
(1996) 04 AHC CK 0150
In the Allahabad High Court
Case No : Criminal Appeal No. 1385 of 1985

Sushil Kumar Upadhyaya

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 14-04-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Evidence Act, 1872 — Section 113B
Penal Code, 1860 (IPC) — Section 302, 304B

Citation : (1996) 20 ACR 695

Hon'ble Judges : R.N. Ray, J;N.L. Ganguly, J

Bench : Division Bench

Advocate : K.K. Misra, for the Appellant; D.G.A., for the Respondent

Judgement

N.L. Ganguly, J.—Appellant Sushil Kumar Upadhyaya has been convicted u/s 302, I.P.C. by the Sessions Judge, Ballia in S.T. No. 78 of 1984. The prosecution case is that Smt. Mamta, who was the daughter of Srikant Tewari was married on 9.5.83. It is said that in this marriage, a demand for dowry for Rs. 10,000 cash, watch, electric fan, winter suit, scooter and two-in-one radio-cum-tape recorder were made by the Appellant Sushil Kumar Upadhyaya. The father of the deceased Smt. Mamta was not able to give scooter, two-in-one radio-cum-tape recorder and winter suit. For want of dowry, the accused was dissatisfied and was very angry since the time of bidai of his wife. He had threatened Sri Kant Tewari, his father-in-law that if the aforesaid articles were not supplied to him, the result would be very bad. After the marriage, the Appellant Sushil Kumar Upadhyaya and deceased Smt. Mamta resided in one room of a house in Mohalla Harpur in the City of Ballia. Witnesses Anand Swarup Chaturvedi (P.W. 3), Kamakhya Narain Singh (P.W. 5) and one Arvind also used to reside in separate room of that house. The witnesses have stated that after the marriage, the Appellant used to torture his wife and used to say that if the articles were not supplied, it would not be good for her. The deceased Smt. Mamta had informed these things to her father. Mamta had returned to her father's place In

November, 1983 and after hearing the torture and demands of the Appellant, he was not ready to send her to the house of the Appellant. However, on intervention of Shanker Singh (P.W. 6) and Sher Singh (P.W. 4), Mamta was sent with the accused. A letter was sent by the accused to the lady which has been proved as Ext. Ka-1.

2. In between the night of 22nd and 23rd of December, 1983, Smt. Mamta was burnt by the Appellant by pouring kerosene oil. She had received 70% burn in the lower part of the body. After this burning, the residents of the house assembled. The residents of the house where the deceased lived with her husband Appellant, persuaded the Appellant to take Smt. Mamta to the hospital and the Appellant took her to the hospital at Ballia with reluctance. In the District Hospital of Ballia, Smt. Mamta was examined by Dr. Kailash Singh. M.O. at 11 p.m. on 22.12.1983. She had found third degree burn on whole of front and back of abdomen, pelvic region both leg front and back both arms under hung skin. Skin was red in colour. The doctor found that the Injury was fresh and produced by dry heat. The injuries were entered in the Accident Register. The true copy of the extract of the register has been proved by the witness. Dr. Kailash Singh P.W. 8 which has been marked as Ext. Ka-24. He had prepared a reference slip for referring the injury to Sir Sunder Lal Hospital, B.H.U., Varanasi. This reference was made at 2.45 p.m. on 23.12.1983. P.W. 2 Srikant Tewari, Father of the deceased Smt. Mamta was not informed by the Appellant. He had come to know about the burning of his daughter at about 7 a.m. the next day. Srikant Tewari P.W. 2 went to the hospital at Ballia. The Appellant did not inform him about the cause of the burning of Smt. Mamta. He gave evasive reply on query and told that Smt. Mamta will tell the cause after she has been cured. It has also come in evidence that one Dr. Vijal Kumar Shukla, M.O. in the District Hospital, Ballia is maternal uncle of the Appellant. It has also been stated in the evidence that Appellant used to remain with Smt. Mamta in the hospital and has not taken any interest in the treatment of the deceased. It is said that the Appellant had threatened Smt. Mamta that if she will state any fact against him then, he will get an injection of poison administered to her and she will die.

