

State Vs. Rajkumar

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Court : Rajasthan Jodhpur

Decided On : Apr-04-2014

Appellant : State

Respondent : Rajkumar

Judgement :

DB Cr.Appeal No.64/1988 1 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR :

JUDGMENT

: :: State of Rajasthan versus Raj Kumar & Ors D.B.Criminal Appeal No.64/1988
Date of Judgment :: 4th April 2014 PRESENT HON'BLE MR.JUSTICE DINESH MAHESHWARI HON'BLE MR.JUSTICE V.S.SIRADHANA Mr.AR Nikub, PP for the State Mr.HSS Kharlia with Mr.SS Dhillon, for the respondent BY THE COURT: (Per Dinesh Maheshwari,J.) This appeal is directed against the judgment and order dated 27.06.1987, as passed in Sessions Case No.32/1986 whereby the Additional Sessions Judge, Nohar, while giving benefit of doubt, has acquitted the accused-respondents Raj Kumar, Mst.Chhoti @ Naraini and Mst.Durga, who were charged for the offence under Sections 302/34 IPC on the allegations of causing death of Mst.

Kamla wife of Purshottam after setting her on fire.

The accused were related to the deceased Kamla as being her brother-in-law, mother-in-law and sister-in-law respectively.

It may be noticed at the outset that in this State appeal against acquittal, the accused persons Raj Kumar, Mst.

Chhoti and Mst.

Durga have been arrayed as respondents Nos.1,2 and 3 respectively.

However, the respondents Nos.2 and 3, Mst.

Chhoti @ Narayani and Mst.

Durga, were reported to have expired.

The DB Cr.Appeal No.64/1988 2 learned Public Prosecutor, after obtaining verification, submitted that they had indeed expired in the years 2008 and 2010 respectively.

Thus, it was observed on 20.02.2013 that this appeal has abated qua the respondents Nos.2 and 3.

This appeal, therefore, remains to be considered only qua the respondent No.1 Raj Kumar son of Satyanarayan, the brother-in-law of the deceased.

The relevant factual aspects could be noticed in the following: The Officer-in-charge of Civil Hospital, Bhadra, Dr.Brij Mohan Choudhary (PW-5) informed the SHO, Police Station, Bhadra, Mr.Abdul Aziz (PW-9) through the communication dated 29.05.1986 (Ex.P/4) that Kamla wife of Purshottam Kumhar, aged 25 yearRs.was brought to the hospital at about 6:45 p.m.in 90% burnt state; and that her general condition was serious.

According to the prosecution, the concerned SHO reached the Civil Hospital at 7:10 p.m.; and the injured Kamla made her statement (Ex.P/16) before him, which was recorded by the Constable Mr.Ashu Singh of Police Station, Bhadra in the presence of SHO Mr.Abdul Aziz (PW-9).In the aforesaid statement (Ex.P/16).the

victim Mst.

Kamla purportedly stated that she was married 5 years back and was having one son; and was residing with her in-laws for last 4 months.

She further stated that her husband was working as a Muneem; and that her mother-in-law Mst.

Chhoti, brother-in-law Raj Kumar and sister-in-law Mst.

Durga had been pressurizing her while alleging that she was sleeping with her father-in-law and were also depriving her of food; and that her husband had turned down her request of getting separated from the family.

She stated further that on the day of incident, at around 4:00 p.m., her mother-in-law slapped her and the DB Cr.Appeal No.64/1988 3 brother-in-law and sister-in-law asserted that they shall continue to beat and abuse her.

Mst.

Kamla further stated that her mother-in-law blind-folded her and poured oil upon her and then, in order to kill, one of them set her ablaze though she did not know as to who lit the fire.

She also stated that her brother-in-law jotted down something on a paper, which was not shown to her; that she was educated upto 5th standard; and that her father-in-law and husband both were not in the house.

She stated yet further that her mama (maternal uncle) Jaikishan brought her to hospital but thereafter, stated that she did not know as to who brought her to the hospital and that her maternal uncle was not present there.

Thereafter, the S.H.O allegedly read out the statement to Mst.

Kamla, who after confirming the same, affixed her right thumb impression thereupon.

For their relevance, the contents of this statement (Ex.P/16) could be taken note of as under:- W/o 25 5 " % % 4 () * - " %) 1 % " % " % 4 ") " " " %) *) A " B C % " After the aforesaid statement, since Kamla's condition was deteriorating, the SHO (PW-9) sent a request to the Judicial Magistrate Bhadra, Shri Madan Gopal Dadhich (PW-12) at 7:15 p.m.DB Cr.Appeal No.64/1988 4 through the communication Ex.

