

Kamlesh Jain Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Dec-14-2007

Reported in : 2008CriLJ1484; I(2008)DMC620

Judge : Abhay Gohil and ;N.K. Mody, JJ.

Appellant : Kamlesh Jain

Respondent : State of M.P.

Disposition : Appeal allowed

Judgement :

Abhay Gohil, J.

1. Convicted appellant has preferred this appeal under Section 374, Cr. P.C. against the judgment of conviction under Section 302, IPC and sentence of life imprisonment with fine of Rs. 1000/- and in default of payment of fine further one month S.I. passed in Sessions Trial No. 5/92 vide judgment dated 23-12-1999.

2. Prosecution case in brief is that the deceased Ushadevi was married to the appellant. The appellant used to quarrel with her over dowry demand. He has also performed second marriage and is having a son from his second wife. On 28-8-1991 at about 4.00 p.m. deceased was sitting inside the house. The appellant beat her, threw her on the ground and poured kerosene oil on her and set her on fire

and thereafter he ran away. Thereafter Ushadevi went to the police station and lodged FIR at 6.10 p.m. She was then referred to hospital for medical examination, where her dying declaration was recorded by Dr. A.K. Jaiswal (P.W. 3) at 5.15 p.m. After seven days Ushadevi died on 4-9-1991. Her post mortem was performed by Dr. V.S. Tomar (P.W. 6). Crime was registered, matter was investigated and charge-sheet was filed. During trial the appellant abjured his guilt and his defence was that he has been falsely implicated. Deceased was suffering from mental illness and she herself set her on fire. Trial Court after considering the evidence of dying declaration convicted the appellant under Section 302, IPC and sentenced as above, against which the appellant has filed this appeal.

3. In appeal we have heard the learned Counsel for the parties and perused the evidence on record. Learned Counsel for the appellant submitted that there is no eyewitness account in the case and conviction is solely based on dying declaration recorded by Dr. A.K. Jaiswal (P.W. 3). He argued vehemently on the question that dying declaration is not reliable at all as there is no corroborative evidence. It was submitted that prosecution evidence is doubtful as dying declaration was recorded first at 5.15 p.m. medical report was prepared at 5.30 p.m. and FIR was lodged at 6.10 p.m. from which it appears that FIR was fabricated and the case was concocted against the appellant with a view to falsely implicate him. He has further submitted that the trial Court has wrongly discarded the defence version as all the prosecution witnesses as well as the defence witnesses, those who are reputed doctors of Government hospital have admitted that the deceased was suffering from mental illness and there was every possibility that she herself might have committed the suicide. There is no medical opinion that it was a case of homicidal burning. In the dying declaration the mental and physical condition of the deceased has not been mentioned. It was not mentioned that whether she was in a fit state of mind to give evidence or not and in the absence of any such certification by doctor, the dying declaration cannot be relied upon and also placed reliance on a decision in the case of Arvind Singh v. State of Bihar : 2001 CriLJ2556 and also Ramilaben Hasmukhbhai Khristi v. State of Gujarat : 2002 CriLJ3917 . He also criticized the evidence of Dr. A. K. Jaiswal (P.W. 3) and also cited a decision in the case of Pachdeo Singh v. State of Bihar : 2002 CriLJ973 and Chacko v. State of Kerala : 2003 CriLJ441 . It was further vehemently argued

that the deceased survived for five days but no attempt was made to get the dying declaration recorded by the executive magistrate and placed reliance on a decision in the case of Keshav v. State of Maharashtra : 1971 CriLJ798 and submitted that on the previous occasion also she had attempted to commit suicide. It was argued that no injuries were found on the body of the deceased to suggest that she was subjected to physical assault or was beaten or was thrown on the ground. There is no evidence about the presence of kerosene oil on spot. Appellant has already suffered Jail sentence of more than 10 years. The conviction of the appellant is bad in law and based on no evidence, therefore the appellant is liable to be acquitted.

4. In reply, learned Public Prosecutor for the respondent supported the judgment of the trial Court and submitted that the conviction of the appellant is based on logical evidence. It was argued that the conviction can also be based simply on the basis of dying declaration and there is no scope for any interference in the finding recorded by the trial Court. Learned Public Prosecutor placed reliance on the decision in the case of Heeralal Yadav v. State of M.P. : 2006 CriLJ3301 , Ravikumar v. State of Tamil Nadu : 2006 CriLJ1625 and Narain Singh v. State of Haryana (2004) 13 SCC 264 : 2006 Cri LJ 1409 and submitted that the appeal has no merit and be dismissed.

