day and therefore, they could not have been present in the hospital at the alleged time of recording the dying declaration. As per their admission, their attendance used to be marked at 11:30 a.m. as also at 02:30 p.m. The learned counsel thus, states that the impugned judgment is liable to be reversed and the appellant is entitled to be acquitted.

15. On the other hand, Mr. Rajat Katyal, learned APP for the State supports the impugned judgment. He argues that in fact the Trial Court also ought to have

believed the first dying declaration made by Nirmala @ Nimmo to her parents which was very natural and logical.

OCULAR TESTIMONY OF PW-1

16. We have referred to the examination-in-chief of PW-1 in earlier part of the judgment. PW-1 was put to a lengthy and searching cross-examination. However, nothing could be brought in the cross-examination of PW-1 to discredit his testimony. PW-1 was cross-examined on the details of his brothers and sisters and other family members, as to whether they were receiving education, about the visit to Vaishno Devi and when he went to sleep after arrival of his parents from Vaishno Devi. PW-1 logically and effectively with clarity answered all questions. In cross-examination on the actual incident, PW-1 testified as under:-

"..... When I got up I saw the accused and deceased grappling with each other. The deceased was resisting and was trying to beat the deceased with her hand and it was after that the accused poured kerosene oil on her. He was given one or two slaps by the deceased on his person. The moment I got up and tried to hold him he ran away and therefore, I could not touch him. I cannot say if the accused and deceased might have been grappling before my waking up. I woke up on hearing her alarm shouts. I cannot say from where he picked up the match box whether from the temple or was having with him. I only saw him throwing the burning match stick. I only saw them grappling for two three minutes only. During this I did not hit or catch hold the accused or attacked him through I wanted to save my sister but in the meantime, he ran away. When I tried to catch hold the accused from his arm, he gave a strong push to me and thereafter he poured kerosene oil on her. I did not try to snatch the can from him or the match box. The can was of 10 Lt. Capacity and it was having 6/7 Lt. Oil in it, and has reasonable size of mouth. I cannot tell as to how much time it took in pouring the kerosene oil on her but it was poured very fastly. I did not extinguish the fire. I did not receive any injury when the accused pushed me.

..... I did not try to extinguish the fire when she was burning and only raised noise and as such none part of my body received injuries. It is wrong to suggest that I did not receive burn injuries as I was not present in the room nor did I see the accused pouring the kerosene oil and striking the match stick at per. I raised alarm and shouts for two three or four five minutes. I did not run after the accused. It is wrong to suggest that we have falsely implicated the accused because of our enmity with him....

17. Similarly on the drinking habit of his father, PW-1 frankly admitted that his father was a drunkard in the past but stated that he had left the same after the death of his sister. On this aspect he testified as under:-

..... It is correct that my father was a habitual drunkard in the past. He had left drinking since the death of my sister as she while dying had asked him not to drink in future. It is correct that whenever, my father was under the influence of liquor, he used to beat my mother. However, he did not raise his hands over

Nimmo. However, Nimmo while alive used to tell my father not to drink but he did not listen. It is wrong to suggest that after coming from Vaishno Devi my father started taking liquor and Nimmo tried to snatch the bottle from his hand by saying that he should not take liquor after coming back from holy place but my father pushed her away, while saying that he would continue drinking and would burn them and the entire house. It is wrong to suggest that on this Nimmo retorted by saying that she herself would set her on fire instead of his burning her.....

18. Had PW-1 been tutored or had he not seen the incident, he being a child aged 13 years could not have answered the questions in the manner aforesaid. From the overall testimony of PW-1, we find that he is a credible and most reliable witness.

19. Otherwise also, there was no reason for this boy aged 13 years to have falsely roped in the appellant for having sustained the burn injuries by his sister. Thus, the Trial Court rightly relied upon his testimony and the appellant's contention that he was planted as a witness is liable to be rejected.

TWO DYING DECLARATIONS

20. The reception of dying declaration in evidence is an exception to the rule of non-admissibility of hearsay evidence. It is believed that truth sits on the tongue of a dying man; he wouldn't lie for he is to meet his Creator. In the case of Laxman Vs. State of Maharashtra, , the Supreme Court observed that the situation in which a man is on his death bed is very solemn and serene and this in fact is the reason to accept the veracity of his statement in law. It is for this reason that the requirements of oath and cross-examination are dispensed with. It was added that since the accused would not have had any opportunity of cross-examination, the court insists that the dying declaration should be of such a nature so as to inspire full confidence of the Court in its truthfulness and correctness. In Kundula Bala Subrahmanyam and Another Vs. State of Andhra Pradesh, , the sanctity of a dying declaration was highlighted as under:-

A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment, such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration.

