

(2001) 12 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Criminal Acquittal Appeal No. 47/1983

State of J & K

APPELLANT

Vs

Joginder Lal

RESPONDENT

Date of Decision : 24-12-2001

Acts Referred:

Jammu and Kashmir Evidence Act, 1977 — Section 32

Citation : (2002) KashLJ 225 : (2002) 1 SriLJ 32 : (2002) SriLJ 32

Hon'ble Judges : S.K.Gupta, J and Syed Bashir-Ud-Din, J

Bench : Division Bench

Advocate : Ashok Kumar, Advocates appearing for the Parties

Judgement

1. We have heard Mr. Ashok Parihar, learned Additional Advocate General, for the appellant. Nobody appeared for the respondents.

2. This Criminal Acquittal Appeal is directed against the order passed by the learned Sessions Judge, Jammu dated 25.07.1983. By the aforesaid

order, the learned Sessions Judge acquitted the accused, Joginder Lal, for offence under Section 302 RPC.

3. The facts of the prosecution case in nutshell are that, the accused, Joginder Lal had to go to Srinagar on 13.06.1981 to perform his work as

Painter and demanded some money from his wife. Mst. Rekha Kumari, to meet the expenses of the journey. His wife, however, declined as she

had no money with her. The accused wanted the household utensil (brass Bultoi) to be sold in order to fetch some money, but deceased Rekha

Kumari resisted and did not allow him to do so. The accused, however, felt insulted and humiliated and in order to do away with his wife, he lifted

bottle containing kerosene oil and poured it on the body of Mst. Rekha Kumari and set her ablaze. The accused thereafter fled away from the

place of occurrence. The hue and cry raised by the deceased attracted the people from the neighbourhood who extinguished the fire. After

sometime, the accused also returned and deplored his wife to save him. He removed his wife with burn injuries in a taxi to the hospital. It is also

alleged by the prosecution that the accused earlier also used to chastise his wife. Mst. Rekha Kumari and about which the father of Rekha Kumari

had got a report entered in Police Station, Gandhi Nagar, Jammu on 22.09.1980. The statement of Mst. Rekha Kumari was recorded by the

police in the hospital on 13.06.1981 on the basis of which a case under Section 307 RPC stood initially registered. Subsequently, Mst. Rekha

Kumari deceased, could not withstand to the burn injuries and died in the hospital on 14.06.1981 and the offence stood converted from section

307 RPC to Section 302 RPC against the accused. On the conclusion of the investigation, challan against the accused came to be presented

before Chief Judicial Magistrate, Jammu, who in turn committed the same for offence under Section 302 RPC exclusively triable by the Court of

Session. The accused was chargesheeted for offence under Section 302 RPC by the learned Sessions Judge, Jammu vide his order dated

31.08.1980 and after the completion of the Trial, the learned Sessions Judge found that there is no evidence connecting the accused with the

commission of the offence and acquitted him of the charge vide order dated 25.07.1983.

4. Mr. Ashok Parihar, learned AAG, contended at the outset that there is overwhelming evidence showing the participation of the accused in the

commission of the crime. His further submission is that the statement of Mst. Rekha Kumari, deceased, receives support from the evidence

provided by Darshna Kumari and Vidya Devi. That Rekha Kumari made a dying declaration in presence of Dr. Ajay Kotwal and Shri. Showkat

Ali, ASI. She had clearly implicated the accused for pouring kerosene oil on her body and set her ablaze. Recovery of kerosene oil bottle and

other attending incriminating circumstances are sufficient to hold the accused guilty and record his conviction. The Trial Court has not appreciated

the evidence in its proper perspective and had taken erroneous view of the prosecution case and reached to fanciful conclusion in acquitting the

accused. With a view to appreciate these contentions, we proceed to examine the matter comprehensively.

5. It is significant to point out at the first flush that out of totality of six eye witnesses cited by the prosecution only Darshana Kumari and Vidya

Devi were examined. According to Mst. Darshna Kumari, on hearing the shouts of PW Vidya Devi that the house of Rekha Kumari is set on fire,

she rushed to the spot and saw Rekha Kumari in ablaze in the compound of her house and many women from the locality, who had assembled,

were busy in extinguishing her fire. It is in her evidence that when ladies asked Rekha Kumari as to why she was crying when she had set herself on

fire, the latter narrated that the accused had set her on fire. The witness further stated that the accused came there and when enquired from Rekha

Kumari, the latter told that the accused has himself committed the act. She, however, did not know as to who has set Rekha Kumari on fire.