3. After referring the patient to Sir Sunder Lal Hospital, B.H.U., Varanasi, Srikant Tewari (P.W. 2), father of the deceased and Appellant went there at Varanasi. Nand Kishore, brother-in-law of Srikant Tewari lived in B.H.U. compound who used to come to the hospital to see Smt. Mamta. The Appellant went away on 2.1.1984. Then Smt. Mamta told Nand Kishore (P.W. 2) and Srikant Tewari that the accused had sprinkled kerosene oil on her and burnt her. She had told that she was not burnt accidentally. She also informed Srikant Tewari that the Appellant had threatened her not to state any fact. When Srikant Tewari (P.W. 2) came to know about this fact, he moved an application Ext. Ka-8 to the Dy. Inspector General of Police, Varanasi Range, Varanasi. On the basis of the application of Srikant Tewari (P.W. 2), one Smt. Sunita Chaturvedi S.D.M. (P.W. 11) was deputed to record the dying declaration of Smt. Sunita. She recorded the statement of Mamta on 3.1.1984 which has been proved by her and marked

as Ext. Ka-22. Smt. Mamta died on 4.1.1984. A report about the death was received by the P.S. Lanka, Varanasi. Thereafter, P.W. 12 Surendra Pratap Singh, Sub-Inspector went to the S.S.L. Hospital, B.H.U., Varanasi and he appointed punches, inspected the deadbody and prepared panchayatnama which was proved and marked as Ext Ka-2. He prepared the other papers for post-mortem examination and handed over the deadbody to Sheo Dutt Pandey and Kamaldeo Singh for taking the deadbody to the mortuary for post-mortem.

4. Dr. S.K. Pandey, Medical Officer, (P.W. 15) conducted the post-mortem on the deadbody of Mamta on 4.1.1984 at 3.45 p.m. The doctor found that the whole body except bottom of legs of Smt. Mamta was burnt to third degree. The Doctor opined that the deceased had died as a result of septicaemia. The postmortem report has been proved by the doctor S.K. Pandey (P.W. 15) and marked as Ext. Ka-45.

5. The F.I.R. of the case was lodged by Srikant Tewari on 5.1.1984 at 4.15 p.m. at P.S. Kotwali, Sadar, Ballia naming the Appellant as the person who burnt Smt. Mamta. The case was actually registered at the police station on 13.1.1984. In the case charges u/s 302, I.P.C. was framed by the Sessions Judge. The Appellant had pleaded not guilty and had claimed to be tried.

6. In support of the case, the prosecution examined P.W. 1 Abdil Sadir who stated that his house is near the house of Srikant Tewari. The marriage of daughter of Srikant Tewari was performed with the Appellant. At the time of bidai from the house of Srikant Tewari, one Rai Saheb and other baraties were there. Sher Singh was also present. The people of the mohalla were present at the time. Appellant Sushil Kumar Upadhyaya at the time of bidai was highly displeased and was saying that he want a scooter and a tape-recorder. The Appellant had also said that if these things are not given, result would not be good. This witness stated about the demand of scooter and tape-recorder and the displeasure of the Appellant. His evidence is confined to the aforesaid fact. P.W. 2 Srikant Tewari is the father of the deceased, who has stated the fact about the marriage with the Appellant. He also stated that whenever he visited to see his daughter at the house of Appellant in Mohalla Harpur, the deceased used to tell him that her husband is not pleased and he troubled her. She had requested Srikant Tewari to arrange for the items demanded. Once deceased come to his house with Appellant Sushil Kumar Upadhyaya, there also Sushil Kumar Upadhyaya Appellant also asked about the demand of dowry. Sushil Kumar Upadhyaya has said to the deceased that get the demands fulfilled otherwise it would not be good. Sushil Kumar Upadhyaya Appellant had left for his house. Sushil Kumar Upadhyaya Appellant has sent a letter which has been proved as Ext. Ka-1 on record. The letter Ext. Ka-1 was put to the Appellant in statement u/s 313, Code of Criminal Procedure. He has denied his signature or writing on the said letter. P.W. 13 Chandrahas Shukla, Dy. Jail, Superintendent. Ballia. He stated in Para 13 of the statement that a letter was given by Srikant Tewari P.W. 2. He stated that he had submitted an application to the Magistrate for obtaining the

