

Kailash Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jul-11-2005

Reported in : 2005CriLJ3823; 2004(3)MPLJ249

Judge : S.L. Kochar and ;Ashok Kumar Tiwari, JJ.

Acts : Indian Penal Code (IPC) - Sections 302 and 307; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. A. No. 281 of 1998

Appellant : Kailash

Respondent : State of M.P.

Advocate for Def. : M. Dwivedi, Govt. Adv.

Advocate for Pet/Ap. : Anil Oza, Adv.

Disposition : Appeal dismissed

Judgement :

S.L. Kochar, J.

1. By this Appeal, the appellant prays for setting aside the judgment dated 29-1-1998 passed by the learned Addl. Sessions Judge, Garoth passed in S.T. No. 258/96 thereby he finding the appellant guilty of the offence punishable under

Section 302, IPC, convicted and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 1,000/-. In default of payment of fine, he has been directed to suffer addl. R.I. for one year.

2. Briefly stated, the facts of the prosecution case as unfolded before the trial Court were that on 9-6-1994 at 12.40 in the noon in village Chand was the appellant brought his wife in a Jeep in burnt condition to the Primary Health Center Shamgarh. There at the Primary Health Center, Dr. Smt. Asharani Jain (P.W. 10) finding the wife of the appellant namely Santoshbai in burnt condition, made a report at the Police Station which was recorded by the ASI P.S. Shamgarh Shri A. P. Saxena (P.W. 6) in Roznamcha Sanha (Ex. P/8-A). He proceeded for hospital for getting Santoshbai medically examined. Finding Santoshbai in 90% burnt condition, made requisition to Dr. Smt. Jain (P.W. 10) for getting her Dying Declaration recorded. Dr. Jain recorded the dying declaration of Santoshbai vide Ex. P/21, wherein Santoshbai stated that her husband had burnt her by pouring kerosene oil. Dr. Smt. Jain also gave MLC report Ex. P/22. Thereafter, she referred the patient to the District Hospital, Mandsaur. In the meanwhile, P.W. 6 Saxena also recorded the statement of Santoshbai and registered an offence under Section 307 Indian Penal Code, against the appellant. During treatment in the District Hospital, Mandsaur Santoshbai breathed her last on 9-6-1996. The First Information Report is at Ex. P/12. The requisition for postmortem examination is Ex. P/6. Dr. Shrimal conducted the autopsy on the dead body of Santoshbai and the postmortem report is at Ex. P/23. Dr. Patidar and Dr. Mishra also put their signatures on the report Ex. P/23. According to the postmortem report Santoshbai was 85 to 90% burnt and died due to shock of burn injuries.

3. The appellant was arrested and the statements of the witnesses were recorded. After due investigation, charge-sheet was filed against the appellant. The appellant denied his guilty and claimed trial. To establish its case, the prosecution examined in all 12 witnesses. The defence did not examine any witness. On conclusion of the trial, the learned trial Court finding the appellant guilty of the offence under Section 302. Indian Penal Code, convicted and sentenced him as indicated herein-above.

4. We have heard Shri Anil Oza, learned Counsel for the appellant and Shri Manoj Dwivedi, learned Govt. Advocate appearing for the State and perused the entire record with due caution and care.

5. The conviction of the appellant is mainly based on dying-declaration (Ex. P/21 recorded by P.W. 10 Dr. Shrimati Asha Rani Jain, Ex. P/22 MLC Report prepared by Dr. Smt. Jain (P.W. 10) wherein causing of burn injuries by the appellants mentioned as disclosed by the deceased to the doctor and the learned trial Court sought corroboration to the evidence of Dr. Smt. Jain by the evidence of ASI A.P. Saxena (P.W. 6) and P.W. 9 S. P. Sharma, Sr. Officer of Forensic Science Unit Mandsaur who inspected the house of the appellant and sent the seized articles for examination to the Forensic Science Laboratory and according to the FSL Report, kerosene was found on the seized clothes and earth seized from the place of incident.