5. Admittedly, in this case there is no eye-witness account and all the prosecution witnesses have not supported the prosecution case. Indrasen (P.W. 1), who is the brother of the deceased, was witness of oral dying declaration, but there was omission of this fact in his case diary statement that she was burnt by her husband after pouring kerosene oil and thereafter he shut the doors of the room and went away. Though the trial Court found that the evidence was corroborated by dying declaration recorded by Dr. A. K. Jaiswal (P.W. 3), but it was criticized very badly on the ground that when the deceased was in a position to give dying declaration to her brother, then why the dying declaration was not recorded by the executive magistrate. Trial Court has discarded this argument on the ground that under Section 32 of the Indian Evidence Act, there is no provision that dying declaration should be recorded by the Executive Magistrate only and it was held that it was not necessary. Babulal (P.W. 2) was eye-witness, who had seen the deceased

burning, and at the relevant time he was working as a mason at the house of the accused, but not supported the prosecution and turned hostile. Munir Mohammad (P.W. 4) was the witness of spot map (Ex. P/6). Though he has accepted his signature on the spot map, but he has deposed that he had not seen that for what purpose the signatures were obtained on the aforesaid document, and has not supported the prosecution. Ugrasen (P.W. 5), who is the neighbour, has also not supported the prosecution and was declared hostile. Meghe (P.W. 8), who had also seen the deceased burning, has not supported the prosecution and was declared hostile. Rajkumari (P.W. 10), who is also the sister of appellant, has also not supported the prosecution and was declared hostile.

6. When there is no ocular or eye-witness account in the case and only evidence of dying declaration is available, which was recorded by doctor, but not by Executive Magistrate, the question is whether such evidence of dying declaration recorded by the doctor or by anybody is reliable, trustworthy and conviction can be based thereon.

7. In catena of decisions Supreme Court has enumerated various principles and circumstances in which such an evidence of dying declaration can be held to be reliable and what are the factors which should be considered by the Courts while relying on the dying declarations. In the case of Arvind Singh v. State of Bihar : 2001 CriLJ2556 , the Supreme Court has held as under:

15. Though the earlier view of this Court in Ramnath's case (Ram Nath Madhoprasad v. State of Madhya Pradesh : AIR 1953 SC420 stands overruled by a five Judges judgment in the case of Tarachand Damu Sutar v. State of Maharashtra : [1962]2SCR775 but there is no denial of the fact that during declaration ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. The same is the view taken in a case reported in : 1976 CriLJ1718 , Mannu Raja v. State of Madhya Pradesh), wherein this Court stated:

It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination. There is neither a rule of law nor a rule of prudence which has

hardened into a rule of law that a dying declaration cannot be accepted upon less it is corroborated. Thus Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of which it was necessary to look out for corroboration.¹⁶ In the same year this Court in the case of *K. Ramachandra Reddy v. Public Prosecutor* : 1976 CriLJ1548 observed:

The dying declaration is undoubtedly admissible under Section 32 and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancor, Once the Court is satisfied that the dying, declaration is true and voluntary it can be sufficient to find the conviction even without any further corroboration.

A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of question and answer and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character. In order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by

interested parties : 1958 CriLJ106 Rel. on.

8. In the case of Keshar v. State of Maharashtra : 1971 CriLJ798 , the Supreme Court has held as under:

That apart, there was sufficient time for him to have called a Magistrate and although he admits that a Magistrate should be called he did not do so because according to him the injured was in a serious condition. We have already pointed out that the injured died at 2 a.m. There was considerable time, for him to have called a Magistrate. At any rate there is nothing to show that the injured became unconscious immediately or that he made any attempt to call the Magistrate.

9. As cited by the State, in the case of Ravikumar v. State of Tamil Nadu : 2006 CriLJ1625 it is held by the Supreme Court that when conviction is based solely upon dying declaration, it should be voluntary and not tutored, prompted or product of imagination. Court should seek medical opinion so as to be satisfied that deceased was in fit mental condition to make the statement and that he had opportunity to identify the accused. Dying declaration was read over and explained by the doctor to deceased who admitted the same to be correct and the Magistrate made an endorsement to the effect, the dying declaration can not be said to be unreliable.

Again in the case of Narain Singh v. State of Haryana (2004) 13 SCC 264 : 2004 Cri LJ 1409 it was held by the Supreme Court that Section 32(1) is an exception to hearsay rule, the dying declaration like any other evidence has to pass the test of credibility. If found reliable, it can be the basis of conviction. There is also no legal bar in action on a part of the dying declaration.