Rekha Kumari was taken to the hospital in autorickshaw, where she died. Whereas the statement of Vidya Devi is to the effect that she had gone

to the house of Rekha Kumari to fetch price of the fruit she had sold to her and heard the cries coming from inside the house of Rekha Kumari.

She raised alarm and proceeded to inform the sister of the deceased about the incident. It is also in her evidence that the accused opened the door

of the house from inside and brought Rekha Kumari out. The evidence provided by these witnesses, namely, Darshna Kumari and Vidya Devi, is

highly contradictory, discrepant and conflicting in material particulars. According to Darshna Kumari when she reached on spot found the

deceased on fire and crying outside the door of her house and ladies from the Mohalla were extinguishing the fire by pouring water and putting

blanket on her. Rekha Kumari thereafter was taken to her room. In the meantime, the accused also arrived there and in his presence when the

ladies asked Rekha Kumari as to why she is crying when she had committed this act herself, to this Rekha Kumari replied that Joginder, accused,

had set her on fire. However, this statement of Darshana Kumari stood contradicted by Vidya Devi when narrated that it was accused, who

opened the door in her presence and brought the deceased outside the house and thereafter she went to inform the sister of the deceased about the

occurrence. She, however, did not talk to the deceased, Apart from that, Pritam Kour, Om Parkash and Usha Rani, though cited as prosecution

witnesses, but were produced by the accused, who happened to be resident of the same locality were the deceased and the accused resided

together. The presence of these witnesses at the relevant time has not been denied. There is nothing in the evidence of these witnesses to connect the accused with the commission of the crime. It is also found from their evidence that when the accused arrived and enquired from the deceased the reason of setting herself on fire, the deceased replied that luck has played the part. It is also in the evidence that the accused was assisted by Om Parkash in removing the deceased to the hospital after the occurrence. Discrepancies found in the statement of Darshna Kumari and Vidya Devi, PWs, with regard to the facts as to what the deceased stated to the accused when enquired about the occurrence. The statement of Darshna Kumari that the deceased when asked by the ladies told that the accused has set her on fire. But this evidence stands contradicted both by Vidya Devi, PW, and also defence witnesses Pritam Kour, Usha Rani and Om Parkash, though cited as prosecution witnesses, but produced by the accused. These contradictions found in the testimony of Vidya Devi and Darshna Kumari, prosecution witnesses, with regard to the involvement of the accused in the commission of the crime, will go to the root of the matter and will take basic version of the matter and, therefore, cannot be annexed with much importance, it is not denied that PW Mst. Vidya Devi reached the spot first in point of time and raised alarm when some smoke was coming out of the house of Rekha Kumari and her cries coming from inside. Had the deceased, Rekha Kumari, told the ladies that it was accused, who had set her on fire, but natural for PW Vidya Devi to hear about it when she remained there till the accused opened the door and brought her outside the house. Not only Vidya Devi, but other ladies Usha Devi and Pritam Kour must also have heard about what Rekha Kumari stated that the accused must have set her on fire, when their presence has not been denied. These witnesses in normal course would have reached the place of incidence after hearing the cries of Mst. Rekha Kumari while in ablaze. These material and vital contradictions found in the evidence of the prosecution witnesses and rendered their version untrustworthy and unbelievable and, thus, leaves a serious dent in the prosecution case. The veracity of a witness is judged not only from his/her individual statement, but from his/her testimony taken in conjunction with by other facts brought out in the course of testimony. The real tests are how consistent the story is with itself narrated by the witness and how far it fits in

with the rest of the evidence and the circumstances of the case.

6. While assessing evaluating the evidence of the witnesses, the Court must adhere to two principles, namely, (i) whether in the circumstances of

the case, it is possible for the eye witnesses to be present at the scene; (ii) whether there is anything improbable and unnatural, credibility of a

witness has to be decided by referring to his/her evidence and find out as to what impression is created by his/her evidence taken in a manner and

in the context with the other evidence on record on scrutinizing the evidence of Vidya Devi and Darshna Kumari, PWs. It is found that inconsistent

and contradicting each other so far as what Rekha Kumari, deceased, stated when asked by the ladies as to how the incident took place. The

evidence provided by PW Darshna Kumari that he deceased, Rekha Kumari, narrated to the ladies when latter asked that the accused had set her

ablaze, does not find support from the statement of Vidya Devi, another eye witnesses examined by the prosecution. Apart from that, the other eye

witnesses, namely, Pritam Kour, Om Parkash and Usha Rani, though cited as eye witnesses of the occurrence, when did not depose on the

dictates of the prosecution, were given up and, subsequently, were produced by the accused in evidence. These witnesses did not support

prosecution version so as to provide a nexus between the accused and the commission of the offence. These witnesses, in fact, had completely

ruled out the implication of the accused in the occurrence. The next circumstance against the accused, according to Mr. Ashok Parihar, learned

