

(2000) 11 DEL CK 0020

In the Delhi High Court

Case No : Criminal Appeal No. 18 of 1997

Gopali Devi and Another

APPELLANT

Vs

State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 23-11-2000

Acts Referred:

Evidence Act, 1872 — Section 32

Penal Code, 1860 (IPC) — Section 302, 34, 498A

Citation : (2000) 11 DEL CK 0020

Hon'ble Judges : Dr. Arijit Pasayat, C.J.;D.K. Jain, J

Bench : Division Bench

Advocate : Geeta Luthra, Jitender Kr. Singh and Biswajit Singh and amices Curia, for the Appellant; Anil Soni, for the Respondent

Final Decision : Dismissed

Judgement

Arijit Pasayat, C.J.—At an alarmingly high rate cases involving in-laws who behave and act like out laws are coming to Court. This is one of those cases where the prosecution alleges that Sunita Dudeja (hereinafter referred to as the deceased) was sacrificed at the alter of dowry demand. Appellants Gopali Devi and Suraj Prakash (hereinafter referred to as the accused appellants), are mother-in-law and husband of the deceased respectively. They have been found guilty, convicted and sentenced, details of which we shall indicate infra.

2. Prosecution case in a nutshell is that on 17 February 1988 on receiving information the deceased was lying in a burnt condition in the house of accused appellants, SI Surinder Singh (P.W. 22) along with Constable Attar Singh, Constable Sansar Pal went to the spot and found that the deceased was lying in a burnt condition. They removed was to the hospital. The Doctors at eh SDN Hospital referred the patient to LNJP Hospital. MLC of the patient was taken. At that stage P.W. 22 was told by the Doctors that she was unfit to make a statement. After he reached the LNJP Hospital he was told that deceased was in a fit state to make a statement. Accordingly he informed the Duty Officer, P.S.

Shahdara to call the SDM for recording her statement. At about 10 PM SDM, Parimal Rai, (P.W. 14) arrived at the hospital and recorded her statement (Ex P.W. 14/A). A direction was given by the SDM to the SHO for registration of case under Sections 307/498-A/34 of Indian Penal Code. 1860 (for short the IPC). It was also directed that in case the patient expired the case was to be registered under Sections 302/304-B/498-A/34 IPC, Accused appellants were responsible for burn injuries on the deceased, as they had set her ablaze after putting kerosene on her. As subsequently deceased succumbed to the burn injuries a case was duly registered, investigation was undertaken and completion thereof charge-sheet was filed. Accused appellants were put to trial for alleged commission of offences punishable u/s 302/498-A/34 IPC. Learned Additional Sessions Judge, New Delhi (hereafter referred to as Trial Judge), on consideration of the material on record found both the accused appellants guilty and awarded sentence of life for the offence punishable u/s 302/34, IPC's with a fine of Rs. 500/- each and in default of payment of fine, further sentence of one month RI. In respect of the offence punishable u/s 498-A/34 IPC, sentence of one year RI with fine of Rs. 250/- each was imposed and in default of payment of fine, further sentenced to RI for fifteen days. It is to be noted that 22 witnesses were examined to further the prosecution version while the accused persons pleaded innocence and eight persons were examined to support their stand of innocence. Learned Trial Judge found that the dying declarations recorded by Doctor (P.W. 4) and the SDM (P.W. 14) were sufficient to fasten guilty on the accused appellants. Accordingly, as aforesaid, accused appellants were found guilty and sentenced.

3. In support of the appeal learned counsel for the accused appellants submitted that the so called dying declarations are un-reliable and learned Trial Judge committed error in placing reliance person. It is highlighted that deceased had suffered 40% burns, and it is in-conceivable that she would be in a position to make a statement. It is further submitted that the two statements before P.W. 4 and P.W. 14 were in-consistent. In the first statement only the role allegedly played by accused Gopali Devi was highlighted, while in the subsequent statement recorded by the SDM(P.W. 14) both the accused appellants were implicated. It is pointed out that at about 8 PM P.W. 4 had found the deceased to be not in a fit condition to make a statement but barely after about 1-1/2 hours an in-experienced Doctor has certified the patient to be in a fit condition to make a statement. It is also submitted that the SDM (P.W. 14) did not record his own satisfaction about the patient being in a fit condition to make a " statement. Several decisions are cited to substantiate the pleas taken which we shall advert to later on. Learned counsel for the State on the other hand submitted that it cannot be laid down as a rule of universal application that whenever a person has suffered 90% or more burns no statement can be given which can be termed as a "dying declaration". According to him it would depend upon the views of the Doctor who examines the patient and unless it is shown that something was intrinsically wrong in the views of the Doctor, it has to be accepted as true and

correct.

