

(2010) 04 DEL CK 0108
In the Delhi High Court
Case No : Criminal Appeal No. 524 of 2009

Umesh Dutt

APPELLANT

Vs

State (Govt. of NCT, Delhi)

RESPONDENT

Date of Decision : 23-04-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2010) 04 DEL CK 0108

Hon'ble Judges : Ajit Bharihoke, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Keshav Kaushik, Govind N. Kaushik and Kanica Bakhroo, for the Appellant; Lovkesh Sawhney, APP, for the Respondent

Judgement

Ajit Bharihoke, J.—The appeal is preferred against the impugned judgment dated 06.04.2009 in Sessions Case No. 150/2008 FIR No. 162/03 convicting the appellant on the charges u/s 302 IPC and Section 307 IPC and the consequent order on sentence dated 13.04.2009.

2. Briefly stated, the case of the prosecution is that in the morning of 13.3.2003 at around 9.20 a.m., deceased Kavita and her daughter Nikita sustained fire burn injuries at their house in Village Pandwala Kalan, Delhi. At that time, they were alone in the house. The mother-in-law of the deceased Gyanwati (PW-4) who had gone to provide water to her buffalo returned home almost at the same time and she noticed the deceased lying in burnt condition in the courtyard. She tried to put off the fire by throwing water on her. In the meanwhile, Nagender(PW-1) husband of the deceased also reached there and on seeing his daughter Nikita aflame, he picked her up and dipped her in the water tank to put off the fire. Thereafter, he arranged for a maruti van and he along with his brother Dharmender(PW-5), Sanjay Kumar (PW-7), Gaurav @ Manu(PW-8) and one Love Kumar took the deceased and Nikita to Safdarjung Hospital.

3. It is claimed by the prosecution that on the way to the hospital, the deceased

Kavita was crying and insisting that she should be taken to the hospital quickly. When the maruti van reached near Kapashera, the deceased is claimed to have expressed her desire to make a statement at Police Station Kapashera as she did not expect to survive till the time she reached the hospital. Thus, the maruti van was stopped at Police Station Kapashera. PW-1 Nagender and others went inside the police station to request the police to record the statement of the deceased while PW-5 Dharmender stayed back with the deceased and Nikita in the van. It is claimed by PW-5 Dharmender that at that time the deceased told him that she was set on fire by one Umesh Dutt(the appellant herein). The police officials, however, refused to record the statement of the deceased and advised them to immediately take the deceased and Nikita to Safdarjung Hospital and it is alleged that at Safdarjung Hospital, MLCs of the deceased as well as her daughter Nikita were prepared.

4. It is also the case of the prosecution that on 13.3.2003, Inspector Nirmal Kaur (PW-12) of CAW Cell, Nanak Pura, Delhi was on Women Help Line duty from 8.00 a.m. to 8.00 p.m. She, while on duty, received information about a quarrel involving a woman which is subject-matter of DD No. 17. On the receipt of said information, she made an enquiry from PCR van Zebra 98, which van had visited the spot of occurrence and learnt that the burnt woman had been removed to Safdarjung Hospital. Thus, she reached Safdarjung Hospital and met the deceased who had sustained burn injuries. The deceased, when asked, told her that she and her daughter were set on fire by one Umesh who had poured kerosene oil over them and set them ablaze. She also disclosed that aforesaid Umesh was a friend of her husband and he had a quarrel with her husband few days before the incident.

5. We may note that on 13.3.2003 at around 10.20 a.m., an information was received at the Police Station Zafarpur Kalan about a fight near the house of Pradhan, Village Pandwala Kalan. The said information was recorded as DD No. 11A(Ex.PW-10/A) and copy thereof was entrusted to S.I. Bhoop Singh who reached at the spot along with Constable Rajbir. By that time, the deceased and her daughter had already been removed to the hospital.