P/17 for recording her dying declaration.

Upon reaching the hospital, the Judicial Magistrate obtained a fitness certificate from the Officer-in-charge of the hospital Dr.

Brij Mohan Chaudhary (PW-5) at 7: 25 p.m.that Kamla was speaking and was in a fit condition to make the statement.

Hence, PW-12 recorded her dying declaration (Ex.

P/6) at 7:30 p.m.Mst.Kamla, in her dying declaration (Ex.P/6) before the Judicial Magistrate, Bhadra, stated that her mother-in-law Chhoti, brother-in-law Rajkumar and sister-in-law Durga accused her of having illicit relations with the father-in-law and abused her in filthy language; and that all of them set her ablaze with kerosene oil.

She, however, stated further that she set herself on fire; and that she did so because she was not being given the food, was tortured and her husband was not getting separated.

She also stated that she was beaten by everyone and that day too, she was beaten up and at that time, her husband and father-in-law were not in the house; but her mother-in-law, brother-in-law and sister-in-law were present.

She stated further that her mother-in-law bind-folded her and she could not say as to who ignited the fire.

At this stage of statement, the Magistrate tried to seek clarification from Kamla and asked her to state clearly as to whether her mother-in-law, brother-in-law and sister-in-law set her on fire or she burnt herself to which, she replied that she was

set on fire by her mother-in-law, bother-in-law and sister-in-law but she did not know as to who of the three did so.

She concluded by saying that she had a child and was married four years back.

This statement (Ex.P/6) has been strongly relied upon by the prosecution as being the dying declaration of the victim Mst.

Kamla.

DB Cr.Appeal No.64/1988 5 The contents of Ex.P/6 could be noticed as follows: -
To The Duty Doctor, Civil Hospital, Bhadra.

Please certify that patient Smt.

Kamla w/o Sh.

Purshottam caste Kumhar age 25 R/o Bhadra admitted in your hospital as a burn case is in fit condition to give her statement.

sd/- 29.5.86 Time 7.25 PM She is speaking & in fit condition to give statement.

sd/- 29.5.86 , 1 " %) " " D " " D F, A " (" % A , ") ") " F " "A (stage D "" - , "" - " "A
(" % " Q % " w/o " F" .

.- "/- statement recorded in my presence 29.5.86 sd/- 7.30 ". 29.5.86 Duty Doctor"
The same day, i.e., 29.05.1986, at 7:45 p.m., on the basis of parcha bayan (Ex.
P/16).FIR No.80/1986 (Ex.

P/39) was registered at Police Station, Bhadra against the three accused persons
Rajkumar, Chhoti and Durga for the offence under Section 307/34 IPC.

A constable was also posted at the site of incident.

However, Mst.

Kamla expired at about 8:10 p.m.The hospital sent the DB Cr.Appeal No.64/1988
6 information about her demise to the investigating officer and, therefore, FIR

came to be registered for the offence under Section 302/34 IPC.

Subsequently, the Dy.

S.P.Mohan Singh (PW-10) took over the charge of the case and carried out investigation.

He reached at the Civil Hospital on 30.05.1986 and got prepared the inquest report (Ex.

P/1) and also recorded the statements of the witnesses namely Sahabram, Lekhram, Jaikishan and Hajari, who were present in the hospital.

The postmortem report (Ex.P/8) was also obtained.

Thereafter, a site map (Ex.P/2) was prepared and a burnt cloth was also recovered from the place of occurrence under the memo Ex.

P/3.

As per the prosecution, the burnt cloth pieces were also recovered under the memo Ex.P/23 on the information of the accused Mst.

Durga; and on 05.06.1986, a container with a small quantity of kerosene oil was recovered under the memo Ex.P/25 on the information of the accused Raj Kumar.

The recovered articles were sent for forensic examination.

On the basis of investigation, the police concluded that the accused Rajkumar, Chhoti and Durga poured kerosene on Kamla and set her on fire, which resulted in her death.

It was also observed in the investigation that the place of incident was cleaned and all the traces were wiped off.

The charge-sheet against the three accused persons for offences under Section 302/34 was placed before the Judicial Magistrate, Bhadra who, after taking cognizance, committed the case to the Court of Additional Sessions Judge, Nohar.