specimen signature for getting the Handwriting Expert opinion about the signature and writing of the letter Ext. Ka-1. The Appellant had denied to give his signature or specimen handwriting. The application given by P.W. 13 Chandrahas Shukla for specimen signature and Handwriting Expert opinion was rejected by the Magistrate. The order of the rejection of the said application has been proved as Ext. Ka-36. It has not been proved by any direct evidence that the letter Ext. Ka-1 was written by the Appellant Sushil Kumar Upadhyaya. We have perused the letter Ext. Ka-1. The list of the letter shows that in this letter, nothing was written demanding scooter or two-in-one tape-recorder. This referred to the incident which had happened the earlier day. It has been said that now the episode that has happened has created a very serious affect in his mind and the episode has made a permanent scratch in his heart and will continue throughout his life. It has also been said that perhaps now it will not be possible to live happily. Besides several other things, it has been mentioned that she may pardon her and live separately so that the rest of the life both may live separately. She was free to do whatever she likes and live at distance. He also stated that perhaps her parents have known the weakness that he could not live without her but now nothing could be said. In the end he said that forget him. Destroy the letter. He had also said that if he do not forget he will have to repent whole of the life. He regretted that he is not in a position to restore happiness to her. The careful perusal of this letter, though not proved in the handwriting of the accused Appellant, shows that it was not a letter of demand of scooter and tape-recorder but indicated that something had happened which had broken his heart and he even stated that he may finish his life also, have said that she was free to live in a way she likes and perhaps she was not in a position to fulfil her desire. This letter cannot be taken as a ground for recording conviction for murder.

7. The evidence of P.W. 2 Srikant Tewari is to the effect that there was a demand for scooter and two-in-one tape-recorder. The torture and ill-treatment met by his daughter. He has also stated that the Appellant was not interested in the treatment of the deceased. All along Appellant used to stay in the hospital near the deceased and there was no occasion for Mamta to tell the real facts to P.W. 2 Srikant Tewari. She had stated to him that if the correct facts are told, he may get poison injected and she may die.

8. Sri Anand Swarup Chaturvedi, an Advocate, lived in the house in Mohalla Harpur. He is related to Appellant Sushil Kumar Upadhyaya. He had stated that on hearing about the occurrence of burning at 10.30 in the night, he heard from people and young man of the locality. His room was opposite to the room of Sushil Kumar Upadhyaya, Appellant. He had reached the place of occurrence and Sushil Kumar Upadhyaya Appellant had told him that his wife met to accidental burn by stove. He testified that the victim was taken to the hospital on rickshaw at his instance. He had also gone to the hospital. The key of the room of Sushil Kumar Upadhyaya remained with him and the room was closed. A Sub-Inspector of Police had taken burnt Sari, petticoat, kerosene can, etc. After taking key of the room from him and had also taken possession of the match box. The recovery

memo was proved by him. He is also not an eye-witness of the occurrence.

9. P.W. 4 is Sher Singh who is an Engineer. He is a witness of the marriage of the deceased with the Appellant and has stated about the displeasure on account of the dowry demand. He had given Rs. 1,000 as Srikant Tewari needed it badly at the time of bidai of the deceased.

10. P.W. 5 is Kamakhya Narain Singh, who was a student of Dubhar Degree College. He also stated that the demand of dowry and displeasure of the Appellant for non-fulfillment of the dowry demand. P.W. 6 is Shanker Singh. He is a Financial Advisor of the District Board, Ballia. He also stated about the dowry demand and said that there was some demand when the girl had come to the parents' house. Sushil Kumar Upadhyaya Appellant wanted to get bidai of his wife, failing which he would desert her. This witness examined in the trial shows that there was dissatisfaction of the Appellant for not getting the demand of dowry. None of the witnesses are eye-witnesses of the occurrence, none have seen the Appellant actually setting fire to the deceased Smt. Mamta. P.W. 7 Dr. Fanish Man Tripathi is the Surgeon of the Medical College, B.H.U. who proved the admission of the deceased in the hospital with the reference letter. He also stated that the deceased had 80% burn. On 2nd January, 1984 the condition of the patient was better and she could speak. The nurses' daily record was proved by him. On 3rd of January, 1984 also, her physical and mental condition was okay. He stated that the dying declaration of Smt. Mamta was recorded on 3rd January, 1984 at 1.20 p.m. by Smt. Sunita Chaturvedi. Magistrate P.W. 11.