6. On 13.3.2003 at 12.20 p.m., Duty Constable Mahesh telephonically informed the police station from Safdarjung Hospital about the admission of the deceased Kavita and her daughter Nikita at the hospital in burnt condition. The said information was recorded as DD No. 13-A(Ex.PW-10/B). Copy of the report was also forwarded to S.I. Bhoop Singh who had already left for verification of DD No. 11-A. On the receipt of said DD No. 13A, S.I. Bhoop Singh visited the Burns Ward, Safdarjung Hospital where both the injured persons were admitted. He collected their MLCs Ex.PW-17/A and Ex.PW-17/B. Deceased Kavita was declared "unfit for statement". S.I. Bhoop Singh informed the SDM concerned about the incident on telephone and also told him that the deceased was unfit for statement. He, thereafter, returned back to the spot of incident. There he found a white plastic can of kerosene oil, a burnt hawai chappal, some burnt clothes, a

plier and a matchbox containing 1-2 matchsticks. Those articles were converted into sealed packets and seized by the Investigating Officer.

7. Kavita died on the night of 13th /14th March 2003 at 12.30 a.m., which information was also conveyed to the Police Station Zafarpur Kalan by the Duty Constable posted at Safdarjung Hospital. On 14.3.2003, father and brothers of the deceased were taken to the Office of the SDM, Shri Madhup Vyas (PW-13) who recorded their statements Ex.PW-13/A to Ex.PW-13/C wherein they did not suspect the role of the husband of the deceased or her in-laws in the incident. The SDM also examined PW-1 Nagender, PW-4 Gyanwati, PW-6 Gajraj Singh and other witnesses and directed the SHO concerned to investigate the case as per law. After the inquest proceedings, the dead body was sent for post mortem examination and the report collected.

8. Despite of the order of the SDM, SHO Police Station Zafarpur Kalan did not register the FIR. FIR was ultimately registered on 30.12.2003 after PW-1 is claimed to have filed a criminal writ petition in the High Court. However, copy of the writ petition or the order, if any, passed by the High Court has not been placed on record.

9. After the registration of the case, formal investigation started wherein the statements of the witnesses were recorded u/s 161 Cr.P.C. and on completion of investigation, charge sheet against the appellant was filed in the Court.

10. The appellant was charged by the learned Additional Sessions Judge for the offences of murder of Kavita and attempt to commit murder of Nikita punishable u/s 302 IPC and Section 307 IPC respectively. The appellant pleaded not guilty to both the charges and claimed trial.

11. In order to bring home the guilt of the appellant, prosecution has occurrence nor there is any witness who might have seen the appellant entering or coming out from the house of the deceased on or around the time of occurrence. The prosecution case is based upon the purported dying declarations made by the deceased.

12. The appellant in his statement u/s 313 CrPC has denied the prosecution version and claimed that he has been falsely implicated in this case. In defence, he has examined three witnesses, namely, DW-1 Uttam Chand, DW-2 Naresh Kumar and DW-3 Kishan Dutt who have stated to the effect that on the relevant day, the appellant was playing cards with them from 8.00 a.m. onwards till 3.30 p.m., meaning thereby that the appellant has taken the plea of alibi.

13. Learned trial court, on consideration of the evidence, has convicted the appellant on both the counts on the strength of the purported dying declaration of the deceased.

14. At the outset, we may note that there is no eye witness to the occurrence nor there is any witness who might have seen the appellant entering or coming out of the house of the deceased on or around the time of occurrence.

Prosecution case is based solely upon the dying declarations purportedly made by the deceased on first occasion in presence of PW5 Dharmender outside Police Station Kapashera and on second occasion in presence of PW-12 Inspector Nirmal Kaur, CAW Cell, Nanak Pura, Delhi. Which dying declarations are oral.