The learned Additional Sessions Judge framed the charges for offence DB Cr.Appeal No.64/1988 7 under Sections 302/34 IPC.

The three accused persons denied all the charges and claimed trial.

In oral evidence, the prosecution examined as many as 12 witnesses in support of its case, as follows: PW-1: Lekhram (father of the deceased) PW-2: Jaikishan (maternal uncle of the deceased) PW-3: Kanwar Sen (son of Jaikishan and cousin of the deceased) PW-4: Hajari (paternal uncle of the deceased) PW-5: Dr.

Brij Mohan (Medical Officer-in-charge, Civil Hospital Bhadra) PW-6: Dr.

Kailash Chandra (A medical practitioner at Bhadra) PW-7: Prithvi Raj (Head Constable, Police Station, Bhadra) PW-9: Abdul Aziz (SHO, Police Station, Bhadra) PW-10: Mohan Singh (Dy.

S.P., Nohar and IO of the case) PW-11: Om Prakash (ASI, Police station, Bhadra who registered FIR on the basis of parcha bayan of Kamla) PW-12: Madan Gopal Dadhich (Judicial Magistrate, Bhadra who recorded the dying declaration of Kamla). Besides these witnesses, the prosecution also adduced documentary evidence, which included two dying declarations dated 29.05.1986: one allegedly made before the SHO, Bhadra (PW-9) at 7:10 p.m.(Ex.

P/16).and the second one, as recorded by the Judicial Magistrate (PW-12) at 7:30 p.m.(Ex.P/6).There was no eyewitness of the incident.

In defence, Durga, the sister-in-law of the deceased, stated that on the date of incident, she was not present at Bhadra but was at her in-laws' house and she did not go to Dr.

Kailash Chandras DB Cr.Appeal No.64/1988 8 clinic for taking medicines.

Similarly, Rajkumar, brother-in-law of the deceased, also stated that on 29.05.1986, he was not present in his house and was, in fact, working at Shiv Bhagwans shop when a boy from the neighbourhood informed that his brothers wife was burnt whereupon, he rushed to the house and found his brother Purushottam, his wife, and Jaikishan present; and thereafter, all of them took

Kamla to the hospital and he, along with his brother, went to fetch the medicines.

Mst.Chhoti, the mother-in-law of the deceased, stated that on the fateful day, she was lying unconscious between 3:00 p.m.to 8:00 p.m.after having suffered from the fits.

On the behalf of the accused, three witnesses were examined, namely: DW-1: Purushottam Kumhar (husband of the deceased) DW-2: Shiv Bhagwan (uncle of Rajkumar who had a photography studio at Bhadra) DW-3: Shambhu Dayal (another uncle of Rajkumar) It is noticed that the prosecution case rested essentially on the two statements of the deceased which were relied upon as dying declarations (Ex.P/16 and Ex.P/6).The learned Trial Court, therefore, proceeded to examine these two statements in meticulous details with reference to all the relevant aspects and circumstances, including their contents.

The learned Trial Court declined to accept the statement (Ex.P/16) as a dying declaration, which was allegedly made before PW-9 Abdul Aziz, SHO Bhadra, on several grounds, including the following:- First, the learned Trial Court observed that PW-9 did not obtain the medical certificate regarding fit mental state of Kamla, whether DB Cr.Appeal No.64/1988 9 before or immediately after recording of the statement.

It was observed that the statement made by PW-9 that he recorded the statement of Kamla after obtaining fitness certificate from the medical officer was not believable since the endorsement of the Medical Officer-in-charge Dr.

Brij Mohan Chaudhary (PW-5) was obtained on the back side of Ex.P/4 at a very later stage, only at 7:30 p.m.The learned Trial Court observed that recording of statement by PW-9 was completed by 7:10 p.m.and it appeared that the endorsement on Ex.P/4 was taken from the Medical Officer-in- charge only after the Magistrate had recorded the dying declaration Ex.P/6.

It was also observed that PW-9 had stated that at the time of recording of the statement, Dr.

B.M.Chaudhary was present but, inspite of his presence, no endorsement was obtained on the statement made by Kamla.

Hence, following the law laid down by the Courts, the learned Trial Court observed that without corroboration by the medical attendant, the statement (Ex.P/16) could not be accepted as dying declaration.

