

(2017) 08 MP CK 0016
In the Madhya Pradesh High Court
Case No : 1332 of 2005

Smt. Poorva Goyal, & Anr.

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 10-08-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 161 - Examination of witnesses by police
Indian Penal Code, 1860, Section 302,
Section 307 - Punishment f

Citation : (2017) 08 MP CK 0016

Hon'ble Judges : S.K.Seth, Anjuli Palo

Bench : Single Bench

Advocate : Y.M.Tiwari, Akshay Namdeo

Judgement

1. This appeal has been preferred by the appellant challenging the judgment dated 25.05.2005, passed by Sessions Judge in S.T. No. 15/2005, whereby the appellant/accused has been convicted under Section 302 of Indian Penal Code and sentenced to life imprisonment and fine of Rs. 1000/- with default stipulations for committing murder of his wife Mamta.

2. The case of the prosecution is that, on 09.11.2004 at village Bamhori, District Seoni, for some domestic dispute the appellant/accused poured kerosene oil on his wife Mamta and set her ablaze. On the report of victim Mamta herself, police station Seoni lodged Dehatinalishi (Ex. P/2) and FIR (Ex. P/3) crime has been registered for offence under Section 307 of IPC against the

appellant. Police recorded the statement of Mamta (Ex. P/18) under Section 161 of Cr.P.C. during her treatment at hospital. Her dying declaration (Ex. P/8) was recorded by Nayab Tehsildar. She died during treatment on 12.11.2004. Hence, the case has been converted under Section 302 of IPC, against the appellant. After investigation, charge-sheet has been filed. Learned Trial Court after committal of the case framed charge under Section 302 of IPC. The appellant abjured guilt.

3. The Learned Trial Court convicted the appellant under Section 302 of IPC on the basis of the dying declarations (Ex. P/8), Dehatinalishi (Ex. P/2) and FIR (Ex. P/3) and statement under Section 161 of Cr.P.C which (Ex. P/18) were also treated as the dying declaration under Section 32 of the Evidence Act. Learned Trial Court did not accept the defence of the appellant/accused that the deceased got accidentally burnt while cooking food and the appellant was falsely implicated by the family members of the deceased. The learned Trial Court convicted the appellant under Section 302 of IPC and sentenced the appellant to life imprisonment with fine of Rs. 1,000/- and in default of payment of fine, additional S.I for 5 months.

4. The present appeal has been preferred by the appellant/accused challenging the aforesaid conviction, on the ground that the findings of the learned Trial Court are against the evidence on record, hence, liable to be set aside and the appellant prays that he may be acquitted from the charge under Section 302 of IPC.

5. In the opinion of the Trial Court dehatinalishi (Ex. P/2), FIR (Ex. P/3) and statement recorded under Section 161 of Cr.P.C. (Ex. P/18) all were written as per the statements given by the deceased herself about her death just after the incident and before her death.

All these documents are covered under the purview of dying declaration under Section 32 of the Evidence Act. Further, with regard to the above documents, the testimony of V.S.Pal, ASI (PW-3) is found trustworthy and reliable. He had no motive or intention to falsely implicate the appellant.

6. Similarly, the FIR (Ex. P/3) was lodged by Jamuna Prasad, Head Constable (PW-1). The statement of the deceased under Section 161 Cr.P.C. was recorded by V.S.Pal (PW-3). There is no inconsistency found in his cross-examination, which would not create reasonable doubt in favour of the appellant. The documents dehatinalishi (Ex. P/2), FIR (Ex. P/3) and statement of the deceased under Section 161 of Cr.P.C. all indicative of similar facts about the offence caused by the appellant. There has been no contradiction, hence, the same seems reliable.

7. Further, Gaurishankar Sharma, Nayab Tehsildar (PW-7) has submitted that he has duly recorded the dying declaration of the deceased as per law. The deceased was able to give her statement. Dr. M.R.Wasne (PW-6) examined her and gave the fitness certificate to record her dying declaration. He has clearly denied that at the time of recording the statement of the deceased, she was not able to speak properly or to give her statement. The dying declaration of the deceased under Section 32 of the Evidence Act corroborate with other documents i.e. Ex. P/2, Ex. P/3 and Ex. P/18 which was recorded by the police.

8. In case of Babu Lal and others v. State of Madhya Pradesh [AIR 2004 SC 846 : (2003 AIR SC 7074)] , while dealing with the value of dying declaration in evidence, this Court has observed thus:-

"A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The

mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his maker with a lie in his mouth" (*Nemo moriturus praesumitur mentire*). Mathew Arnold said, "truth sits on the lips of dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, 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 mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.