6. Learned counsel for the appellant submitted that the Dying-declaration (Ex. P/21) is a concocted piece of evidence and brought into existence in ante date and time. He has also submitted that the statement of the deceased recorded in the MLC Report Ex. P/22 and the Dying-Declaration (Ex. P/21) are contradictory to each other. Therefore, no implicit reliance could have been placed by the trial Court on those documents. Learned counsel placed reliance on the following judgments of the Supreme Court and High Courts in support of his contention :--

(1) Kamlakar Nandram v. State of Maharashtra, 2004 Cri LR (SC) 45 : (2004 Cri LJ 615).

(2) State of M. P. v. Sunder Singh, 1994 (1) MPWN Note 172

(3) Laxminarayan v. State of M. P., (1993 (1) MPWN Note 109)

(4) Hemraj v. State of M. P., (1997 (2) MPWN Note 116)

(5) Bhagwandas v. State of M. P., (1998 (2) Jab LJ 259)

(6) Raju alias Rauendra Prasad v. State of M. P., 2002 CM LR (MP) 168 : (2002 Cri LJ 2367).

7. On the other hand, learned Govt. Advocate supported the impugned judgment.

8. On perusal of the documents (Ex. P/21) and Ex. P/22) as well as the statement of Dr. P.W. 10 Smt. Asha Rani Jain and P.W. 6, I.O. Shri A. P. Saxena vis-a-vis, the statements of Sr. Scientist Shri S. P. Sharma (P.W. 9), we are of the opinion that there is no substance in the submissions of the learned Counsel for the appellant. According to Dr. Smt. Jain (P.W. 10) on 9-6-1996, she was posted at PHC Shamgarh as Asstt. Surgeon. On that day at 12.40 p.m. the appellant brought his wife Santoshbai who was suffering from 90% burn injuries. This witness immediately sent written intimation to the Police Station Shamgarh where the PHC was situated. This intimation is Ex. P/20 and thereafter, she started the treatment of the patient Santoshbai. She gave injections of compose and Tet Oxide. P.W. 6 A.P. Saxena reached over there and submitted requisition (Ex. P/11) for recording of Dying Declaration of Santoshbai. This witness P.W. 10 Dr. Smt. Jain recorded the dying-declaration of Santoshbai vide Ex. P/21, in which the deceased had stated that quarrel was going on in her house and she was set to fire by her husband, levelling allegation against her chastity. She was told by her husband that she was having so many friends which allegation was controverted by her upon which her husband poured kerosene oil on her and lit fire. On the dying-declaration of Santoshbai her right hand thumb-impression was taken by Dr. Smt. Jain. Dr. (P.W. 10) Jain also deposed that she was in a fit condition to give dying-declaration. After conclusion of the dying-declaration Dr. Smt. Jain again certified that 'recorded by me under sound state of mind'. After recording the dying declaration Dr. Smt. Jain (P.W. 10) examined the patient and found 80 to 85 per cent burn injuries on all over the body.

9. Learned counsel for the appellant has assailed the genuineness of the dying-declaration on the ground that Dr. Jain (P.W. 10) commenced the dying-declaration at 12.50 on 9-6-1996 and completed the same at 1.05 p.m. whereas according to P.W. 6 A.P. Saxena he proceeded for the hospital at 1.10 p.m. and took five minutes to reach to the PHC. After reaching the hospital, he submitted medical requisition form for examination of deceased (Ex. P/10) and also made written-request vide Ex. P/11 for recording of the dying-declaration. If the Dying Declaration was recorded, as stated by P.W. 6 A. P. Saxena and Dr. P.W. 10 Smt.

Asharani Jain, after reaching of P.W. 6 A.P. Saxena, the dying declaration could not have been commenced at 12.50 p.m. and also could not have been completed at 1.05 p.m. We have perused the medical requisition form (Ex. P/10) proved by witness P.W. 6 A.P. Saxena and also the letter of request (Ex. P/11) for recording of dying-declaration submitted by P.W. 6 Saxena (on both these documents, the witness who proved it is mentioned as P.W. 7, which appears to be a mistake on the part of the trial Court. Both the documents have been proved by P.W. 6 A.P. Saxena ASI). On both these documents, time is not mentioned. On Roznamcha Sanha (Ex. P/8-A) time is mentioned as 1.00 p.m. and on another Roznamcha Sanha (Ex. P/9-A) the time for proceeding of A.P. Saxena to the Hospital is mentioned as 1.10 p.m. The information was received and recorded at 1.00 p.m.

