
(2017) 01 RAJ CK 0020
In the Rajasthan High Court
Case No : 638 of 2011

Nemichand S/o Shri Nathu Ram,

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 10-01-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#), [Section 313](#), [Section 374\(2\)](#)
a> - Examination of witnesses by police - Power to examine the accused - Appeals from convictions<B

Citation : (2017) 01 RAJ CK 0020

Hon'ble Judges : Gopal Krishan Vyas, Kailash Chandra Sharma

Bench : DIVISION BENCH

Advocate : B.K. Mehar, C.S. Ojha

Final Decision : Allowed

Judgement

1. The present criminal appeal has been filed by the appellants under Section 374 (2) of Cr.P.C . against the judgment dated 05th July, 2011 passed by learned Addl. Sessions Judge, Didwana, District Nagaur (for brevity, hereinafter referred to as "trial court") in Session Case No.14/2010 whereby the appellants were convicted for the offences under Sections 302 / 34, 323 / 34, 341, 509 and 498A of IPC and following sentence was imposed against them:

302/34 of IPC : Life Imprisonment and a fine of Rs.1000/- each, in default of payment of fine, to further undergo two months additional imprisonment.

323/34 of IPC : One Year's Simple Imprisonment and a fine of Rs.200/- each, in default of payment of fine, to further undergo fifteen days simple imprisonment.

341 of IPC : One month's simple imprisonment.

509 of IPC : Six months' simple imprisonment.

498A of IPC : Three years' rigorous imprisonment with a fine of Rs.500/- each, in default of payment of fine, to further undergo three months' simple imprisonment.

2. Succinctly stated, the facts of the case are that statements (Ex.P/3-"Parcha-Bayan") of injured, namely, Smt. Radha Devi, were recorded by Bhanwar Singh, Head Constable of Police Station- Ladnu, at P.B.M. Hospital, Bikaner on 25.03.2010, in which Smt. Radha Devi stated that she got married with Askaran S/o Nathu Ram, 24 years back and having one daughter and two sons from the said wedlock. In the family of her in-laws, there are four brothers including her husband and out of four brothers, two brothers along with their family members are residing with her. As per allegations of Smt. Radha Devi, on 24.03.2010 at about 05-06.00 PM, when she came back at her house in the evening, her brother-in-law, namely, Nemichand used abusive language and inflicted injuries on her head by a sharp weapon and pushed her forcibly in a room where her mother-in-law came and poured kerosene upon her and set her at fire by throwing a matchstick. After lighting fire, both, Nemichand and mother-in-law, namely, Smt. Mangi Devi, ran away from the place of occurrence. Upon hearing the hue and cry, her sister-in-law, Kamla Devi, came there and poured water for rescue.

3. Upon the aforesaid "Parcha-Bayan" (Ex.P/3), on

26.03.2000 an F.I.R. No.57/2010 was registered at Police Station Ladnu, District Nagaur, against the accused appellants and investigation was commenced.

4. During investigation, statements of deceased, Smt. Radha Devi, were recorded under Section 164 Cr.P.C. by learned Magistrate (Ms. Purnima Gaur, PW.11), who was working on the post of Addl. Civil Judge (Jr. Division)-cum-Judicial Magistrate No.3, Bikaner, after obtaining certificate from the doctor, in which almost similar allegations were levelled by Smt. Radha Devi, as stated in her "Parcha-Bayan" (Ex.P/3).

5. After arrest of the accused appellants, upon completion of investigation, charge sheet was filed against the appellants under Section 306, 498A, 323, 324 and 509 of IPC in the court of learned Judl. Magistrate, First Class, Ladnu from where the case was committed to the court of Addl. Sessions Judge, Didwana, District Nagaur for trial.

6. The learned trial court while taking into consideration the directions issued vide order dated 07.08.2010 by this Court in S.B. Criminal Misc. Bail Petition No.4249/2010, framed charges against the accused appellants for the offences u/s 302 and in the alternative u/s 302/34, 498A, 323, in the alternative u/s 323/34 of IPC and commenced the trial.

7. In the trial, statements of 15 prosecution witnesses were recorded and 15 documents were also exhibited from the prosecution side to prove the case against the appellants.