Secondly, the learned Trial Court found that PW-9, Abdul Aziz, in his statement had stated that he was involved in listening and the statement was recorded by the constable Ashu Singh but then, this fact was not mentioned that Ashu Singh recorded the statement in the same words as uttered by Kamla.

The learned Trial Court also remarked that the scribe Ashu Singh was the only person who could have verified the statement (Ex.P/16) but the prosecution did not examine him inspite of his presence in the Court on the day when PW-9 was being examined.

Thirdly, the learned Trial Court observed that the dying DB Cr.Appeal No.64/1988 10 declaration could be accepted only when the same had been recorded in the same words as stated by the deceased; and, after examining the contents of Ex.P/16, pointed out several discrepancies therein.

It was observed that PW-9 in his statement had mentioned that Kamla was speaking mixed hindi-marwari language but, the word Khavind.

was used, which was neither a hindi word nor Marwari but was an urdu word, which Kamla would not have used.

Similarly, it was observed that word Aspatal.

was used at one place and hospital.

at another.

Fourthly, the learned Trial Court further noticed that initially, it was stated that her mama Jaikishan brought her to the hospital but immediately thereafter, this statement was withdrawn and it was stated that she did not know as to who

brought her to hospital.

The learned Trial Court observed that this deviation had only been in order to rule out any suggestion about tutoring of Kamla by her Mama, Jaikishan.

The learned Trial Court observed that all the inconsistencies in the statement (Ex.P/16) were brought about by the SHO, Bhadra (PW-9) who, inspite of having sufficient knowledge about the rules, imported his own words in the statement, which he should have avoided.

The learned Trial Court, while deprecating the actions of PW-9, concluded that for the inconsistencies as noticed, it was not established that the statement in Ex.

P/16 was given by Kamla; and, therefore, this piece of evidence was rejected.

The learned Trial Court, thereafter, proceeded to examine the second dying declaration (Ex.P/6) with reference to its contents and the statement of Judicial Magistrate, Bhadra (PW-12).The Judicial DB Cr.Appeal No.64/1988 11 Magistrate (PW-12) stated that he received an information from SHO, Bhadra at 7:15 p.m.under the letter Ex.

P/17 for recording the dying declaration of Kamla whereafter, he went to the Civil Hospital for recording her statement.

It was observed with reference to the contents of Ex.P/6 that PW-12 asked the duty doctor to certify as to whether the victim Mst.

Kamla was in fit condition to give her statement whereupon, the medical officer certified that she was in a fit condition to do so; and thereafter, PW-12 proceeded to record the statement of Kamla.

PW-12 further stated that he recorded the statement, in the same manner as was stated by Kamla; and at the time of recording the statement, the medical officer and other doctors were present; and after recording the statement, Kamla affixed her thumb impression at X and he (the Magistrate) put his signature from I to J on Ex.

P/6.

During cross-examination, the Magistrate stated that the reason why he posed a question to Mst.

Kamla to say clearly as to whether she herself caused the fire or the three accused persons did so, was the contradiction occurring in her statement, which required clarification.

He further stated that it was wrong to suggest that SHO (PW-9) or any other constable asked him to pose this question.

PW-12 was asked as to whether police officers were present at the time of his recording the statement to which, he answered that they were present but were standing at some distance.

PW-12 also denied the suggestion that he obtained the fitness certificate of Kamla after recording her statement.

The learned Trial Court observed that the Magistrate was an impartial and independent officer and there was no reason to doubt his statement.

The learned Trial Court also observed that the DB Cr.Appeal No.64/1988 12 defence had failed to establish that the medicines given to Kamla contained any such sedative which would have made her unconscious and incapable of making statement.

After examining all the relevant aspects, the learned Trial Court held that the statement Ex.

P/6 had been made voluntarily.

Even after holding that the statement (Ex.P/6) had been made voluntarily, the learned Trial Court found it unsafe to arrive at a conclusion of guilt of the accused persons on the basis thereof.

After examining the statements of all the witnesses and the material placed on record, the learned Trial Court observed that the three accused persons used to torture and harass the deceased Kamla for last two-three years and also assassinated her character by accusing her of having illicit relations with her father-in-law.

The deceased wanted to get separated from her in-laws but her husband, Purushottam (DW-1) refused to do so.

This way, the learned Trial Court observed, it was clearly established that the deceased was harassed and tortured by the three accused persons and the situation was such that the possibility of her committing suicide could not be ruled out.