Additional Advocate General, is the dying declaration made by the deceased, Rekha Kumari, to the Police Officer in presence of the doctor,

which is admissible under the Evidence Act and, in such circumstances, there was no reason to disbelieve it in any manner. The dying declaration

of the deceased coupled with eye witnesses of the occurrence clearly points out that the offence has been committed by the accused. The dying

declaration of Rekha Kumari before the Police and in presence of the doctor was to the effect that she was residing in Sheikh Nagar, Bahu Fort

alongwith her husband and two daughters. Her husband was working as a Painter and had to go to Srinagar to pursue his avocation. When asked

by her husband to bring some money on loan, she told that in case she brings some money, what she would do after he left for Srinagar. Her

husband then suggested to pledge utensil with somebody for the loan, which the deceased refused. The deceased when proceeded to bring water

after leaving her younger daughter on a cot, her husband intending to kill her poured kerosene oil on her body, lit a matchbox and set her ablaze

and therefore fled away with table fan. Her clothes caught fire and she went outside and raised alarm. The inhabitants of the Mohalla, namely, Om

Parkash, wife of Om Parkash, Pritam Kour and Darshna Devi arrived and extinguished the fire. That her husband also came there at that time and

asked her to save him and thereafter went away to bring taxi. She further narrated that her husband had been quarrelling with her and causing

harassment. This statement was recorded by Showkat AM, Probationer Assistant SubInspector and testified by Dr. Ajay Kotwal. What is

required to be seen in this case is, whether the dying declaration is recorded in accordance with the law and Rekha Kumari was in senses at the

time of making statement, whether the services of the Magistrate were requisitioned.

7. Although dying declaration recorded by the Police Officer during the course of investigation is admissible, it is better to take recourse to better

and more reliable method of recording a dying declaration and the one recorded by the Police Officer may be relied upon, if there was no time or

facility available for adopting a better method. Dying declaration only based on untested evidence and must, like any other evidence, satisfy the

court that what is stated therein is unallayed truth and that it is absolutely safe to act upon it. The person who records dying declaration, must be

satisfied that the deceased was in a fit state of mind. Though dying declaration is indirect evidence, being a specie of hearsay, yet it is an exception

to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no

corroboration for forming basis of conviction of an accused. But then the question as to how much weight is attached to the dying declaration is a

question of fact and has to be determined on facts of each case.

8. In the instant case, the occurrence had taken place on 13.06.1981 at 12 noon and the deceased, Rekha Kumari, was taken to the hospital in

precarious condition immediately with extensive burns on her body. Her dying declaration was recorded at 10.30 p.m. by Showkat AM,

Probationer Police Officer, Dr. Ajay Kotwal in whose presence the statement was recorded, was also under training in the hospital. There was sufficient time for the police to have approached the Magistrate for recording dying declaration of the deceased. The Magistrate could have been easily available at the Head Quarter at Jammu, but no steps seem to have been taken in this respect. No efforts also seem to have been made to record dying declaration of the deceased in presence of a senior doctor of the hospital and instead the choice fell on a doctor who was under training in the hospital. It is also in the evidence of Showkat Ali, ASI and Dr. Ajay Kotwal that there were 5/6 persons present around Rekha Kumari when her statement was recorded, but signatures of none is found on such statement, as regards the certificate obtained from the doctor that the deceased was in fit state of mind at the time of recording her dying declaration. There appears two certificates on the record one issued by Dr. Ajay Kotwal and the other one by another doctor on the same day. In one certificate issued by the doctor, it is recorded that Rekha Kumari was not in fit condition, while the other certificate issued by Dr. Ajay Kotwal recites that the patient was in fit condition to make the statement. There is another certificate appearing at the back of the dying declaration made by Rekha Kumari to the effect that patient is neither able to sign the statement nor finger prints can be taken on papers, as both the hands are severely burnt". The statement given above was taken before me. This certificate has been given by Dr. Ajay Kotwal. It is pertinent to point out that the postmortem report reveals that declarant suffered 90 % burns. According to PW Dr. Inayat Ullah Sheikh, who conducted postmortem examination, the burns were superfices and extended from fact to calf region internally.