8. After recording prosecution evidence, statements of

the accused appellants were recorded u/s 313 Cr.P.C ., in which they denied all the allegations levelled by the prosecution witnesses against them and said that all the allegations are false. It is specifically said that Smt. Radha Devi was not assaulted by them, more so, deceased, Smt. Radha Devi was of stubborn attitude and she herself lit fire and falsely implicated them in the alleged crime. It is also stated that accused appellant, Mangi Devi, tried to rescue her but due to her nature, she (Smt. Radha Devi) falsely implicated them with the alleged crime.

9. In defence, 3 witnesses viz. DW.1 Chananaram, DW.2 Poonamchand and DW.3 Magharam were produced before the court and statements of Askaran (husband of the deceased) recorded under Section 161 Cr.P.C. were exhibited as Ex.D/1 in defence.

10. The learned trial court after recording the evidence of both the sides heard final arguments and convicted the accused appellants for the offences mentioned herein above and passed sentence vide judgment dated 05.07.2011, which is under challenge in this appeal.

11. Learned counsel for the appellants vehemently argued that it is a case in which both the appellants have been falsely implicated upon false allegations of Radha Devi, which is evident from the fact that all the material witnesses including husband of the deceased, Askaran (PW.2), the witnesses of "Panchnama" PW.4, Rampal, PW.5, Gajraj (son of deceased), PW.6 Deepika (daughter of deceased) and PW.7 Sanjay (second son of deceased) turned hostile and did not support the allegation of deceased, Radha Devi. According to learned counsel for

the appellants, the entire case is based upon dying declaration in the form of "Parcha-Bayan" (Ex.P/3) and statement (Ex.P/12) of the deceased recorded by the Judicial Magistrate, Bikaner. However, the learned trial court has wrongly relied upon both above statements of the deceased so as to convict the appellant because it has not been proved by the prosecution that before recording the statements of the deceased, fitness certificate of doctor was obtained, therefore, in absence of any reliable and trustworthy evidence, the findings of learned trial court to hold accused appellants guilty, deserve to be quashed. It is settled principle of law that it is the duty of the police officer to obtain certificate of fitness from the doctor whether the patients is in a position to speak or understand the things before recording statement of an injured. It is also argued that although statement of the deceased were recorded by Ms. Purnima Gaur (PW.11), the then Addl. Civil Judge (Jr. Division)-cum-Judicial Magistrate No.3, Bikaner, upon the certificate of Dr. Pradeep Gupta declaring the patient (Smt. Radha Devi) to be fit for giving statements, but said Dr. Pradeep Gupta, has not been produced as witnesses to prove the correctness of the facts, therefore, the allegation of prosecution for committing offence by the appellants, has not been proved.

12. Learned counsel for the appellants further submit that all the family members including husband, daughter, Kamla Devi, and two sons of the deceased came in the witness box, however, they turned hostile and did not support the allegations levelled by the deceased in her

statements, who died after five days of the incident, therefore, in absence of any corroboration of allegations by the family members of the deceased, there is no question to accept the allegation of deceased, therefore, the instant appeal deserves to be allowed.

13. It is also argued that initially the prosecution case was based upon the testimony of witnesses of family members, whose statements were recorded under Section 161 Cr.P.C., but all the witnesses turned hostile and failed to prove the prosecution case. More so, all the witnesses specifically stated before the court that incident of quarrel took place in between accused appellant, Nemichand and deceased Smt. Radha Devi, but fire was lit by the deceased herself, therefore, the findings of the learned trial court so as to hold the accused appellants guilty for the alleged offence of murder, deserves to be rejected. According to appellant even if the entire prosecution evidence is accepted, then also, the basic ingredient of murder i.e. motive, is completely absent in the case and, therefore, the finding of guilt arrived at by the learned trial court against the appellants for the offence of murder, deserves to be reversed and accused appellants are entitled to be acquitted from the charges levelled against them.

14. Per contra, learned Public Prosecutor vehemently opposed the submissions made by the learned counsel for the appellants and supported the findings of the learned trial court. It is argued that although family members including, husband of deceased, namely, Askaran and children of the deceased, turned hostile and did not support

the prosecution case, but we cannot lose sight of the fact that deceased herself gave statements to the investigating officer as well as to the Magistrate, in which specific allegations are levelled by her against the appellants for committing offence of murder. Therefore, it is obvious that no error has been committed by the trial court in relying upon the statements of deceased, Smt. Radha Devi, and holding the appellants guilty for the offence of murder.