The fact of torture by the accused persons was substantiated by the statements made by the father of the deceased Lekhram (PW-1), her uncle Jaikishan (PW-2) and cousin Kanwar Sen (PW-3). The learned Trial Court also referred to the other evidence on record and found several lacunae in the prosecution case.

With reference to the site plan (Ex.

P/2), it was observed that the room in which the incident took place, there were certain burnt materials on the floor but no other fire marks anywhere else in the room.

It was DB Cr. Appeal No. 64/1988 13 observed that if any person is set on fire, he/she would try to run around to extinguish the fire but in the instant case, it did not appear that the victim made any such effort, else there would have been some damage to the other objects in the room.

The learned Trial Court also observed that PW-9 did not record the statement of Jaikishan (PW-2) on the same day of the incident in spite of the fact that he was at Bhadra but the same was recorded on 30.05.1986 along with the statement of the father of the deceased, Lekhram (PW-1). According to Trial Court, this was intentionally done so that there would not appear any discrepancy in the version of these two witnesses.

The learned Trial Court, while relying on various precedents, observed that in the case based on circumstantial evidence, those witnesses which are against the accused could be believed only if their testimony is beyond any reasonable doubt and found it unsafe to rely on the testimony of these witnesses, PW-1 and PW-2.

The learned Trial Court further observed that indisputably, the accused Rajkumar along with his brother Purushottam took Kamla to hospital; and inferred that if Rajkumar had caused the fire, he would have not immediately taken Kamla to hospital and would have waited for her to die.

The learned Trial Court also noticed that efforts were made to extinguish the fire and that Rajkumar even went along with his brother to bring the medicines for the treatment of Kamla.

The learned Trial Court also observed that it appeared quite improbable that Kamla's eyes were closed by a cloth by her mother-in-law, since no burnt piece of cloth was recovered from the site which could have been used for closing her eyes.

The learned Trial DB Cr.Appeal No.64/1988 14 Court observed that if the cloth used for blind-folding was fully burnt then, in such a case, the victim's eyes too should have been completely burnt but as per the records, only eye-lashes were burnt and the victim was intermittently closing and opening her eyes while making the statement before PW-9.

With reference to all the aspects aforesaid, the learned Trial Court found doubtful the prosecution story that the accused persons had planned the kill Mst.

Kamla; and rather found it more probable that it were a case of suicide.

The Trial Court did not believe on the other version given by the deceased in her dying declaration (Ex.P/6) and observed that the deceased was carrying a grudge with the accused persons and in order to implicate them, made the statement that she was set on fire by them.

While observing so, the Trial Court held that the accused were entitled to be given the benefit of doubt and, accordingly, acquitted them of the leveled charges.

Assailing the judgment and order so passed by the Trial Court, the learned Public Prosecutor has contended that the facts and record of the case have not been appreciated in correct perspective.

The learned Public Prosecutor submitted that the learned Trial Court has grossly erred in discarding the dying declarations made by Smt.

Kamla immediately before her demise only with reference to minor discrepancies or contradictions, which do not relate to the substance of the matter.

The learned Public Prosecutor also submitted that even if there appeared some minor suggestion in the dying declaration (Ex.P/6) that deceased Smt.Kamla set herself on fire, the same was clearly explained and in the face of other explanation, her statement could not have been discarded altogether.

DB Cr.Appeal No.64/1988 15 The learned Public Prosecutor submitted that with the dying declarations and reliable testimony of its witnesses, the prosecution case stood proved beyond reasonable doubt; and the Trial Court has erred in acquitting the accused persons.

Per contra, the learned counsel for the respondent has argued that with the respondents No.2 and 3 having expired, the matter remains to be considered only qua the respondent No.1 and there is no cogent reason on record for interfering with the order of acquittal qua him.

The learned counsel contended that even otherwise, the order of acquittal deserves not to be lightly interfered with as the presumption of innocence of the accused stands fortified with the finding of acquittal by the Trial Court.

As regards the dying declarations, the learned counsel has strenuously argued that when the alleged fiRs.dying declaration (Ex.P/16) does not inspire confidence and has already been rejected; and when the second dying declaration (Ex.P/6).as recorded by the learned Magistrate, carry fundamental inconsistencies as to who

caused the fire, conviction cannot be based thereupon.