11. The dying declaration of Smt. Mamta deceased was recorded by Smt. Sunita Chaturvedi (P.W. 11), Executive Magistrate, Varanasi on 2.1.1984. She proved the signature and handwriting of the S.S.P. Sri K.K. Bansal who had written to the District Magistrate a letter which was proved by her and marked as Ext. Ka-26. Sri Ram Snehi, A.D.M. (Finance) had passed the orders for P.W. 11 Smt. Sunita Chaturvedi to record the dying declaration of Smt. Mamta. She had proved the signature of the District Magistrate passing the said order. Sri Ram Snehi was officiating as the District Magistrate. The order of Sri Ram Snehi, officiating District Magistrate was proved by her and marked as Ext. Ka-26. She had also proved the application of Srikant Tewari and marked as Ext. Ka-8. She stated that after receiving the orders for recording the statement of Mamta Chaturvedi, she recorded the statement of Mamta Chaturvedi. She specifically stated that the mental condition of Smt. Mamta Chaturvedi was quite fit and she was in a position to make her statement. She proved the statement of Mamta. She had recorded and marked Ext. Ka-2. After reading the statement recorded by her to Mamta Chaturvedi. The hands of Mamta Chaturvedi were burnt, as such thumb of the right foot was affixed on her statement. At the time of recording of the statement, the Doctor was present and the Doctor had given a certificate about the mental and physical condition of the person to be fit. The certificate of the Doctor about the mental and physical fitness of the witness given the statement have been proved and marked as Ext. Ka-22A.

12. It is clear and undisputed that there is no eye-witness of the occurrence. It is the circumstances said to be the demand of scooter and two-in-one tape-recorder and non-fulfillment of the demand, was the result of burning of the victim Smt. Mamta by the Appellant by pouring kerosene oil. The most important and clinching evidence that has been adduced in the case is the statement u/s 164, Code of Criminal Procedure recorded by Smt. Sunita Chaturvedi, Executive Magistrate, Varanasi on 2.1.1984. The solitary dying declaration if proved to be unadded voluntary statement given without any external aid or tampering is sufficient evidence to record conviction. It may not need any corroboration. In this case, the defence examined D.W. 1 Rakesh Kumar, Dy. Collector. Ballia who stated that on 23.12.1984 when he was posted as A.S.D.M. Rasra of Distt. Ballia, he recorded the statement of Mamta, daughter of Srikant Tewari resident of Harpur Niddhi, Ballia in the district hospital of Ballia. He has also testified that before recording her statement, Dr. R.N. Sharma had certified that the deceased was in fit mental and physical condition. He also said that he had also found Mamta fit to give statement. He had recorded the statement of Mamta which he has read over to her and had taken her thumb Impression. The dying declaration so recorded was proved by Sri Rakesh Kumar D.W. 1 and marked as Ext. Kha-2. Dr. R.N. Sharma, D.W. 2 appeared in the witness box and have stated to have certified that physical and mental condition of Smt. Mamta on 23.12.1983 was all right and she has been in complete senses to give her statement. She was fully mentally alert.

13. The learned Counsel for the Appellant drew the attention of the statement of Smt. Mamta recorded on 23.12.1983 by D.W. 1 Sri Rakesh Kumar. In her statement, Smt. Mamta stated that she was lighting the stove, there was only one stick in the match box, as such one dibri lamp was lit by her and she started lighting the stove when the stove had lit and she was going to fetch milk by crossing the dibri lamp, the sari caught fire. There was no responsibility of any one. The fire was due to the dibri lamp. She stated that she was in perfect mental condition to understand the question.

14. The learned Counsel for the Appellant submitted that the dying declaration given by the deceased Smt. Mamta on 23.12.1983 was recorded which was wholly reliable, she had not implicated anyone for the death on account of the burns. The learned Counsel for the Appellant cited a number of decisions in Smt. Kamla v. State of Punjab 1993 SCC 155; Abdul Hamid v. State 1993 ACC 610 . The decision in Mohanlal Gangaram Gehani Vs. State of Maharashtra, , which is on the point that the dying declaration first in time is to be preferred. Learned A.G.A Sri K.C. Saxena referred to Smt. Paniben Vs. State of Gujarat, . The Hon"ble Supreme Court laid down the principles governing dying declaration, which we are reproducing for reference:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. Mannu Raja v. State of M.P. (1976) 2 SCC 764.

(ii) If the Court is satisfied that the dying declaration is true and voluntary. Court

can base conviction on it, without corroboration. State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, ; Ramawati Devi Vs. State of Bihar, .

(iii) This 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 opportunity to observe and identify the assailants and was in a fit state to make the declaration. K. Ramachandra Reddy and Another Vs. The Public Prosecutor, .

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. Rasheed Beg v. State of Madhya Pradesh 1975 (4) SCC 264.

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. Kake Singh Alias Surendra Singh Vs. State of Madhya Pradesh, .

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. Ram Manorath v. State of U.P. 1981 SCC 581.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. 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. 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 looks up to the medical opinion. But where the eye-witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. 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. State of U.P. Vs. Madan Mohan and Others, .