10. On the question of deviation of time, suggestion was given by the defence counsel to this witness Dr. Smt. Jain (P.W. 10) that P.W. 6 A.P. Saxena did not reach the hospital before 12.50 p.m. but reached after 1.00 p.m. This suggestion was denied by the witness Dr. Smt. Jain (P.W. 10) and she also stated that if according to Shri Saxena he reached the hospital at 1.15 p.m. that time might be by his own watch. Learned trial Court, in paras 13, 14 and 15 considered this aspect of the matter and some over-writing and arrived at the conclusion that the difference of 5 to 10 minutes time could be possible because of two different wrist watches used by the witnesses and we are of the opinion that this conclusion of the trial Court is sound and well reasoned. The contents of the dying declaration (Ex. P/21) are further strengthened by the fact of setting fire to the deceased by the appellant by the document i.e. Ex. P/22 MLC report in which it is mentioned that the deceased disclosed that she was caught hold by two persons and the appellant burnt her. Dr. P.W. 10 Smt. Jain has specifically stated that the medical examination about sustaining of burn injuries by patient was done by her after recording of her dying declaration and she has also stated that the patient was brought by her husband i.e. the appellant and the history of the patient was written in MLC report (Ex. P./21) that 'Patient, is saying that two persons caught hold her and her husband burnt her'. This MLC Report is also disclosing the fact that the patient was identified and brought by her husband. After medical examination, the patient was referred to the District Hospital, Mandsaur.

11. Learned counsel submitted that the prosecution is completely silent about those two persons who caught hold of the deceased according to its own document Ex.P/22 and the same has been proved by PW-10 Dr. Smt. Jain. On this point, Dr. Smt. Jain (PW-10) was cross-examined by the defence and in para 7, she has stated that she did not ask about the whereabouts of those two persons from the patient because she was not interested in all that and she had given priority to her treatment. She was also stated that she disclosed this fact to the A.S.D. Shri A.P. Saxena (PW-6). In para 8, the defence suggestion to this witness that prior to recording of dying-declaration and putting the question to the patient Dr. Jain already knew that the patient was burnt by her husband, was denied by the witness. In the statement recorded under Section 313, Cr.P.C. recorded by the trial Court, the appellant, in answer to question No. 2 admitted that he took the deceased to the hospital, but he was not knowing the time. The appellant, in his entire statement under Section 313, Cr.P.C. has no-where explained as to how his wife sustained burn injuries. According to both the documents Ex.P/21 and P/22, dying declaration and MLC Report, they are disclosing the fact of presence of appellant in the house and thereafter bringing the deceased to the hospital. Under this situation it was for the appellant to explain as to how the deceased sustained burn injuries.

12. The deceased sustained burn injuries by kerosene and this fact is fortified by the statement of PW-9 S. P. Sharma, Senior Scientist of FSL, Unit Mandsaur who had inspected the house of the appellant and found smell of kerosene oil on the earth as well as the signs of spreading of kerosene oil on the earth and blackness. He also found outside the room near the wall burnt clothes, saree, petticoat and blouse having kerosene smell. In cross-examination of this witness, nothing substantial could be brought out to discredit the testimony of this witness. We have perused the FSL report which has not been exhibited and tendered in evidence by any of the prosecution witnesses and the contents of the same have been relied upon about presence of kerosene oil by the learned trial Court as discussed in para 24 of its judgment, but we are of the opinion that legally the contents of this document cannot be used against the appellant because the same were not put to him in his statement under Section 313, Cr.P.C. The law is well settled that any incriminating circumstance against the accused could not be relied upon against

him unless the same is not put to him in his statement under Section 313, Cr.P.C. so that he may submit his explanation for the same.

