

Jagdish Devda Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jul-04-2005

Reported in : 2005(4)MPHT148

Judge : S.L. Kochar and ;S.K. Gangele, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Criminal Appeal No. 1195/1999

Appellant : Jagdish Devda

Respondent : State of M.P.

Advocate for Def. : G. Desai, Dy. Adv.

Advocate for Pet/Ap. : Mukesh Parwal, Adv.

Disposition : Appeal allowed

Judgement :

S.L. Kochar, J.

1. This appeal aims at setting aside the judgment dated 14-9-99 passed by the learned Sessions Judge, Rajgarh (Biaora) in Sessions Trial No. 210/97 thereby finding the appellant guilty of the offence punishable under Section 302, Indian Penal Code, convicted and sentenced him to suffer imprisonment for life with fine

of Rs. 100/-, and in default of payment of fine to further suffer additional S.I. for 15 days.

2. In nut-shell, the prosecution case as unfolded before the Trial Court was that the deceased-widow was serving as maid servant in the house of the appellant Jagdish Devda. The appellant assured her for Court-marriage. On 25-6-97, in the night she went to the appellant at 9.00 PM for deliberations regarding expenses of the Court-marriage. During the course of talks, quarrel developed between them and the appellant threatened her to eliminate her whereupon the deceased herself brought kerosene in a bottle from her aunt and while standing by the side of the appellant, challenged him for killing her upon which, the appellant poured kerosene oil on her person and ablazed her. The appellant, after litting fire ran away and immediately thereafter, her aunt reached over there. She extinguished the fire after throwing water on the person of the deceased Madhubai. She was taken to the hospital at Rajgarh where she was attended in the intervening night of 25th and 26th June, 1997 at 12.35 AM by Dr. O.P. Sahu (P.W. 8). Dr. Sahu prepared MLC Report (Ex. P-7) and found in total 14 to 16 per cent burn. The patient was conscious and was admitted in the Surgical Ward. According to Ex. P-7, there was 2nd degree burn on front of chest and back of abdomen, back of both arms and back of chest. Her condition was good. Dr. Sahu sent information to the police by letter Ex. D-2, dated 26-6-97 which was received by the police on 26-6-97 at 6.55 AM. By this letter, the doctor mentioned that Madhubai sustained burn-injury in the night by lamp (Chimney). The information was recorded by the police on this basis in Roznamcha Sanha No. 1308. During the course of treatment, the police of P.S. Rajgarh sent a letter of request to the Medical Officer District Hospital, Rajgarh, through Constable for recording of Dying Declaration of deceased because the Executive Magistrate was not available. On the basis of this request, Dr. P.W. 6 R.C. Bansiwal recorded the Dying Declaration of deceased on 26-6-97 at 7.00 PM in the presence of two witnesses namely Memuna Qureshi (Axillary Nurse Midwife) and Dalchand (sweeper) in the hospital. Signatures of the deceased Madhu were also obtained on the dying declaration. Madhubai died on 1 -7-97 in the hospital. Her body was sent for post-mortem examination which was conducted by Dr. P.W. 8 O.P. Sahu with a Panel of three doctors including himself. He found second degree of 14% burn on front of chest,

neck, upper arm, back of abdomen and back of chest. The injuries were ante mortem in nature. Foul smell was also coming from the burn injuries due to infection and sloughing tissues. According to this doctor, the deceased died because of delayed shock due to inflamed injuries on the body. The post-mortem report is Ex. P-8. After due investigation, charge-sheet was filed.

3. The appellant abjured his guilt and took the plea of alibi. He examined two witnesses in his defence. Learned Trial Court finding the appellant guilty convicted him on the basis of the Dying Declaration (Ex. P-6) recorded by P.W. 6 Dr. R. Bansiwai.

4. We have heard learned Counsel for the parties and also perused the entire record carefully. It emerged from the oral and documentary evidence adduced by the prosecution that the deceased was a widow and working as maid-servant in the house of the appellant. There was some sort of proposal between the appellant and the deceased in regard to their marriage, which has been stated by P. W. 1 Sunderbai, mother of the deceased. After sustaining burn injuries, the deceased was immediately taken to the hospital by P.W. 5 Kulsumbai. She has been declared hostile by the prosecution, but she has admitted the fact of taking of deceased Madhubai to the hospital in burnt condition. She did not disclose as to how the deceased suffered burn injuries.

5. Dr. O.P. Sahu (P.W. 8) attended the patient Madhubai in the hospital for the first time in the night at 12.35 AM and also examined her. He also found 14 to 16 percent burn injuries. The patient was conscious. Her MLC Report is Ex. P-7. After the death of Madhubai, this doctor alongwith a panel of two doctors including himself, performed autopsy on the dead body of the deceased and found infection in the burn injuries and the deceased suffered in total 14 per cent burn. According to the opinion of this doctor, the deceased died because of delayed shock due to infection and if infection would not have been developed, there was no possibility of her death because of less percentage of burn. In cross-examination, he has specifically stated that the deceased died because of infection. He also stated that at the time of admission and examination of Madhubai, she had disclosed that she sustained burn injuries due to lamp (Chimney) and he sent the information to this

effect to the police. This document is Ex. D-2 containing this fact. This witness has also stated that upto that time, nobody had disclosed with regarding to setting Ore to Madhubai.