In the case of Heeralal Yadav v. State of M.P. : 2006 CriLJ3301 , it is held by the Supreme Court that a conviction can be solely based on the evidence of dying declaration if it inspires confidence. It should be well corroborated with other attending circumstances and if dying declaration is otherwise credit worthy, the conviction cannot be reversed.

10. From the aforesaid decision, it is clear that though there is no bar in basing the conviction solely on the evidence of dying declaration recorded by doctor, but while placing reliance such an evidence should be treated with care and caution as the maker of the statement cannot be subjected to any cross-examination. It should be supported and corroborated by some other attending circumstances, should inspire confidence, should be credit worthy and should also not suffer from any infirmity. The Court has to rule out the possibility of tutoring, prompting and that it is not a product of imagination. The Court has to satisfy that the deceased was in a fit state of mind, was fully conscious and capable to give the statement. Therefore, in the case in hand we have to examine the prosecution evidence whether the same fulfills the aforesaid criteria, which has been laid down by the Supreme Court or not.

11. Dr. A. K. Jaiswal (P.W. 3), who recorded the dying declaration, has affirmed that dying declaration was recorded at 5.15 p.m. She was fully conscious. She has put her thumb impression. Dying declaration is Ex. P/5, but he has admitted that looking to her serious condition, he himself has taken the dying declaration, though the general condition has not been mentioned in the dying declaration (Ex. P/5) and there is no certificate that she was in a fit state of mind and capable to give dying declaration. He has admitted in the cross-examination that he has not informed the police before recording the dying declaration, nor that her condition is serious or arrangement should be made for recording her dying declaration by executive Magistrate.

12. As vehemently argued, it is true that in this case conviction can not be based on this dying declaration (Ex. P/5) for the simple reason that it is not corroborated by any other evidence or by attending circumstances, it does not inspire confidence, no intimation was given to the police and dying declaration was not recorded by the Executive Magistrate, though there was sufficient time and no certificate was affixed thereon that she was under fit state of mind and there is also no certificate in the end of dying declaration that while dying declaration was recorded she remained fully conscious and in a fit state of mind. In the absence of such certificate it cannot be held that there is evidence to the effect that the doctor was satisfied that the dying man is making a conscious, voluntary and true

statement.

13. Dr. V.S. Tomar (P.W. 6) had conducted the autopsy of the dead body and was of the view that the deceased had received 70-80% burn injuries. The burn injuries were of second and third degree and she died because of the complications of burn injuries. The cause of death was the cardio respiratory failure. He was unable to give any opinion that whether after receiving burn injuries she was in a position to speak or not. Doctor had deposed that there is hardly any person who can survive after 80% burn injuries. He was also unable to give any opinion about the cause of death, whether it was suicide, homicidal or accident.

Doctor has also not given any opinion whether after receiving the burn injuries she was fully conscious and was in a position to give any statement or not during all the seven days, while she remained hospitalized. In such circumstances it cannot be held that she remained conscious or was capable to give statement or is a case of homicidal death. To corroborate the other attending circumstances, doctors' evidence and opinion is very material.

14. Maharaj Singh (P.W. 3), Head Constable was examined to prove the Marg Intimation Report (Ex. D/4), which was referred by Dr. Prabhat Shrivastava to police station, in which it has been mentioned that the deceased himself set her on fire. Dr. Mrs. S.K. Malhotra (D.W. 1), who was working as psychiatric and Superintendent of Mental Hospital, Gwalior, had examined and treated the deceased on 6-11-1989, two years before the incident. Her prescription is Ex. D/2. She had found her a case of mental illness and it was deposed that she was suffering from mental illness for last 5-6 years, deceased was not in a position to speak well. She was a slow witted lady. Doctor has also explained the mental condition of such types of persons that they may go anywhere without informing anybody, they may ease in the clothes, their behaviour may be uncommon, even they may also commit suicide and her condition was abnormal. Doctor has also replied that there is no technique in the medical science for any kind of positive test for the mental illness but she has affirmatively answered that the deceased was suffering from mental illness and was abnormal. Dr. J.P. Gupta (D.W. 2), who was working as Assistant Surgeon at the Community Health Centre, Bhid, had

also examined and found that she was suffering from mental illness, has also elaborately explained the condition and had also referred her to Mental Hospital Gwalior. He has admitted that such types of patients are harmful and their behaviour is always uncommon and they may do anything and may also commit suicide. It appears that the learned trial Court has wrongly discarded the aforesaid evidence of two Government doctors on the ground that regular treatment papers were not submitted and she was only shown once to the doctor during ten years matrimonial period. But we are of the view that on such a ground expert evidence cannot be discarded as the same appears to be genuine. Both the doctors had seen her two years before this incident, therefore their evidence also cannot be held doubtful. More so this evidence is supported by prosecution witnesses as all the prosecution witnesses P.W. 2, P.W. 5, P.W. 8 and P.W. 10 have also admitted in their cross-examination that the deceased was suffering from mental illness but their evidence was also discarded on the ground that they were declared hostile and they have not supported the prosecution, which is also not logical. As a matter of principle, if the evidence of hostile witness is reliable, the same can be considered and reliance can be placed thereon.