15. Learned Public Prosecutor further submitted that upon perusal of statements of hostile witnesses, there is no dispute that incident of quarrel took place in the house, which resulted into the death of Smt. Radha Devi, therefore, when incident is proved by the hostile witnesses, then, said fact has rightly been taken into consideration by the trial court for the purpose of convicting the accused appellants. The learned trial court has rightly held the accused appellants guilty for the offences, therefore, same be dismissed because there is no force in this appeal.

16. After hearing the arguments of learned counsel for the parties, we have perused the entire evidence and findings of the trial court. Admittedly, from the prosecution side 15 witnesses were produced before the trial court to prove the prosecution case and out of 15 witnesses, PW.4, Rampal turned hostile and did not support the prosecution case with regard to preparation of "Panchnama" (Ex.P/2), more so, said witness stated before the court that on the date of incident I was not present at the place of occurrence but later on, came back from the

marriage and heard that some quarrel took place between deceased and her brother-in-law, Nemichand, and deceased, Smt. Radha Devi, herself lit fire on her body and her behaviour was quarrelsome with the family members.

17. The witness PW.2, Askaran, husband of the deceased gave following statement before the trial court in the examination-in-chief, which reads as under: -

VERNACULAR MATTER OMITTED

18. Upon perusal of above statement, it is obvious that no allegation was made by him for pouring kerosene by the accused appellant No.2, Mangi Devi, and lighting fire upon deceased.

19. PW.5, Gajraj, son of deceased, turned hostile and specifically stated before the Court that the date on which the incident took place, I was at Delhi. I heard that some quarrel took place between my mother and my uncle, Nemichand, and thereafter my mother tried to commit suicide while lighting fire from chimney. It is also stated by this witness that I met my mother at Govt. Hospital, Bikaner, where the aforesaid facts were disclosed by her.

PW.6, Deepika, is the daughter of deceased. The said witness also turned hostile and she stated that on the date of incident, some quarrel took place between my mother and my uncle and due to said quarrel, my mother went inside the room and lit fire and she died after four days, but I was not present at the place of occurrence.

20. PW.7, Kamla, is the wife of other brother-in-law of deceased, namely, Prema Ram, who was present at the time of occurrence. PW.7, Kamla did not turn hostile. The

said witness categorically stated before the court that, VERNACULAR MATTER OMITTED

21. PW.8, Sanjay, is second son of deceased, Smt.

Radha Devi. PW.8 turned hostile and stated before the court that my mother herself lit fire and died but alleged that some quarrel took place between my mother and uncle, Nemichand.

22. Upon perusal of above statements of the prosecution witnesses, it is established that some quarrel took place in between deceased, Smt. Radha Devi and accused appellant No.1, Nemichand, and incident of burning took place thereafter. During treatment at Govt. Hospital, Bikaner, Smt. Radha Devi, expired on 28.03.2010. There is another set of evidence, which is in the form of dying declaration of Smt. Radha Devi. The FIR was registered upon "Parcha-Bayan" (Ex.P/3) of deceased, Smt. Radha Devi, recorded by PW.9, Bhanwarlal, Head Constable at P.B.M. Hospital, Bikaner. In the "Parcha-Bayan", specific allegation was levelled by deceased, Smt. Radha Devi, that on 24.03.2010 at about 5-06.00 PM when I came back after taking some firewood, at that time, my brother-in-law, Nemichand, used abusive language and inflicted injury by knife ("Nqjk") upon my head and he pushed me in the room and all of sudden my mother-in-law, came there having a kerosene tin with her, and poured kerosene upon my body and lit fire by matchstick, so also Nemichand caught hold me.

23. In the "Parcha-Bayan", further said that at the time of incident, wife of my other brother-in-law, Smt. Kamla, came on the spot and she with a view to extinguish the

fire, poured water and thereafter my husband, Askaran came back from his work place and firstly took me at Govt. Hospital, Ladnu for treatment, from where doctor referred me to Government Hospital, Bikaner for further treatment.

