

(1989) 07 MP CK 0023

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 151 of 1985 (G)

Rambai

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 28-07-1989

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (1989) MPJR 929

Hon'ble Judges : T.N. Singh, J;S.K. Dubey, J

Bench : Division Bench

Advocate : K. Sharma, for the Appellant; Govind Singh,A.G.A., for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

This judgment shall also govern disposal of Criminal Appeal No. 152/1985. (Halkibai alias Hakkobai v. State of M. P.) and Criminal Appeal No. 173/1985. (Kallu v. State of M. P)

All the three Appellants, aggrieved of this conviction and sentence u/s 302/34, Indian Penal Code, passed in Sessions Trial Nos. 70 of 1984 and 107/1984, by the Sessions Judge, Guna, on 30-7-1985, who sentenced them for imprisonment for life for committing the murder of Vijayram, have preferred these appeals.

The prosecution case, in brief, is that on 10-12-1983 between 10 and 11 p.m., in village Nasrampur the deceased Vijayram was sleeping in his house, covered by a quilt. The three Appellants, acquitted accused Gangaram and one Jwala, a juvenile came to the house of Vijayram in furtherance of their common intention to kill Vijayram. Appellant Kallu put his legs on the neck of Vijayram, Appellant Rambai caught hold of his legs and Appellant Halkibai alias Hakkobai, after pouring kerosene oil on the body of Vijayram, set him on fire. Upon this, Vijayram cried for help. Nathuram (P. W. 4), younger brother of the deceased,

and Rajaram (P. W. 7), son of Nathuram, reached the house. There they saw all the accused persons fleeing from the house of Vijayram. The body of Vjjayram was completely burnt above the knee. On the next day morning, 11-12-1983, Vijayram was taken in a bullock-cart to Police Outpost Ukavad, where deceased Vijayram lodged a report (Ext. P-7), while lying in the bullock-cart An offence u/s 307/34, I. P. C was registered at Crime No. 041/83 After the report, Munshi Singh (P.W. 3), Assistant Sub-Inspector of Police, Outpost, Ukavad, recorded the statement (Ext. P-8) of complainant Vijayram in the shape of dying declaration. Vijayram was taken with this report to Police Station, Jamner, which was having territorial jurisdiction for taking cognizance of the offence. There also a first information report (Ext. P-19) was recorded, and a case u/s 307/34. I.P.C., at Crime No. 189/83 was registered against all the accused persons. Vijayram was sent for medical examination. Dr. S. K. Jain (P. W. 1) examined injured Vijayram at 2-00 p. m. on 11-2-1983 and found 8 burn injuries on the body of Vijayram. Burnt blisters were found to be ruptured. The injury report is Ext. P-1-A. In the evening at about 5 p. m Vijayram died. In between this, the concerning Police Station requested Tahsildar Maksudangarh to record the dying declaration of Vijayram Bhagirath Jatav (P. W. 11) Naib Tahsildar of Maksudangarh, district Guna, after verifying from Dr. S. K. Jain (P. W. 1) about the state of health and the condition of Vijayram, recorded dying declaration (Ext. P-2). It would be worthwhile to mention here that Ext. P-2, so recorded, is not in the form of questions and answers, but it is a statement of deceased Vijayram. Autopsy on the dead body of Vijayram was performed by Dr. S. K. Jain (P. W. 1), the post-mortem report is Ext. P-6. The Doctor found that the body above knee was completely burnt and there were 60% burns. After completing the investigation, the "challan" was filed against the Appellants and acquitted accused Gangaram and Jwala who was tried in Juvenile Court.

It is not in dispute that Halkibai alias Hakkobai who was a married woman, was kept as a concubine by deceased Vijayram. Kallu and Jwala are the sons of Halkibai from her first husband Kashiram. Both these sons were also staying with Halkibai in the house of Vijayram. Rambai is the mother of Halkibai. Nathuram (P. W. 4) and Rajaram (P. W. 7) were not residing with Vijayram in the village, but they were residing separately in the same village.

The prosecution in its case alleged that Halkibai used to demand from Vijayram half share in the property of deceased Vijayram and for this a panchayat was also held, but no share was given to her in the landed property, which included agricultural lands and a house. Therefore, Halkibai, her two sons and Rambai started living separately about 11/2 years back from the date of occurrence. All the accused persons were not residing with the deceased at the time of occurrence.

The defence of the accused persons was that they have been falsely implicated because of party faction and election of panchayat in the village, wherein Babusingh (P. W. 10) lost.