The learned counsel has referred to and relied upon the decisions of Hon'ble Supreme Court in State of Rajasthan vs Naresh @ Ram Naresh:2010 Cri.L.J.1928, Md.Ankoos & ORS.vs The Public Prosecutor, High Court of A.P.: AIR 2010 SC566 Sharda vs State of Rajasthan: AIR 2010 SC408 State of Gujrat vs Khuman Singh Karsan Singh & Ors.: AIR 1994 SC1641and Smt.

Kamla vs State of Punjab : AIR 1993 SC374 Having given thoughtful consideration to the rival submissions and having examined the record, we are not persuaded to consider interference in this case.

DB Cr.Appeal No.64/1988 16 As noticed, there had been no eyewitness to the incident.

The statements of the witnesses, PW-1, PW-2 and PW-3 as examined by the prosecution go the extent of suggesting that there had been some misgivings between the parties and the relationship of the deceased with the accused persons had not been much cordial.

However, from these statements, it is difficult to conclude that the incident as suggested by the prosecution took place where the accused persons set the deceased ablaze.

The matter essentially rests only on the two statements said to have been made by the deceased Mst.Kamla (Ex.P/16 and Ex.P/6).which are relied upon by the prosecution as dying declarations.

So far, the alleged statement (Ex.P/16).as said to have been made before the SHO (PW9 is concerned, the same cannot be considered carrying the requisite value and worth; and cannot be relied upon.

Before recording this statement, no certificate was obtained from the medical officer attending on the victim about her fit state for making such a statement.

Moreover, even when the said statement was recorded by the Constable Ashu Singh, this fact was not stated in the body of the statement.

Significantly, the Constable Ashu Singh, the scribe, was not even examined by the prosecution though, as noticed by the learned Trial Court, he was present in the Court at the time of recording of the statement of PW-9.

In fact, the presence of Constable Ashu Singh in the Court was admitted by PW- 9 himself in his cross examination by the learned counsel for the accused Mst.

Chhoti @ Narayani.

Then, vacillation in this statement (Ex P/16) about presence of Jaikishan, who brought victim Kamla to hospital, also puts a question mark on the veracity.

The Trial Court DB Cr.Appeal No.64/1988 17 has further rightly pointed out that there had been expressions used in this statement like Khavind.

and Hospital., which were not likely to be used by Mst.

Kamla, who was educated upto 5th standard and was allegedly speaking in Hindi/Marwari language.

Thus, the learned Trial Court cannot be faulted in declining to rely upon the statement (Ex.

P/16).Though removal of the statement Ex.P/16 from consideration is not the end of the matter because the other statement Ex.

P/6 is on the record, which was recorded by the Magistrate, PW-12 after obtaining the requisite certificate from the medical officer; and the matter would have called for further consideration on the basis of this statement but then, a fundamental incongruity occurring therein, in our view, strikes at the bottom of the prosecution case and cannot be ignored.

In this statement (Ex.P/16).Mst.

Kamla, even while alleging maltreatment by the accused persons with abuses and assaults, categorically stated that she set herself on fire! She also gave the reason of herself doing so that she was deprived of food; was being harassed and her

husband was not getting separated.

She, however, also stated that she was blind-folded and was set on fire by the three accused persons.

In view of these contradictions, the Magistrate sought clarification whereupon, she stated that she was set on fire by the mother-in-law, brother-in-law and sister-in-law but she did not know as to who of the three lit the fire.

There is no quarrel with the proposition of law that a dying declaration, when found to be voluntary, truthful and free from doubts could form the basis of conviction.

However, equally well settled it is DB Cr.Appeal No.64/1988 18 that a dying declaration cannot be relied upon mechanically; it has to be examined scrupulously to find whether the same is voluntary, truthful and made in a conscious state of mind.

In *Puran Chand v.*

State of Haryana, reported in (2010) 6 SCC566 the Hon'ble Supreme Court has held as under:- 15.

The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person.

A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous.

The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

18.

The law is now well settled that a dying declaration which has been found to be voluntary and truthful and which is free from any doubts can be the sole basis for convicting the accused.

In *Sharda v.*

State of Rajasthan : AIR 2010 SC408 the Hon'ble Supreme Court has held as under : 34.

Though a dying declaration is entitled and is still recognized by law to be given greater weightage but it has also to be kept in mind that accused had no chance of cross-examination.

Such a right of cross-examination is essential for eliciting the truth as an obligation of oath.

This is the reason, generally, the court insists that the dying declaration should be such which inspires full confidence of the court of its correctness.

The court has to be on guard that such statement of deceased was not as a result of either tutoring, prompting or product of imagination.