It has come out in the evidence that the deceased was conscious and her mind was well-oriented. Other witnesses have also deposed that she was in a fit state of mind. The medical report produced by the Jubilee Mission Hospital also reflects that she was conscious and oriented. She was given a pain killer injection. That apart, there cannot be any thumb rule that a person sustaining a particular percentage of burn injuries would not be in a position to give any declaration. Recently, in *State of Madhya Pradesh v. Dal Singh & Ors .*, in Criminal Appeal No. 2303 of 2009, this Court while dealing with burn injuries, has expressed thus:-

"Burn injuries are normally classified into three degrees. The first is characterised by the reddening and blistering of the skin alone; the second is characterised by the charring and destruction of the full thickness of the skin; and the third is characterised by the charring of tissues beneath skin, e.g. of the fat, muscles and bone. If a burn is of a distinctive shape, a corresponding hot object may be identified as having been applied to the skin, and thus the abrasions will have distinctive patterns."

9. The dying declaration proved by the prosecution conclusively establish that Mamtabai was murdered. It is therefore incumbent upon the appellant to offer explanation as to how and in what manner his wife was burnt or murdered. But the appellant did not offer any explanation.

10. Hence, the learned Trial Court placed reliance on the dying declaration of the deceased which established that the burn injuries were caused by the appellant by pouring kerosene oil on the deceased Mamta and ablazed her. The deceased had no intention to falsely implicate her husband/appellant. Appellant himself has not

stated as to how the fire was caused to his wife. To that effect, we do not find any rebuttal of the concerned prosecution witness. Surprisingly, wife of the appellant was burnt at his house at 8:00 PM where they were living together. The appellant has not taken any specific defence that at the time of the incident, he was not present at his house. Further, in reply to question No. 16 and 27 of his examination of accused, the appellant has stated that he did not know that his wife was burnt upto 70-80% and that she was hospitalised. The conduct of the appellant is also untrustworthy as he did not try to rescue his wife/deceased, nor took her to the hospital for medical treatment but instead he fled away from the house after the incident. Presence of the accused at the spot and participation in commission of crime is duly proved by the deceased. Fleeing of accused after the commission of crime, is a circumstance indicative of the fact that the appellant was liable for the offence.

11. In the above circumstances, we also deem it necessary to reproduce the provision of Section 106 of Evidence Act, it provides that :

"Burden of proving fact especially within knowledge.-- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

12. It is not always possible for the prosecution to prove all the circumstances, more so, when such circumstances is within the special knowledge of the accused. Section 106 of the Indian Evidence Act then comes into play, to relieve the prosecution from proving such circumstances, which cannot be proved by adducing evidence. The accused is duty bound to offer explanation of such circumstances. If the accused offers false explanation of such circumstances, the accused will be deemed to be the author of such

crime. This principle has been observed by the Supreme Court in case of Chaman & Ors. Vs. State [AIR 2016 SC 1912] and State of Rajasthan vs. Thakur Singh [2014 AIR SCW 4479].

13. The Apex Court, in a decision in the case of State of West Bengal Vs. Mr. Muhammed Oman reported in 2000 C CrLR (SC) 469 : (AIR 2000 SC 1589) has been pleased to observe as follows :

The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

14. In that judgment on the Hon"ble Apex Court has relied on the judgment rendered in the case of Shambu Nath Mehra vs. The State of Ajmer (1956 SCR 199) wherein it has been held that :

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre- eminently or exceptionally within his knowledge."

15. In dying declaration, it is proved that dispute cropped up between the husband / appellant and his wife/deceased over the domestic issues. The said dispute may safely be accepted as motive of the appellant to do away with the deceased. Thus, we also find motive of the appellant in the commission of such crime.

16. In case of Ramesh & Ors. Vs. State of Haryana [2017 Cr.LJ 352 SC], SPS Rathore Vs. CBI & Nr. [2017 Cr.LJ 537 SC] and [2017 Cr.LJ 556 SC], the Hon"ble Apex Court held that if dying declaration is voluntary and reliable, no question of tutoring arises and it can be made basis of conviction.

17. Learned counsel for the appellant contended that the accused deserves acquittal under the canopy of "benefit of doubt". In the present case, it is very difficult to define the term "benefit of doubt".

It would be an auto-limitation if one ventures to define it. Hon"ble Apex Court held in a decision, rendered in the case of Gurbachan Singh Vs. Satpal Singh & Ors. [1990 SCC Criminal 151 : (AIR 1990 SC 209)] :

"that "exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punishing an innocent." Doubt would be called reasonable if they are free from zest for abstract speculation. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. When there is clinching evidence of the crime, there is hardly any scope to set the accused scot free under the canopy of benefit of doubt."

18. In the present case, we do not find any reasonable doubt in favour of the appellant.

19. On the above discussions, we find that learned Trial Court was justified in holding the appellant guilty for the offence under Section 302 of IPC.

20. Accordingly, this appeal is dismissed.