6. After admission of Madhubai in the surgical ward, at the request of the police P.W. 6 Dr. R. Bansiwali recorded the dying declaration of Madhubai. We have perused this dying- declaration as well as the statement of Dr. R. Bansiwali. The dying-declaration (Ex. P-6) is disclosing the fact that the doctor commenced recording dying-declaration on 26-6-97 at 7.00 PM and gave certificate of her fitness to give statement. After completion of the statement, there is endorsement that D.H. Rajgarh, S.W.. No. III Date 26-6-97, Time 7.00 P.M.. This endorsement and the endorsement of date and time on the top of document (Ex. P-6) dying-declaration are disclosing the same time, i.e., 7.00 PM and this is apparently incorrect. If recording of dying-declaration was commenced at 7.00 P.M., then certainly its recording must have taken some time to say at least ten to 15 minutes. But, after recording of the dying-declaration, the place, ward number, date and time mentioned are the same. This dying-declaration was recorded in the presence of Memuna Qureshi A.N. Midwife and Dalchand Sweeper of the hospital. Both these witnesses have not been examined by the prosecution for the reasons best known to them. After framing of charge, trial programme was submitted by the Govt. Pleader for summoning the prosecution witnesses on 10-1-98 and in this list, the names of both these witnesses were not mentioned. No reason has been assigned by the prosecution as to why these witnesses were not examined who were very important and material witnesses and they could throw sufficient light upon the genuineness of the dying- declaration.

7. Dr. P.W. 6 R. Bansiwali, in his statement in Para 6 has deposed that at the time of recording of dying-declaration, deceased Madhubai was talking with witness Kulsumbai (P.W. 5). She was asking Kulsumbai and thereafter giving reply to him. Contrary to the fact of dying-declaration (Ex. P-6) about allegation of setting fire by pouring kerosene oil, to the deceased by the appellant, the doctor P.W. 8 O.P. Sahu has stated in Para 7 that when deceased was brought in the hospital and examined by him, she had disclosed the fact of sustaining burn- injuries by lamp (chimney). She did not disclose about setting fire after pouring kerosene oil by the

appellant. This fact has also been specifically mentioned in the document (Ex. D-2) which information was sent by the doctor to the police and the same was also recorded in the Roznarncha Sanha.

8. Dr. P.W. 6 Bansiwal in Para 8 of his deposition, has stated that in the dying declaration (Ex. P-6), he did not mention the time of completion of the dying declaration, but, the time is available in the document Ex. P-6 and this witness has not been confronted with this fact by the defence Counsel and the Trial Court has also not taken notice of this fact.

9. It is settled legal position that the conviction can be sustained only on the basis of the dying declaration without any corroboration if the same is found fully reliable by the Court. But, here in the case on hand, in view of the first report made by Dr. P.W. 8 O.P. Sahu (Ex. D-2) and his positive admission in his statement that the deceased disclosed about sustaining of burn injuries by lamp (Chimney) is creating doubt upon the veracity of the dying-declaration (Ex. P-6) recorded by Dr. P.W. 6 R. Bansiwal. Dr. Bansiwal also admitted that during the course of recording of dying declaration the deceased was having deliberations with witness Kulsumbai. Therefore, possibility of tutoring to deceased by Kulsumbai, can not be ruled out. As a matter of fact, the doctor should have not allowed the presence of Kulsumbai near the deceased at the time of recording of dying-declaration. The non-examination of two independent witnesses of the same hospital namely Memuna Qureshi and Dalchand without assigning any reason, is also throwing doubt over the veracity and the truthfulness of the dying-declaration.

10. The burden of proof is on the prosecution that the dying declaration is a true statement of the deceased and recorded after taking due precautions and care. The deceased was in a fit statement of mind and was not scumbed to any kind of suggestion and tutoring by her near and dear or any body in favour or against the dying declaration. Further, the denial of Dr. R. Bansiwal (P.W. 6) about non-mention of time of completion of dying declaration though it is mentioned at the bottom of dying-declaration (Ex. P-6) on left side of the document and date and time of commencement of dying-declaration is mentioned in the same handwriting at the top of Ex. P-6. The Trial Court has also failed to note on the basis of the

contents of the post-mortem report (Ex. P-8) proved by Dr. P.W. 8 O.P. Sahu that the deceased died due to delayed shock which can be due to inflamed burn injuries on the body. P.W. 8 Dr. Sahu attended the deceased first in point of time and he did not find any smell of kerosene oil and did not mention in the, M.L.C. Report (Ex. P-7). Nothing is mentioned about smell of kerosene oil in the M.L.C. Report and Dr. Sahu also did not say anything in his statement in Court. Although P. W. 7 Banwarilal Head Constable has deposed and proved the seizure of bottle containing some quantity of kerosene, burnt piece of cloth having small piece of meat vide seizure memo Ex. P-3, but firstly, the panch witnesses have not supported the seizure and secondly, these articles were not sent for examination to the Forensic Science, Laboratory for chemical examination. Therefore, the seizure of these articles is of no consequence.

11. In view of the aforesaid marshalling and discussion of oral and documentary evidence, we are of the considered view that it would be quite unsafe to rely on the dying-declaration (Ex. P-6) for proving the guilt of the appellant for committing murder of Madhubai without corroboration by the independent material particulars. We have noted several infirmities as mentioned hereinabove and contrary to the story of the prosecution about sustaining of burn injuries by the deceased.

12. Consequently, the appeal of the appellant succeeds and it is hereby allowed. His conviction and sentence for the offence punishable under Section 302, Indian Penal Code are hereby set aside. The Trial Court is directed to release the appellant forthwith if not required in any other criminal case. Fine if paid or realised, shall be refunded to the appellant.