21. As stated earlier, the oral dying declaration purported to have been made by

the deceased to her parents has been rejected by the Trial Court primarily on the ground that she could not have been in a fit state of mind to make the statement as she was found unfit when she was admitted in the GTB hospital at 10:20 a.m. and secondly, on the ground that PW-1 is completely silent about any such statement having been made by the deceased to her parents in his statement Ex. PW-1/A which forms the basis for registration of the case against the appellant.

22. In our view, the Trial Court misdirected itself while rejecting the oral dying declaration merely on the ground that the deceased was found to be unfit to make a statement at the time of her admission in the hospital. At this stage, it would be appropriate to notice MLC Ex. PW-5/A. At the time of her admission, the patient, that is, the deceased was found to be conscious and responding (to commands) but was not oriented. Her pulse was 110 and her BP could not be recorded. As per PW-1, the incident took place at about 09:30 a.m. Immediately after a person is set ablaze, he/she does not lose senses. Rather, the person who has been set ablaze would run helter-skelter to save himself/herself. Within 2/3 minutes of the incident of setting the deceased ablaze, the deceased's parents (PW-4 and PW-9) came downstairs. Bhola (PW-9) extinguished the fire by putting a quilt over the deceased. It is natural that the victim would suo moto narrate the incident to her saviour, particularly when they are her own parents. Of course, in the statement Ex. PW-1/A, Baboo (PW-1) is silent about the factum of the deceased informing about the incident to her parents. This, however, is not material in view of the fact that a witness, a child aged about 13 years had narrated the incident as an eye witness. Moreover, at the time of recording PW1's statement Ex. PW-1/A, the IO was also not aware whether any statement had been made by the deceased about the incident to the parents and therefore, he could not question PW-1 about the same. In view of this, non-mention of the deceased making any statement about the cause of her death in Ex. PW-1/A, is not material and would not falsify the statements of Smt. Kiran (PW-4) and Bhola (PW-9) that their daughter had told them that it was the appellant who had set her ablaze after pouring kerosene oil on her and molesting her. In our view, on the basis of the evidence adduced, the Trial Court ought to have taken into consideration the oral dying declaration given by the deceased to these two witnesses, although the same would not have made any difference in the outcome of the case.

23. Turning to the dying declaration Ex. PW-2/A, we notice that the dying declaration was recorded by the IO and not by the Magistrate. At this stage, we would like to advert to the testimony of SI Brijesh (PW-26). The IO deposed as under:-

..... She was unfit for statement as per endorsement of the doctor at portion B, thereafter, when the doctor visited the bed of Nirmala, she was found crying and was found fit for making statement as per the doctor at about 12:45 p.m.

Thereafter, statement of Nirmala Ex. PW-2/A was recorded by me correctly in the

presence of Dr. Deepak Aggarwal and the same bears my signatures and also the signatures of the doctor at point C and other witnesses. The thumb impression of Nirmala is at point B.....

24. It goes without saying that a Magistrate is considered to be an independent person and a dying declaration recorded by such a person is considered far more credible. At the same time, there is no prohibition in recording of dying declaration by a police officer or by any other person. It would depend on the facts and circumstances of each case as to how much value is to be attached to the dying declaration recorded by a police officer. The IO was questioned with regard to availability of the SDM. He deposed as under:-

..... I tried to contact the SDM, Vivek Vihar but he was not available. I did not send any written request to call the SDM. I tried to contact the SDM on telephone after recording the statement of the injured. I have not mentioned this fact in the case diary. Only one telephone call was made to the SDM from the hospital. I did not try to contact the SDM thereafter. I do not remember the telephone number on which I tried to contact the SDM. I did not try to call the SDM. I had already informed the SHO, so I did not take any step to call the SDM. I did not make any entry in the DD register either at the PP or PS for requisitioning the services of the SDM for conducting the proceedings u/s. 176. I did not make any entry in the DD register of PP Anaj Mandi or PS Vivek Vihar for requesting SDM to reach the hospital. It is wrong to suggest that since Nirmala was unfit to make a statement. I did not try to call SDM at the hospital.....

25. From the cross examination of the IO, it is evident that he did make efforts to call the SDM. In case of burn injuries, condition of the patient can change very rapidly and it is always advisable to record the dying declaration at the earliest opportunity if the SDM is not available or when presence of an SDM cannot be procured immediately, because a second and subsequent statement can always be recorded by the SDM.

26. Constitution Bench of the Supreme Court in Laxman Vs. State of Maharashtra, , set the controversy at rest about the competency of a police officer to record the dying declaration. In para 3, the Supreme Court held as under:-

..... A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such 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 is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.....

(emphasis supplied).