The prosecution to prove its case led oral and documentary evidence. The accused persons also examined two witnesses in their defence. At the trial, Nathuram (P. W. 4) and Rajaram (P. W. 7) did not support the prosecution case. Ramesh (P. W. 6) was disbelieved by the trial Court. The trial Court also did not place any reliance on the dying declaration (Ext. P-7), recorded by Munshi Singh (P.W. 3), Assistant Sub Inspector of Police, Police Outpost, Ukavad. The trial Court, after placing reliance on the dying dclaration (Ext. P-2) and also on the burnt articles seized by the investigating officer, convicted the Appellants and sentenced them, as stated in Para 2 above, but it acquitted accused Gangaram holding that he was not present nor was involved in the crime in question.

Smt. Kusum Sharma, learned Counsel for the Appellants, contended before us that the dying declaration (Ext. P-2) cannot be made basis for sustaining the conviction, as from the medical evidence and also from the evidence of Bhagirath Jatav (P. W. 11), it is evident that the burn injuries were third degree and there were 60% burns, mouth was completely burnt and the deceased was in a precarious condition, the general condition was not good; therefore, the deceased was not capable of giving any statement or declaration. Moreover, the dying declaration was not recorded at the earliest opportunity and the circumstances show that there was enough opportunity for the maker of the dying declaration to be tutored. It was also contended that it has come in the evidence that Nathuram (P. W. 4) remained with the deceased right from the time of lodging of the first information report till the dying declaration was recorded. Therefore, no reliance can be placed on such a dying declaration Learned Counsel also contended that dying declaration was not recorded in the form of questions and answers; hence, it deserves to be discarded. Smt. Kusum Sharma placed reliance on a recent Division Bench decision of this Court in Harda and Another Vs. State of Madhya Pradesh, and two decisions of the apex Court in State (Delhi Administration) Vs. Laxman Kumar and Others, and Balak Ram Vs. State of U.P., . Lenrned counsel also contended that Dr. S. K. Jain (P. W. 1) has admitted that smell of alchohol was coming from the body of the deceased and it has also come in the evidence that where the deceased was sleeping a chimney was burning, and it is likely that the deceased caught fire from the chimney while he was sleeping and he was drunk. Learned Counsel also took us through the evidence of defence to show that the Appellants have been implicated because of election rivalry and also because the Appellants may not get any share in the property of the deceased. On the other hand, Shri Govind Singh, learned Government Advocate for the State, supported the conviction, Learned Counsel submitted that the deceased was capable of giving his declaration and that the declaration so recorded by the Naib Tahsildar is a valid one, it does not suffer from any infirmity and the same has been rightly relied on by the trial Court, after giving reasons, for convicting the Appellants. Shri Govind Singh placed reliance on 3 decisions of the apex Court in State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, , Thurukanni Pompeiah v. State of Mysore AIR 1965 SC 639 and Khushal Rao Vs. The State of Bombay, .

It is, no doubt, true that the conviction is based only on the dying declaration. Therefore, we have to judge, in the facts of the case, whether the dying declaration so recorded can be placed reliance for sustaining the conviction or not, and if not whether there is any other corroborating evidence to sustain the conviction. In respect of dying declaration, the law is well settled that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. The necessity of corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact that the Court, in a given case, has come to the conclusion that the at particular dying declaration was not free from the infirmities. (See Khushal Rao's case; Ram Sagar Yadav's case (supra) and K. Ramachandra Reddy and Another Vs. The Public Prosecutor,

When it is said that a conviction can rest on a dying declaration, it is implied that it must inspire confidence so as to make it safe to act upon it. Hence, it is to be found out also that the declarant while making the declaration was in a fit state of mind and body and was capable of making the declaration relating to the circumstances which resulted in his death. (See Darshan Singh alias Bhasuri and Others Vs. State of Punjab, : Laxman Kumar's case and Harda's case (supra).] It is also settled that a dying declaration, recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than the dying declarations recorded in any other manner. [Sec K. Ramachandra Reddy's case (supra) and Rabi Chandra Padhan and Others Vs. State of Orissa, .

Keeping in view the above principles, we have closely scrutinised the dying declaration (Ext. P-2) and we are of opinion that it cannot be placed reliance for sustaining the conviction and sentence passed by the trial Court. A bare look at Ext. P-2 shows that it is a statement of the deceased recorded at about 2 p. m. on 11-12-1983. It is like a statement recorded wherein the prosecution case has been stated. Unfortunately, the dying declaration is not in question and answer form, and a bare look at it also shows that there was no proper questioning to elicit full information. Besides the above infirmity, though Dr. S. K. Jain (P. W. 1) has stated that the deceased was conscious and was in a position to give statement, from the post-mortem report it is seen that the body above knee was completely burnt, the mouth was completely burnt and there were 60% burn injuries. Dr. S. K. Jain (P. W. 1) in para 9 of his statement before the Court has