24. Upon perusal of Ex.P/3 it is revealed that before recording the statement, no fitness certificate was obtained by the Head Constable in the burn unit of P.B.M. Hospital, Bikaner, where Smt. Radha Devi was admitted at Bed No.7. A specific question was put to Bhanwarlal, Head Constable (PW.9) whether any fitness certificate was obtained from the doctor declaring Smt. Radha Devi to be fit to give statement. The said witness PW.9- Bhanwarlal, gave reply that before recording the statements of Smt. Radha Devi, I gave written letter to the doctor, but I do not know the name of doctor but after obtaining his opinion, I recorded the statement of Smt. Radha Devi, the deceased. Although said witness specifically stated that one letter was given by me to the doctor in the Hospital for ascertaining the fitness of Smt. Radha Devi, but said certificate or opinion of the doctor has not been placed on record as evidence.

25. During investigation, statement of Smt. Radha Dev (deceased) were recorded by the Magistrate, Ms. Purnima Gaur, the then Addl. Civil Judge (Jr. Division)-cum-Judicial Magistrate, Bikaner on 25.03.2010 before recording statement fitness certificate of the doctor was obtained, which is evident from the statement of Ms. Purnima Gaur (PW.11) itself. The said certificate was given by Dr. Pradeep Gupta in the Hospital at 01.20 PM but Dr.

Pradeep Gupta not appeared as witness. Upon perusal of dying-declaration of deceased, it is revealed that she has reiterated the allegations of pouring kerosene upon her by Smt. Mangi Devi (mother-in-law of deceased), so also, specifically alleged that she lit fire upon her clothes.

26. It is true that Dr. Pradeep Gupta, has not been examined before the trial court to prove the fact of issuance of fitness certificate by him, but Ms. Purnima Gaur, the then Judicial Magistrate, Bikaner, appeared before the court as PW.11 and specifically said that statement of Smt. Radha Devi W/o Sh. Askaran, were recorded by her when she was admitted in burn unit at Bed No.7 in P.B.M. Hospital, Bikaner and before recording her statement I obtained fitness certificate from the doctor, which is recorded on the top of the statements (Ex.P/12).

27. It is true that there are two types of evidence. One set of evidence is of the family members including the husband of the deceased, sister-in-law of deceased ("nsojkuh") Smt. Kamla (PW.7), both these witnesses did not turn hostile and specifically stated that they were informed by the deceased that although quarrel took place in between her (deceased) and Nemichand (appellant No.1) an that Nemichand inflicted injury upon her body but both the witnesses said that deceased Smt. Radga Devi, herself poured kerosene upon her and lit fire.

28. The second set of evidence is the statements of the deceased herself, firstly recorded by the Head Constable, Bhanwarlal and secondly recorded by the Ms. Purnima Gaur, the then Magistrate as PW.11. In these statements,

allegations are levelled by the deceased against both appellants, Nemichand and Smt. Mangi Devi and it has been alleged that accused Nemichand, quarreled with her and inflicted injury by knife on the head and another allegation is levelled against Smt. Mangi Devi, mother-in-law for pouring kerosene upon her.

29. After thorough consideration of both sets of evidence available on record, we are of the opinion that the testimony of deceased recorded by the Head Constable, Bhanwarlal (PW.9) and the then Magistrate, Ms. Purnima Gaur (PW.11) cannot be disbelieved, but at the same time, this Court cannot lose sight of the fact that there is no evidence of "motive", more so, it emerges from both the sets of evidence that some quarrel took place all of sudden when deceased reached in the house in the evening and incident of quarrel and fire took place all of sudden, so also Smt. Kamla (PW.7) immediately made efforts and rescued from fire. Therefore, when there is no specific allegation against accused appellant, Nemichand, of pouring kerosene and lighting fire and there is no evidence of "motive" on record, therefore, we are of the opinion that conviction of the accused appellant, Nemichand, for the offence u/s 302 of IPC is not sustainable in law. But, this Court cannot accept the argument that involvement of Nemichand is false.

30. With regard to participation of Smt. Mangi Devi, in pouring kerosene upon the body of deceased and lighting fire, we have examined the entire evidence, more particularly, the site plan (Ex.P/7), in which there is no mentioning about the recovery of any kerosene tin, the

said site plan was prepared in the presence of PW.7 Smt. Kamla, Shantilal (PW.3) and Gajraj (PW.5). Some articles pieces of "Lehanga", one blanket and one chimney in broken condition were handed over by the husband of deceased to the police and at the time of taking the said articles in possession by the S.H.O., P.S. Ladnu, smell of kerosene was coming out from the clothes. Meaning thereby, the prosecution has proved the fact that on the date of incident, injuries were inflicted by Nemichand and some incident of burning took place in the house.