9. Apart form that, it is clearly exacted from the crossexamination of Showkat Ali, Investigation Officer, who recorded dying declaration that he was fully conscious that dying declaration should always be recorded in presence of a Magistrate. It is also in his evidence that the vehicles are easily available every time for the Court or for the city from the hospital. He, however, did not make any effort to approach the Magistrate and procure his services for the purpose. The explanation given by him is that it was during night and the doctor was present there. It is also borne out

from his statement that he reached hospital at 9.00 p.m. and started recording dying declaration after half an hour. He completed statement at

10.00 p.m. Apart from that, conviction can be based on dying declaration provided it is complete, categorical and truthful, Dying declaration was

not recorded in accordance with Police Rules. Rule 609 is not dependable document as held by the Division Bench of this Court in case Darshana

Kumar vs. State, 1996 SLJ 264. Rule 609 of the J&K Police Rules provides for recording of dying declaration and is reproduced hereunder:

609. Dying declaration:

(1) A dying declaration shall, whenever possible be recorded by a magistrate.

(2) The person making a declaration shall if possible be examined by a Medical Officer with a view to ascertaining that he is sufficiently in

possession of his reason to make a lucid statement,

(3) If no magistrate can be obtained. The declaration shall, when a gazetted Police Officer is not present, be recorded in the presence of two or

more reliable witnesses unconnected with the Police Department and with the parties concerned in the case.

(4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded it shall be recorded in the

presence of two or more Police Officers.

(5) A dying declaration made to a Police Officer should under section 162, Criminal Procedure Code, be signed by the person making it.

Perusal of Rule 609 of the J&K Police Rules clearly indicates that none of the provision of this rule was adhered to by the Investigating Officer for

recording dying declaration. The doctor could record dying declaration in presence of the Investigating officer, but this has not been done. The

witnesses though available, as per the statement of the Investigating Officer, around the deceased while recording dying declaration, but their

signatures were not secured on the statement. The Magistrate though was available, but his service was not procured for the purpose. Even

there are two certificates, appearing on record with regard to the mental condition of the declarant at the time of making dying declaration, which

render dying declaration highly doubtful. Before accepting the same in evidence, the truthfulness of dying declaration must be candidly established.

10. In view of the two conflicting certificates given by different doctors, with

regard to the mental condition of the declarant, before recording her dying declaration, certainly gives rise to suspicion, as to whether deceased Rekha Kumari was in fit condition at the time of making dying declaration.

11. The law with regard to dying declaration is very clear. A Division Bench of Delhi High Court in *Surinder Kumar vs. The State*, (1992 Criminal Law Journal 616), held that:

8. The factors, which should be taken into consideration by the courts, whether or not the dying declaration should be relied upon, have been well

settled by the Supreme Court in a series of decisions. Suffice it to refer to *K. Rama chandra Reddy vs. The Public Prosecutor*, AIR 1976 SC

1994; 1976 Cr. LJ 1548), where at page 1997, the Supreme Court has held that the dying declaration is undoubtedly admissible under S. 32 of

the Evidence Act and not being a statement on oath so that its truth could be testified by cross-examination, the Court have to apply the strictest

scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a

dying man because, person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court

has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court

must be satisfied that the deceased was in a fit state of mind to make that statement after the deceased has a clear opportunity to observe and

identify his assailants and that he was making the statement without any influence or rancor. Once the Court is satisfied that the dying declaration is

true and voluntary, it can be sufficient to found the conviction even without any further corroboration.

12. Applying the aforesaid principles to the facts of the cause and suspicious circumstances about the making the dying declaration gatherable from

the statement of the witnesses and nonobservance of the procedure provided under the J&K Police Rules for recording dying declaration, lends to

only irresistible conclusion that dying declaration is neither a dependable nor acceptable document and has to be rejected. It is highly undesirable

that writing of such a statement should be entrusted to Probationer Assistant SubInspector when the Magistrate could easily be available with little

efforts, which in this case, have not been made for the reasons best known to Police Officer and not for us to speculate. Where a dying declaration by burnt wife, who suffered from 90 % burns, was not attested by the person present and there appears two certificates on record by different doctors, one stating that the declarant is in fit condition to give statement and the other that the patient is not fit to give statement and both the certificates are of the same date, viz 13.06.1981, in such circumstances, it cannot be held that dying declaration deserved credence and no weight age can be given to such statement. The Trial Court has rightly held that such a dying declaration cannot be relied upon as the sole basis of conviction.

13. What emerges from our careful consideration of the whole matter is that the prosecution has utterly failed to established that the deceased was killed by the accused and none else. It would be highly dangerous and hazardous to hold the accused guilty of the offence alleged against him on the basis of weak, shaky, unacceptable and undependable evidence. The Trial Court has correctly analyzed and appreciated the evidence. We are clearly of the view that impugned order does not suffer from any legal infirmity or factual frailty inviting interference in the appeal. Consequently, this appeal, in our view, possessing no merit, is hereby dismissed.