15. The dying declaration dated 23.12.1983 does not implicate the Appellant at all. The learned Counsel for the Appellant submitted that the dying declaration recorded by P.W. 11 Sunita Chaturvedi, Executive Magistrate, Varanasi is wholly unreliable and is wholly contradictory to the first dying declaration given by the deceased on 23.12.1983. He also submitted that the parents and the relations of the deceased Smt. Mamta were close and nearby at the time and just before recording of her statement by P.W. 11 Smt. Sunita Ghaturvedi.

16. We wonder to note that Smt. Sunita Chaturvedi, P.W. 11 said in her statement that she recorded the statement of Mamta Chaturvedi. She stated that at the time of giving the statement, Mamta Chaturvedi was in full senses and conscious and was fit and gave statement. Mamta Chaturvedi had given the

statement and the statement of Mamta Chaturvedi was read over to her by P.W. 11 Smt. Sunita Chaturvedi. She stated that her thumb impression could not be taken as her hands were burnt. As such, the right thumb of the foot print was taken on the statement recorded by her. There is not a single question asked by the defence or the State Counsel as to whether P.W. 11 Smt. Sunita Chaturvedi recorded the statement of Mamta or any other person. Mamta is clear and specific and not at one place the witness mentioned the name of the person giving statement but at 4 or 5 places, she has repeatedly stated that Mamta Chaturvedi stated. The prosecution case fully hinged and depended on the statement/dying declaration of the victim. The first dying declaration recorded on 23.12.1983 and proved by Sri Rakesh Kumar Dy. Collector, Ballia is on record, where she had not named the Appellant or any other person responsible for causing the burn on her. The statement of P.W. 11 Smt. Sunita Chaturvedi, she has recorded the dying declaration, cannot be conclusively said to be the dying declaration recorded of Mamta, the victim. Mamta the victim was married to Appellant Sushil Kumar Upadhyaya. She could write Mamta Upadhyaya or she may, if so, mention her father's surname Tewari after her name. Here it is totally a different surname. We were initially under the impression that the name of Mamta Chaturvedi was perhaps written by in advertance by P.W. 11 Smt. Sunita Chaturvedi as she herself was Chaturvedi but it was repeatedly stated by her that Mamta Chaturvedi said not at one place but at four places. We have verified and checked from the original record of the statement of this witness Smt. Sunita Chaturvedi. The whole case depended on the dying declaration and the dying declaration dated 2.1.1984 cannot be linked with the present case to conclusively, beyond all reasonable doubt, to show that it was of deceased Mamta, the wife of the Appellant who had made the said statement. The prosecution case can succeed only if it succeeds in proving the case against the accused persons beyond all reasonable doubt. We have grave doubts and we cannot accept the dying declaration recorded by Smt. Sunita Chaturvedi P.W. 11. The other circumstances noted may suggest that the Appellant was not satisfied for non-payment of dowry. This is not a case of bride-burning u/s 304B, I.P.C. This is an incident of 1983. At that time, the provision of Section 304B, I.P.C. was not on the Statute. The burden of proof could not be shifted by Section 113B of the Evidence Act in the present case. The other aspect of the case that is the letter Ext. Ka-1 said to be in the handwriting of the Appellant is not proved, even for a moment, we consider the said letter and facts stated therein, it appears that it was not a letter showing anger or dissatisfaction for non-fulfillment of the dowry demand but some happening or episode before a day or two before writing of the said letter which had broken the heart of the writer of the letter. He said that he may even finish his life. He had also said that she may live separately as he would not be able to fulfil and bestow all happiness to her. This is a mystery. On this, we cannot draw any positive inference.

17. After considering the facts and circumstances of the case and evidence, we are of the view that the prosecution has failed to prove the guilt of the accused

beyond all reasonable doubt against the Appellant. It was the duty of the counsel appearing for the prosecution if there was any inadvertant statement of P.W. 11 Smt. Sunita Chaturvedi in saying Smt. Mamta: as Mamta Chaturvedi, this completely changes the texture of the case and cannot be made the basis to record conviction. We are not to record conviction and sentence on moral satisfaction but we have to satisfy ourselves on the basis of the evidence on record and it is the evidence on record which is to come for deciding the appeal. We have, thus, no option but to give benefit of doubt to the Appellant.

18. The appeal is allowed. The Appellant is given benefit of doubt. The judgment of conviction and sentence passed by the Court below is set aside. The Appellant is on bail. He need not surrender.