15. Learned Counsel for the appellant while assailing the impugned judgment has submitted that the impugned judgment is based upon the purported dying declarations made by the deceased, one being in presence of PW5 Dharmender while the deceased was being taken to the hospital and the other being made by the deceased in the hospital in presence of PW12 Inspector Nirmal Kaur of CAW Cell. Learned Counsel submitted that both the purported dying declarations are doubtful because testimony of PW5 Dharmender as well as PW12 Inspector Nirmal Kaur is unworthy of credence. Learned Counsel submitted that the learned Trial Court has committed an error in routinely accepting the dying declarations without testing the evidence relating to dying declaration on the anvil of the accompanying circumstances. He also submitted that the learned Trial Court has also ignored the fact that the deceased had suffered almost 95 per cent deep respiratory burns. Therefore, she could not have been in a fit physical and mental state to make a clear and concise dying declaration. He submitted that once the dying declarations are taken off from record, there is no other evidence to justify the conviction of the appellant for the offences charged. Learned Counsel for the State, on the other hand, has argued in support of the impugned judgment and submitted that from the testimony of PW5 Dharmender and PW12 Inspector Nirmal Kaur, the dying declarations of the deceased implicating the appellant are proved beyond doubt and there is no reason to suspect the reliability of the dying declarations. Thus, he submitted that the learned Trial Court has rightly convicted the appellant.

16. PW5 Dharmender, brother-in-law of the deceased is the sole witness of the prosecution to prove the dying declaration purportedly made by the deceased in his presence. He has deposed that when they were taking the deceased to the hospital, on the way she was crying and insisting that she should be taken to the hospital quickly as she wanted to make statement or she should be taken to the police station. When they reached near Kapashera, the deceased insisted that her statement be recorded at Police Station Kapashera as she was not likely to survive by the time she reached hospital. On this, maruti van was stopped near the police station but the officials of police station refused to record the statement of the deceased and advised them to go to the hospital. He also deposed that while his brother and others had gone inside the police station to request the police to record her statement, the deceased made a dying declaration in his presence that she was burnt by Umesh Dutt accused.

17. If aforesaid version of PW5 Dharmender is true, then obviously the deceased, on her way to the hospital, was showing anxiety to make a statement to disclose the name of the culprit who had set her and her daughter on fire. If that was the state of affair, then, under the natural course of circumstances, the deceased was

expected to at least tell her husband and brother-in-law etc. as to who had set her on fire. This, however, is not the case, which casts a strong doubt on the correctness of the version of PW5 Dharmender regarding the purported dying declaration made by the deceased in his presence. Secondly, as per PW5 Dharmender, on the way to hospital, they had stopped the van outside the Police Station Kapashera but there is not even a whisper about the desire of the deceased to make a statement to the police or stopping at Police Station Kapashera to request the police to record the statement of Kavita (deceased) in the statement of PW1 Nagender, husband of the deceased. This circumstance casts a doubt on the version of the PW5 Dharmender regarding dying declaration. Otherwise also, had the deceased disclosed the name of the appellant as the person responsible for her burn injuries to PW5 Dharmender, under the normal course of circumstances, he was expected to tell his brother Nagender as well as other persons present in the maruti van about the dying declaration so made. But, neither PW1 Nagender nor PW7 Sanjay Kumar nor PW8 Gaurav alias Mannu have deposed that PW5 Dharmender told them about the dying declaration of the deceased implicating the appellant. Above circumstances taken together cast a strong doubt on the credibility of the version of PW5 Dharmender. Therefore, we do not find it safe to rely upon his testimony regarding the dying declaration made by the deceased in his presence.