4. It is well settled principle in law and in fact there is no dispute to the position that dying declaration can form the sole basis of the provided, it is free from infirmities various tests as were laid down by the Apex Court in *Khushal Rao Vs. The State of Bombay*, . The ratio laid down in the said case was that the statement should be consistent throughout. If the deceased had several opportunities of making such dying declaration, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be voluntary, reliable and made in a fit mental condition it can be relied upon without even any corroboration. This position was again reiterated by the Apex Court in *Smt. Kamla Vs. State of Punjab*, . The dying declaration is a statement of a person as to the cause for his death pr as to any of the circumstances of the transaction which resulted in his death and it becomes relevant u/s 32(1) of the Indian Evidence Act, 1872(for short the "Evidence Act"), in a case in which the cause of that person's death comes into question. A dying declaration is not a deposition in Court and it is neither made on oath or in the presence of the accused. Resultantly it cannot be tested by cross-examination on behalf of the accused. A dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence on the principal of necessity. This position was highlighted by the Apex Court in *Tapinder Singh Vs. State of Punjab* and *Another*, and *Paparambaka Rosamma and Others Vs. State of Andhra Pradesh*, .

5. Section 32 of the Evidence Act deals with cases in which statement of relevant fact by person who is dead or cannot be found etc. is relevant. The general rule is that all oral evidence must be direct viz. If it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are; firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might defeat the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremely, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is

imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by Iyre LCR in R.V. Wood Cock (1789) 1 Leach 500. Shakespeare makes the wounded Melun, finding himself disbelieved which announcing the intended treachery of the Dauphin Lewis explain;

"Have I met hideous
death within my view,
Retaining but a quantity of life,
which bleeds away,
even as a form of wax,
Resolve the from his figure,
against the fire ?
What is the world should
make me now deceive
Since I must lose the use of all deceit ?
Why should I then be false
since it is true.
That I must die here,
live hence by truth?
(See King John, Act 5,Scene.4)"

6. The principle on which dying declaration is admitted in evidence is indicated in legal maxim "nemomoriturus presumitur mentiria man will not meet his maker with a lie in his mouth."

7. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a man is an death bed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept in veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded is will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

8. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on

guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. The Apex Court has laid down in several judgments the principles governing dying declaration. Which could be summed up as under as indicated in Smt. Paniben v. State of Gujarat, 1992 (1) SVLR 133;

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja and Another Vs. The State of Madhya Pradesh,

(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 Uttar Pradesh Vs. Ram Sagar Yadav and Others, and Ramavati Devi v. State of Bihar, AIR 1983 SC 154.

(iii) The Court has to scrutinise 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 and Another Vs. The Public Prosecutor,

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence (See Rasheed Beg and Others Vs. State of Madhya Pradesh,

(v) Where the deceased was unconscious and could never make a dying declaration the evidence with regard to it is to be rejected (See Kaka Singh v. State of M.P., AIR 1992 SC 1021.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction (Section Ram Manorath v. State of U.P., 1981 SCC 561. (vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected (See State of Maharashtra Vs. Krishnamurti Laxmipati Naidu,).

(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 and Others Vs. State of Bihar, (ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram and Another Vs. State of Madhya Pradesh,). (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. Vs. Madan Mohan and Others,).

(xi) Where there are more than one statement in the nature of dying declarations, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be truth worth and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani Vs. State of Maharashtra,

9. In the light of the above principles, we will consider the acceptability of alleged dying declaration in the instant case. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration, (See Gangotri Singh Vs. State of U.P., Goverdhan Raoji Ghyare Vs. State of Maharashtra, , Meesala Ramakrishna v. State of A.P. JT 1994 (2) SC 232, and State of Rajasthan Vs. Kishore,

10. We shall now deal with the plea whether there was in-consistency in the two dying declarations stated to have been made before P.W. 4 and P.W. 14. It is not in dispute that in the first statement only name of Gopali Devi was indicated while in the subsequent statement names of both the accused appellants were indicated. An Explanation has been offered in this regard by P.W. 4 who has stated that the deceased only told about the cause of the burns to be due to burning by the accused Gopali. When P.W. 14 recorded the statement, details were given. Therefore, this cannot be treated to be a case where there is in-consistency between the two statements.