admitted that he was not in a position to find out radial brachial and tibial nerves so as to record blood pressure. The general condition of the deceased was not good. The post-mortem report (Ext. P 6) shows that burns were present in the mouth and there were two ruptured blisters on the left and right maxilla; one blister on forehead above lateral angle of left eye and one ruptured blister on tip of nose. There was blackening of skin of anterior surface of neck due to burn. The whole of chest and abdomen was burnt with multiple ruptured blisters extending from anterior surface of both shoulders up to the level of pubic symphysis below. Left and right upper limbs were also burnt having ruptured blisters. Right lower limb and left lower limb were also burnt up to the surface in middle 1/3rd of calf. It has also come in evidence that the first information report at police Outpost, Ukavad, was recorded by Munshi Singh (P. W. 3), Assistant Sub Inspector of Police, while the deceased remained lying in the bullock-cart. Looking to the burn injuries and ruptured blisters on the face, on chest and abdomen, in the mouth and other parts of the body, in our opinion the deceased who was suffering from the burn injuries for more than 16 hours, was not in a position to move and speak. He died about 21/2 hours after giving his so-called declaration (Ext. P-2), and was not physically fit for giving any dying declaration. The trial Court has not carefully examined this aspect to dispel all doubts of the same being concocted. The trial Court merely placed reliance on the statement of Dr. S. K. Jain P. W. 1), but it has not referred to the injuries on the body of the deceased, which he suffered. From the medical evidence itself, it is evident that the victim was in a precarious critical condition while making the statement. Therefore, the declaration so recorded, in our opinion, after careful examination, cannot be placed reliance. Even if the finding of the trial Court is accepted that the deceased was in a physically fit condition to speak, the dying declaration cannot be placed reliance for the reason that it was not recorded in the form of questions and answers and that there was possibility of the victim being tutored by Nathuram (P. W. 4), brother of the deceased, who was present with the deceased right from immediately after the occurrence till the time of recording the dying declaration.

It is proved from the evidence of the prosecution that right from immediately after the occurrence till the dying declaration was recorded Nathuram (P. W. 4) remained with the victim throughout. (See the statement of P. W. 11 Para 5). Dr. S. K. Jain (P. W. 1) was also present at the time of recording the dying declaration. Though the investigating officer took precaution to keep the Doctor present, but as Nathuram (P. W. 4) younger brother of the deceased, was also present when the declaration was recorded, the possibility of the victim being tutored cannot be ruled out. Such a dying declaration can have hardly any evidentiary value so as to base a conviction on it. (See Balak Ram Vs. State of U.P., . Therefore, though a dying declaration without corroboration can be made basis for conviction, in the facts and circumstances of the case, in our opinion, the dying declaration (Ext. P-2) cannot be acted upon without any corroborations, as it suffers from the infirmities pointed out by us above.

Now, coming to the other evidence, Nathuram (P. W. 4) and Raja-ram (P. W. 7), who are respectively the younger brother and nephew of the deceased, have not supported the prosecution. We have scrutinised their statements. They are inconsistent and contradictory to each other about the point of time when they reached the spot after hearing the cries of the deceased and also on the point of seeing the accused persons running away from his house. Rajaram (P. W. 7) has not seen the accused persons running from their face side but he saw them running from their back side, though he stated that he saw them from a distance of 8 to 10 paces and identified them from their back in the moon-lit night. No article belonging to the accused persons was seized from the spot. The accused persons were not residing in the house of the deceased at the relevant time, but they were residing separately since about 11/2 years back. The testimony of Ramesh (P. W. 6) has been discarded by the trial Court, as his statement u/s 161 Code of Criminal Procedure was recorded by the police about 20-22 days after the incident, and the prosecution has not explained the delay. Jagannath Singh (P. W. 9) is said to have reached the spot after hearing the cries, where he found Nathuram (P.W. 4) already present, and on a question being asked by him to Vijayram as to who set him on fire, Vijayram named the accused persons. But surprisingly this witness has not seen any of the accused persons on the way running away or fleeing from the spot. Another witness examined is Kailash (P. W. 8), who reached the spot after Jagannath Singh (P. W. 9). His statement also does not help the prosecution to connect the accused/Appellants with the crime. In such circumstances, when the dying declaration (Ext. P-2) has been discarded by us, there is no convincing and corroborating evidence to connect the accused persons with the offence. In this view of the matter, we need not deal with the evidence of defence. In our opinion, the prosecution has not made out the case beyond doubt against the accused persons, as a result of which the Appellants/accused persons deserve the benefit of doubt.

In the result, the appeals succeed and are allowed, The conviction and sentence u/s 302/34, Indian Penal Code, awarded by the Sessions Judge to the Appellants is set aside and they are acquitted for the offence of committing the murder of Vijayram. They shall be set at liberty forthwith.