18. Now we are left with the dying declaration purportedly made by the deceased in presence of Inspector Nirmal Kaur. She admittedly was not posted at Jafarpur Kalan at the relevant time and was working in CAW Cell, Nanakpura. It is a mystery as to how she reached at Safdarjung Hospital to record the dying declaration of the deceased Kavita. She has tried to explain this by stating that on 13.03.2003, she was at Human Help Line duty from 8:00 am to 8:00 pm and on the receipt of DD No. 17 about a quarrel with a woman, she reached Safdarjung Hospital. In later part of her examination-in-chief, she clarified the facts by stating that the information was about a quarrel at Pandwala Kalan and on the receipt of information she made inquiry from PCR van Zebra 98, which had visited the spot and from the officials of the said van she learnt that the burnt woman had been removed to Safdarjung Hospital and thereafter she reached Safdarjung Hospital. We do not find the aforesaid explanation acceptable for the reason that the above referred DD No. 17, which prompted Inspector Nirmal Kaur into action and reaching the hospital, has not been proved. It is not clear as to which police station said DD No. 17 pertained. However, if we go by the version of the witness that information was about a quarrel at Pandwala Kalan, then perhaps this witness is referring to DD No. 11A (Ex.PW10/A) which records "Roop Nath has given information about a fight near the house of Pradhan, Pandwala Kalan". If this witness is referring to the above DD report, then there is no mention of any woman involved in the crime or fight in the DD report and that being the case, there was no occasion for Inspector Nirmal Kaur (PW12) to go Safdarjung Hospital under the colour of Women Help Line duty. We may note that one DD No. 17A dated 13.03.2003 (Ex.PW20/B) was also recorded

at Police Station Jafarpur Kalan pertaining to the instant case. Said DD report, however, cannot be the basis of the visit of PW12 Inspector Nirmal Kaur to Safdarjung Enclave because it was recorded at 6:00 pm in the evening, whereas as per the case of the prosecution and the testimony of PW1 Nagender, Nirmal Kaur reached the hospital within one hour of admission of his wife and daughter in Safdarjung Hospital in the afternoon. Thus, it is apparent that there is no authentic evidence on the record to justify the presence of PW12 Inspector Nirmal Kaur at Safdarjung Hospital to record the statement of the deceased regarding the cause of death. This circumstance makes her version regarding the dying declaration made by the deceased in her presence highly suspect. Secondly, if the version of PW12 Inspector Nirmal Kaur is true, then she, under the natural course of circumstances, was expected to convey this information to the concerned Police Station Jafarpur Kalan, whereas as per her version she only prepared a performa and deposited it in the office. Such a conduct is not expected of a senior police officer of the rank of Inspector. Further there is no explanation as to why the dying declaration, if it was made, was not reduced into writing. Thus, under the circumstances, taking into account the fact that the deceased had suffered an unnatural death by fire burn injuries within a period of less than seven years of her marriage, PW1 Nagender who was a clerk of a lawyer might have taken her help to save his skin. Another factor which casts doubt upon the testimony of PW12 Inspector Nirmal Kaur regarding the dying declaration is that had her version been true and had the deceased given a dying declaration to her, Inspector Bhoop Singh, under the natural course of circumstances, would have been informed by the Doctor at the hospital about said dying declaration. This, however, is not the case because had it been so, he would have conveyed this fact not only to the Police Station but to the SDM also. Thus, in our considered view, the testimony of PW12 Inspector Nirmal Kaur is highly suspect and we find that prosecution has failed to establish that the deceased actually made any dying declaration in presence of Inspector Nirmal Kaur (PW12).

19. The doubt against the correctness of prosecution version is further compounded by the fact that there is no evidence on record to establish any motive on the part of the appellant to cause death of the deceased or set her daughter Nikita on fire. Even as per the testimony of PW1 Nagender, husband of the deceased, appellant was his friend. Therefore, under the natural course of events, he could not have any reason to cause harm to the wife and daughter of his friend.

20. In view of the discussion above, we find that prosecution case is highly doubtful and it is not safe to rely upon the purported dying declarations of the deceased which have not been firmly established to hold the appellant guilty of charges u/s 302 IPC and Section 307 IPC. We, therefore, accept the appeal and set aside the impugned judgment of conviction as also the order on sentence.

21. Appellant is in Jail. He be released forthwith, if not required in any other case.

22. The appeal is disposed of accordingly.