The court must be further satisfied that deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants.

Once the court is satisfied that the aforesaid requirement and also to the fact that declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration.....

In the case of *Kamla v.*

State of Punjab: AIR 1993 SC374 the Hon'ble Supreme Court said,- 8.....A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declarations they should be consistent

particularly in material particulars. Just like P.W.2, P.W.7, P.W.3 and C.W.1 are also respectable doctors and independent witnesses who spoke about the contents of Ex.

PD in which she implicated both her father-in-law and mother-in-law specifically as having participated in the crime.

Under these circumstances, the irresistible conclusion is that the dying declarations are inconsistent and in such a situation we just cannot pick out one DB Cr.Appeal No.64/1988 19 statement namely Ex.PB/2 and base the conviction of the appellant on the sole basis of such a dying declaration.

The courts have cautioned that in view of the fact that the maker of the statement cannot be cross-examined, the dying declaration should be carefully scrutinised.

In the instant case the deceased was wavering for the reasons best known to her.

The inconsistency between Ex.PB/2 and Ex.PD is enough to manifest the same.

That being so, we do not think that either Dr.

Jaison Chopra, C.W.1 or S.I.Vidya Sagar, C.W.2 who claimed to have recorded Ex.DA and Ex.PJ should be blamed.

Having given our earnest consideration, we feel that under these circumstances it is highly unsafe to convict the appellant on the sole basis of the dying declaration Ex.PB/2 recorded by P.W.2.....

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In the given set of facts and circumstances of the present case, the reasons as assigned by the learned Trial Court for not finding it safe to base the conviction on the dying declaration (Ex.

P/6) cannot be faulted at.

There remains a strong possibility of Mst.

Kamla being in a state of dejection for the ill-treatment of her in-laws and then, for her husband still continuing to live with the family and not getting separated.

In such state of dejection, the possibility of she putting herself on fire cannot be ruled out; and has to be taken into consideration, particularly when such a fact was stated by herself and such utterances do occur in her dying declaration (Ex.

P/6).The dying declaration (Ex.

P/6).as given out by the deceased, we are afraid, gives rise to a reasonable and serious doubt against the prosecution case; and the accused-respondents cannot be convicted on its basis.

Apart from the above, we find that the fact of Mst.

Kamla having been brought to hospital by Jaikishan, her maternal uncle, was attempted to be avoided by the investigating agency in a manner leading to more of doubts.

The fact that some of the relatives of Mst.

Kamla were standing beside her at the time of starting of her treatment, has been indicated by the medical officer Dr.

Brij Mohan Chaudhary - PW5 In the given set of facts and circumstances, it DB Cr.Appeal No.64/1988 20 has become moreover difficult to accept that the statement was made by the victim Smt.

Kamla voluntarily and in an unquestionable state of mind.

The present one has been a case essentially based on dying declarations, one of which, Ex.

P/16, allegedly recorded by the police officer does not inspire any confidence; and the second one, Ex.

P/6, as recorded by the Magistrate carry such fundamental inconsistencies which cannot be ignored and give rise to reasonable doubts.

Taking all the aforesaid fundamental lacuna in the prosecution case, when we notice that the present one is an appeal against acquittal, where the scope of interference remains limited and ordinarily, order of acquittal is not lightly interfered with, we find no reason to interfere.

As laid down by the Hon'ble Supreme Court in several of the cases including that of Naresh, Mohd.

Ankoos (supra).if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal.

Such interference is warranted only when there are compelling and substantial reasons for doing so.

There being no strong and compelling reason in the present case and there being no other evidence to substantiate the charge for the offence under Section 302/34 IPC, we find no reason to interfere in the finding of acquittal qua the respondent No.1.

As noticed, the respondents No.2 and 3 have expired and the appeal against them has already abated.

In the result, this appeal is required to be dismissed.

Keeping, however, in view the provisions of Section 437A DB Cr.Appeal No.64/1988 21 Cr PC, the respondent is directed to forthwith furnish a personal bond in the sum of Rs.20,000/- (twenty thousand) and a surety bond in the like amount, before the Deputy Registrar (Judicial) of this Court, which shall be effective for a period of six months, undertaking that in the event of filing of Special Leave Petition against this judgment or on grant of leave, the respondent, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

The appeal stands dismissed subject to the requirements aforesaid.

(V.S.SIRADHANA),J.

(DINESH MAESHWARI),J.

MK

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