13. The Judgment relied upon by the learned Counsel for the defence (supra) have no relevance in the facts and circumstances of the present case. In the case of Kamlakar v. State of Maharashtra (2004 Cri LJ 615) (supra) the Supreme Court did not place reliance on the dying-declaration because the deceased was having 95 per cent burn and she was put on oxygen right from the moment she was brought to the hospital and continued to be so till she died. In the present case, the deceased was not put on oxygen. According to Dr. Smt. Jain (PW-10) she gave injection of compose and during this period the ASI Saxena reached over there and made request for recording of dying declaration. Therefore, it cannot be said that the deceased was under the influence of compose injection which was generally used for relieving from pain and for sleep. But, before the same could make its effect, the dying declaration was recorded which is clear from the statement of PW-10, Dr. Smt. Asharani Jain and PW-6 ASI Shri A. R Saxena.

14. The another judgment rendered by the Division Bench of Principal Bench of M.P. High Court discarding the dying declaration on the ground of serious and extensive damage to liver of the deceased (State v. Sundersingh) (1994 (1) MPWN Note 172) (supra). In this case, the State went up in appeal against acquittal. Dr. Yadu had opined that normally in case of such extensive damage to liver, the patient is likely to die instantaneously by shock and haemorrhage. Under this situation, the Division Bench of this Court did not interfere with the judgment of acquittal passed by the trial Court.

15. Another judgment rendered by the Division Bench of this High Court in the case of Laxminarayan v. State (1993 (1) MPWN Note 109) (supra), the dying declaration was discarded because the same was not recorded in question and answer form, and also not attested by the attesting witnesses. In the dying-declaration, specific overt acts of the accused persons were not described because at the initial stage for mixing of poison in tea-cup, six persons were involved out of whom, two persons were acquitted. It is observed in this judgment by the Division Bench that 'The act of mixing poison or adding poison to the cup of

tea, even if the dying declaration is taken on its face value, cannot be imputed and has not in fact been imputed to all the accused'. The factual situation of this judgment is also not supporting the contention of the defence in any manner.

16. In the case of *Nemraj v. State of M.P.* (1997 (2) MPWN Note 116) (*supra*) the Division Bench of this High Court did not rely on the dying declaration because according to the prosecution case, it was the accused-husband who tried to extinguish fire missing alarm for help and immediately took her to the hospital. On over all assessment of the evidence, the Division Bench found that the deceased herself set fire on her on the basis of the evidence of PW-5 Panchram and PW-6 Yashodabai.

17. In the case of *Bhagwandas v. State of M.P.* (1998 (2) Jab LJ 259) (*surpa*), the Division Bench of the Principal Bench of this Court has not relied upon the evidence of dying declaration because though the declarant was in the hospital and the dying-declaration was also recorded in the hospital, but without certification of Dr. about conscious state and sense of the declarant. The Dying Declaration was also not recorded in question and answer form and the thumb impression was not proved to be the thumb impression of the deceased. Another circumstance in favour of the appellant was that he tried his level best to save his wife and immediately brought her to the hospital. His prior and subsequent conduct was not showing his guilty mind.

18. In the case of *Raju alias Rajendra v. State* (2002 Cri LJ 2867), this Court did not rely upon the dying declaration and other circumstances because there was no evidence, oral and documentary, against the appellant for ill-treatment with his wife and there was no evidence on record to establish the fit state of mind of the deceased to give dying declaration. The incriminating circumstances were not put to the accused in his statement. This judgment could help the appellant only for discarding the evidence of incriminating evidence of FSL Report and we have already discarded the same as discussed herein above.

19. The Supreme Court having discussed the law of placing reliance on dying declaration in detail in the case of *Narayansingh v. State of Haryana*, : 2004 CriLJ1409 has held that after putting the Dying Declaration on test of credibility if

found reliable, it can be the basis of conviction. Also see : Babulal v. State of M.P., AIR 2004 SC 846 and Ravi v. State of Tamil Nadu, 2004 (10) SCC 776.

20. In the wake of abovementioned legal and factual scenario of the present case we are of the opinion that there is no substance in this appeal warranting interference in the well reasoned judgment of conviction passed by the trial Court. We, therefore, concur with the same and consequently dismiss the appeal preferred by the appellant.

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