15. I.O.B.S. Chauhan (P.W. 9) has admitted that he has not given any application to the Magistrate for recording her statement. He had also not requested the doctor for recording the dying declaration of the deceased. He has also recorded the statement of the deceased under Section 161, Cr. P.C. but neither any permission from the doctor nor any certificate of the doctor was obtained about the fact that she was mentally fit to give statement. Therefore, it is clear that the dying declaration recorded by the doctor is not away from infirmities and cannot be considered as a full proof evidence and this has raised a suspicion. It is also true that no attempt was made to get the dying declaration recorded by the Executive Magistrate. There is no bar that doctor cannot record dying declaration, but what is necessary is the certification and satisfaction of the doctor, which he has to explain. In the Ex. P/5, the doctor has not stated that he was satisfied, his conduct should have a documentary bearing. When the I.O. recorded her case diary statement, he has also not obtained the doctor's permission nor took the certificate from the doctor that she is in a fit state of mind to give statement to the police. I.O. has admitted that he does not remember whether he had informed the parents of

the deceased or not. He has also admitted that he had not referred the clothes of the deceased including the kerosene oil can for chemical examination. Therefore, it is also not corroborated that kerosene oil was used in the crime and prosecution has also failed to prove this fact. He was also examined on the question of time whether the FIR was recorded first or the deceased was referred for medical examination. I.O. has stated that FIR was lodged first by the deceased, thereafter he was referred for medical examination, but he could not give the proper explanation about the opposite timings given on the documents. He has also denied this fact that in this case the investigation was done by the SDO (P) or under his supervision as required under the law. It was also pointed out that there are lapses in the investigation. If there is clinching evidence available on record, those lapses in the investigation would not be fatal for the prosecution, but when there is no corroborative evidence then certainly in that case one has to look for all these mandatory compliance and their non-compliance may be fatal.

16. In the aforesaid factual background, the evidence of two doctors - Dr. Mrs. S.K. Malhotra (D.W. 1) and Dr. J. P. Gupta (D.W. 2) appears to be more irrelevant in comparison to the uncorroborated evidence of dying declaration of the deceased, which is full of aforesaid infirmities. If the deceased was a patient of mental illness and his behaviour was uncommon and unusual, then this possibility cannot be ruled out that she might have committed suicide or it may be a case of accidental death. Doctor has also not firmly opined that it is a case of homicidal death. It was the prosecution case that she was beaten, but doctor has not found any injury on the body of the deceased. Time shown by the prosecution about taking of the dying declaration prior to the FIR has also raised a reasonable doubt about the truthfulness of the conduct of the investigating officer and doctor, who had recorded the dying declaration. It is normal procedure of the hospital that whenever the patient will come to the hospital for treatment his case history shall be written first then she will be given some treatment and only thereafter her dying declaration shall be recorded, but in this case as per the prosecution case firstly the dying declaration was recorded at 5.15 p.m. and thereafter the case history was prepared at 5.30 p.m. and thereafter FIR was written on 6.10 p.m. but the prosecution case is other way round. Thus there is no conformity in the prosecution case and documentary evidence on record, which has also to be held

as fatal.

17. Considering the over all circumstances, we are of the view that in the facts and circumstances of the case the dying declaration suffers from infirmities and is not supported or corroborated by some other attending circumstances. Therefore it does not inspire confidence as has also not ruled out other possibilities and doubts, thus cannot be said to be creditworthy and sufficient to affirm the conviction of the appellant.

18. In view of the aforesaid discussion, the finding of guilt recorded by the trial Court cannot be said to be proper and based on proper appreciation of evidence. Thus, we are of the view that the prosecution has failed to prove the allegations and charges by producing evidence beyond reasonable doubt. According to us, the defence version appears to be more probable in comparison to the prosecution evidence. The prosecution evidence also does not inspire confidence and there is no firm evidence on record that she was in fit state of mind to give dying declaration or the appellant alone has committed the offence, therefore he is entitled for benefit of doubt.

Thus, in view of the foregoing discussion, we allow this appeal, set aside the conviction. The appellant is acquitted from the charges. He be released forthwith if not required in any other offence.