11. Strong reliance was placed by learned counsel for he accused appellants on the decision of the Apex Court in Rosamma's case (supra), State of Gujarat Vs. Khumansingh Karsan Singh and others, , Kamla's case (supra) and Dandu Lakshmi Reddy Vs. State of A.P., to contend that there was inconsistency. A bare reading of the fact, indicated in the aforesaid decisions makes clearly distinguishable on facts. In most of the cases the deceased herself had given inconsistent replies as to the cause of death. In some cases even the cause of injury was stated to be death to accident. Therefore, even if it is accepted, as rightly contended by learned counsel for the accused appellants that in case of in-consistency in the declarations benefit would go to the accused, we do not think that case at hand is one where that principle is applicable. We do not find any in-consistency in the statements.

12. Coming to the plea about the unacceptability of statement of the Doctor (P.W. 20) who had certified about the fitness of the deceased to give a statement, it is seen that at 8.00 PM P.W. 4 had certified that the patient was at that point of time not in a fit condition to give a statement. But P.W. 20 after about 1-1/2 hours recorded that deceased was in a fit condition to give her statement. It is to be noted that immediately after the admission the deceased

had been given injections and though initially she may not be in a position to give a statement, but because of administration of injections the possibility of her having become fit for giving statement cannot be ruled out, more particularly in view of the statement of P.W. 20 and P.W. 14. P.W. 14 has recorded a detailed statement. Though it was pleaded that he had not recorded any subjective satisfaction of his own as to the condition of the patient, we find that he had stated as follows while recording the statement of the deceased:

"I also asked her as to whether she was fit for statement to which she said she was. I also got it certified from Doctor"

Since there is no specific form as to in which a Magistrate has to record his satisfaction in order to form his opinion, even if such is a requirement, quoted port on above is sufficient to show that he was satisfied that deceased was in a fit condition to give a statement. In Rosamma's case (supra) a distinction was made by the Apex Court between the certificate given by the Doctor to the effect that the patient was conscious and a situation where he is in a fit condition to give a statement. That difference does not arise here because the specific certificate was to the effect that the patient was in a fit condition to give a statement.

13. We shall now deal with the plea that with 90% burns the deceased could not have probably given any cohesive statement. It would all depend on the fact situation of each case and it cannot be laid down as a rule of universal application, as rightly contended by learned counsel for the State, that the condition of the patient and fitness to give a statement would depend entirely on the percentage of burns. In fact in Kamlesh Rani v. State of Haryana, 1998 SCC 713, the Apex Court has held that in a case of 90% or more burns a patient can well make a dying declaration. The position was earlier stated by the Apex Court in Suresh Vs. State of Madhya Pradesh, and Padmaben Shamalbhai Patel Vs. State of Gujarat,

14. In the peculiar circumstances of the case when both the P.W. 14 and P.W. 20 have stated that the deceased was in a fit condition to give her statement we do not find any substance in the plea of learned counsel for the accused appellants that the deceased could not have been in a fit state to give a statement.

15. Above being the position we find nothing infirm in the conclusions of the learned Trial Judge convicting the accused appellants for the offences punishable u/s 302/498-A read with 34 IPC. A plea was raised by learned counsel for the accused appellants that a case of Section 302 IPC is not made out and at the most a case of Section 304-B may be there. We find no substance in this plea particularly in view of the fact that the ingredients necessary to constitute offence punishable u/s 304-B IPC are contextually different from those u/s 302IPC. Learned Trial Judge has rightly convicted the accused appellants for the offences are enumerated above. We find no merit in this appeal which is accordingly dismissed. Since the accused appellants are on bail, necessary steps

shall be taken by the concerned Court to bring them back to custody.

Before parting with the case, we record our appreciation for the able manner in which Ms. Geeta Luthra, who was appointed as amicus Curiae rendered assistance to the Court.