27. Turning to the facts of the instant case, the dying declaration was recorded by PW-26 not only after obtaining a fitness certificate from Dr. Deepak Aggarwal (PW-5) but also in PW-5's presence. The fitness certificate at mark X is attacked by the learned Amicus Curiae on the ground that as per the MLC, the patient was advised injections Pethidine and Phenergan. She urges that it is a well known fact that after administration of these pain killers, a person goes in sedation and is unable to understand the implication of the questions and to give rational answers to the same. In this regard, while referring to PW-5, we may notice that Dr. Deepak Aggarwal had stated that no tick mark had been put on these injections in the MLC and normally if these are administered, the concerned nurse puts a tick mark. He also stated that normally it takes half an hour to administer these injections after a patient is admitted in the hospital but the time varies depending upon the rush in the casualty. Thus, it is not clear that in this case whether these injections had been administered to the deceased or not. All the more, it always takes some time before the injections take effect and for the patient to respond. Different persons take different time to react to different drugs.

28. In *Satish Kumar Gulati v. State (Govt. of NCT of Delhi)*, Criminal Appeal No. 100/1997, decided on 11.02.2010, the dying declaration was sought to be challenged on the ground that injections Pethidine and Phenergan had been administered to the victim. Rejecting the contention that the patient would have become drowsy or the drugs would have the tendency to temporarily impair the mental capacity, the Division Bench of this Court held as under:-

25. As regards the second limb of the argument that the deceased was under the influence of drugs like Pethidine and Phenergan, we do not find any merit in the argument. It is true that drugs like Pethidine/ Phenergan sometimes make a patient drowsy, but it takes time before the patient starts feeling the effect of the drug. From the MLC, it transpires that the patient was brought to the hospital on 26.03.92 at about 4:45 am. DD No. 21A (Ex. PW8/B) regarding the incident was recorded at 5:10 am and copy thereof was given to SI Tej Singh, who immediately left for the spot of occurrence. At the spot, as per SI, Tej Singh, PW20, he found that the deceased had been taken to the hospital. Therefore, he straightaway went to the hospital and collected the MLC of the deceased and recorded her statement in presence of the Doctor. The Rukka, as per the record, was sent to the Police Station for registration of the case on 26.03.92 at 6:50 am, which implies that the statement of the deceased was recorded prior to 6:50 am because on the aforesaid statement, SI has appended his endorsement also.

SI Tej Singh, in his cross-examination, has stated that it took him about 20 to 25 minutes to record the statement of the deceased, which means that he started recording the statement of the deceased somewhere around 6:00 am in the morning, i.e., after about 1:15 hours from the admission of the deceased in the hospital. In our view, in such a short span of time, Pethidine/Phenergan could not necessarily have impacted the mental capacity of the deceased. Further, on perusal of the statement Ex. PW17/C, it transpires that it was recorded in presence of the Doctor, who also attested the statement. The fact that the dying declaration of the deceased was recorded in presence of the Doctor by itself means that she was fit for making statement, physically as well as mentally. Otherwise, the Doctor would not have permitted the Investigating Officer to record her statement. Thus, we do not find much merit in the submission of the appellant.

29. A similar view was taken by a Division Bench in *Jai Devi Vs. State of Delhi*, .

30. Moreover, the testimony of Dr. Deepak Aggarwal could not be successfully challenged by the appellant that the patient was fit to make the statement. Thus, although there is no authentic evidence to show that Pethidine and Phenergan had been administered, even if these had been administered, the victim it is apparent was still fit to make the statement.

31. Of course, one Dr. Sharat was also one of the doctors who had referred the victim to surgery department at the time of her admission in the emergency. His non-examination is inconsequential in view of the examination of Dr. Deepak Aggarwal (PW-5) who gave fitness certificate and Dr. B.C. Sahu (PW-10) who had initially attended to the deceased.

32. As stated above, dying declaration Ex. PW-2/A is in question-answer form. Though specific form of recording dying declaration is not prescribed, yet dying declaration recorded in question-answer form stands on a higher footing in view of the fact that the Court is able to make out whether any answers were suggested to the witness or not.

33. In view of this, we are convinced that the dying declaration Ex. PW-2/A was truly and faithfully recorded by the IO in the presence of Dr. Deepak Aggarwal (PW-5), Kamla (PW-2) and Kamla (PW-7). We are not inclined to disbelieve the presence of PW-2 and PW-7 on the ground that they were present on duty at Shahdara as although PW Rohtash was summoned to prove their attendance on 19.04.2006, but as noticed by the Trial Court and as borne out from the Trial Court record, he was not examined and was given up by the appellant. Thus, it cannot be said that their thumb impression were obtained on Ex. PW2/A by the IO later on.

34. In view of the above, we do not find any error or infirmity in the impugned judgment and order on sentence. The appeal is bound to fail. The same is accordingly dismissed.