31. We have also perused the statement of the doctor, PW.15, Dr. Sanjeev Puri, who conducted who performed the postmortem, and gave report Ex.P/15. As per opinion of the doctor, the cause of death was shock due to burn ante-mortem as mentioned, was sufficient to cause death in ordinary course of nature.

32. We have perused the statement of Investigating Officer, Girdhari Singh, who conducted the investigation initially and statement of PW.12, S.H.O. Dharamveer Janu (PW.14), who conducted further investigation and statements of Mr. Rajendra Beniwal (PW.13) who filed charge sheet against the accused appellants for the offences under Sections 306, 498A, 323 of IPC. It is evident from the record that on the basis of dying-declaration, charge u/s 302 and in the alternative 302/34 of IPC was framed against accused appellant, Nemichand and Smt. Mangi Devi.

33. In the case of Om Pal Singh Vs. State of U.P. reported in AIR 2011 SC 1562, the Hon"ble Apex Court held that in absence of certificate of fitness by the doctor

the dying declaration cannot be disbelieved. The certificate of the doctor is rule of caution. The relevant discussion made by the Hon''ble Apex Court in the said case reads as infra: -

"20. This now brings us to the submissions with regard to the dying declaration. Factually, it is to be noticed that the Tehsildar, who recorded the dying declaration appeared as PW-6, he has clearly stated that although no doctor was present in the hospital, he was informed by the pharmacist that Rishipal Singh was in a fit state to make a statement. He, thereafter, isolated the injured Rishipal Singh and recorded his statement. He further stated that he wrote down word by word what Rishipal Singh had stated. The contents of the statement were read to the injured who stated that he understood and accepted the same. Only thereafter, he put his thumb impression on the

statement. It is undoubtedly true that the statement has not been recorded in the question and answer form. It is also correct that at the time when the statement was recorded Rishipal Singh was in a "serious condition".

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22. In our opinion, the trial court as well as the High Court correctly accepted that the dying declaration was an acceptable piece of evidence. Merely because, it is not in question and answer form would not render the dying declaration unreliable. The absence of a certificate of fitness by the Doctor would not be sufficient to discard the dying declaration. The certification by the doctor is a rule of caution, which has been duly observed by the Tehsildar/Magistrate, Bisauli, who recorded the statement. The statement made by the injured is candid, coherent and consistent. We see no reason to disbelieve the same. We, therefore, see no reason to differ with the conclusions arrived at by the trial court and the High Court with regard to the dying declaration also. We must also notice that PW2 and PW3 have given clear and consistent eye- witness account. They have narrated the previous incident of disharmony between the appellant and the deceased. They have also adverted to the previous attempts by the appellant to harm the deceased. The entire incident of shooting has been graphically described by the two witnesses. The direct testimony of these

two witnesses have been corroborated by the medical evidence and the dying declaration."

34. It is settled principle of law that dying-declaration cannot be disbelieved unless and until it is found to be false on the basis of other reliable evidence, therefore, this Court is not inclined to accept the arguments of

learned counsel for the appellants to disbelieve the dying declaration, but at the same time, upon consideration of entire evidence on record and upon the fact that all of sudden occurrence took place, we find that the trial court has committed error in convicting the accused appellant for the offence under Section 302 / 34 of IPC because there is no evidence or allegation of motive on record so as to hold accused appellant guilty for offence under Section 302 / 34 of IPC.

35. Consequently, the instant appeal filed by the appellants, is partly allowed, the finding of guilt recorded by the trial court for the offence u/s 302/34 of IPC against the appellant No.1, Nemichand, is not sustainable in law because as per evidence on record, in spur of moment, all of sudden occurrence took place without any motive to commit the offence of "murder" by the accused appellant No.1, Nemichand, therefore, the conviction and sentence of the accused appellant No.1, Nemichand to the extent for the offence u/s 302/34 of IPC, is hereby quashed but conviction and sentence for other offences is hereby maintained.

36. Similarly, the conviction of accused appellant No.2, Smt. Mangi Devi, for the offence u/s 302/34 IPC, is hereby altered to offence u/s 304 Part I of IPC and the sentence of life imprisonment is hereby reduced to ten years" rigorous imprisonment but the conviction and sentence of other offences is hereby maintained.