

Kaushlaya and Others Vs. the State

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Court : Delhi

Decided On : Sep-25-1987

Reported in : 1989CriLJ257; 1987(3)Crimes747; 33(1987)DLT254

Judge : Charanjit Talwar and; M.K. Chawla, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 162; ; Evidence Act - Sections 32

Appeal No. : Criminal Appeal No. 130 of 1983

Appellant : Kaushlaya and Others

Respondent : The State

Judgement :

Charanjit Talwar, J.

1. The dying declaration of Shakuntla recorded by Investigating Officer is the basis of conviction of her husband Chetan Dass and of her sisters-in-law Kaushlaya and Koyal for the offence under S. 302 read with S. 34 of the Indian Penal Code.

2. By this appeal, the conviction and the sentence of life imprisonment imposed on the three appellants by Shri J. D. Kapoor, Addl. Sessions Judge, Delhi is under challenge.

3. The prosecution case was that Shakuntla was burnt by the three appellants in furtherance of their common intention to murder her. Kaushalya and Koyal are sisters. Their respective husbands are elder brothers of Chetan Das, husband of the deceased. All of them live together. Chetan Dass got married to Shakuntla about eight years prior to the date of occurrence, i.e., 13 the April, 1981. They had three children. The husband and the wife used to quarrel as allegedly Chetan Dass was having an affair with one woman named 'Om'. On 12th April, 1981, Shakuntala was given severe beating by her husband because it is alleged, he wanted to keep Om in their matrimonial home. In the morning of the next day Shakuntala was burnt. The facts preceding the burning and the parts played by each of the accused, have been vividly brought out in the dying declaration which is also the basis of the First Information Report (Ex.P.W. 4/C). That statement (Ex.P.W. 4/B) of the burnt wife may be noticed in full :

'That about 8 years back I had been married to Chetan Das s/o Mangat Ram. I have one male child aged 2 years and two daughters aged 4 years and 8/9 months. I was having dispute with my husband for he was under the influence of his sisters-in-law, namely, Kaushalya and Koyal and he used to ignore me. My husband has been meeting one girl Om who is the daughter of Som Nath member and resided in Basti Julahan and he has been having love affair with her. There used to be quarrels between myself and my husband over this issue. My both sisters-in-law act according to the wishes of Om. Yesterday, the 12th April, 1981 my husband continued to pick up quarrels with me throughout the day and had been beating me with kicks and fist blows and had been saying that he would keep Om at his house and further that he would not keep me with him. The name of the husband of Om is Chhote Lal. My sisters-in-law and my husband had beaten me to-night as well. Today at about 6.30 in the morning both of my sisters-in-law namely Koyal and Kaushalya and my husband Chetan Dass were present at home. I had gone inside the room of the house in order to bring some articles, Koyal who was having a white plastic container which contained kerosene oil, poured on my head and whole body from my back side and my sister-in-law, Kaushalya set me on fire with a match box. When I raised alarm and tried to run outside, my husband Chetan Dass pushed me and did not allow me to go out. I kept on burning and raising alarm. On hearing the alarm, some neighbours came

there and my husband Chetan Dass raised an alarm that she set herself on fire and then he poured water on me. Thereafter my mother-in-law Man Kaur and some other persons brought me to the hospital and got me admitted there. My husband Chetan Dass in collusion with my both sisters-in-law has attempted to kill me by way of setting me on fire as they (sisters-in-law) are jealous of me and had given beating to me at a number of times. My mother-in-law is innocent in this matter. I have heard the statement and the same is correct'.

4. The above statement according to prosecution case was recorded by Sub-Inspector Sis Ram, the Investigating Officer (P.W. 24) at 12.40 p.m. on the day of the incident, viz., 13 April, 1981 in the 'Burn Ward' of the Jai Prakash Narayan Hospital, Delhi where she had been admitted at about 8.45 a.m. in a conscious state but was declared unfit for making a statement. As per the MLC (Ex.P.W. 22/A), she was brought to the hospital by Man Kaur, who is admittedly mother-in-law of the deceased. Under the column 'Particulars of Injuries', it is recorded therein 'Alleged history of burns from the stove'. It was recommended by the Doctor attending on her that she should be given a Pethidine injection and be admitted in Burns Ward. The history sheet of the patient shows that she was kept under sedation and given a Pethidine injection as recommended. However, Dr. Pooran Arya (P.W. 14) found her fit for making statement at about 12.40 p.m. vide endorsement (Ex.P.W. 14/A). It was thereafter that the statement (Ex.P.W./4B), quoted above, was recorded. That statement has not been attested by any doctor or nurse or any of the relations either of the deceased or of the appellants although it is the prosecution case that the Doctors, the nurses and the relations of the deceased were available when the statement which has been treated as a dying declaration, was recorded. At this stage we may notice the statement of Dr. Pooran Arya (P.W. 14). It reads as follows :

'On 13-4-81, I was working in J.P.L.N. Hospital in burns ward. Patient Shakuntla wife of Chetan Dass was admitted in the burns ward vide MLC mark X. At about 12.40 p.m. on 13-4-81, I checked the said patient and found her fit for statement and made endorsement to this effect which is Ex.P.W. 14/A on MLC mark X which is correct and signed by me.

xxx xxx xxx xxx xxx I was not asked by the I.O. of the case or the police officer to be present at the time of recording the statement of the deceased. I did not go through the contents of MLC but I examined the patient thoroughly before giving the endorsement that she was fit for statement. In this examination, I mainly put question and certain queries, to which she replied properly.'

5. It is clear that Dr. Pooran Arya was not asked to record the statement of the injured neither was he asked to be present at the time of recording of that statement. However according to the Investigating Officer, he had asked the Doctor to be a witness but he refused. The Investigating Officer, in his examination-in-chief stated that :

'I requested the doctor to be present at the time of recording the statement of the deceased, but he told that they had instructions only to give declaration regarding the condition of the patient. He also told that when the patient was fit for making statement, it is the duty of the police to record the statement irrespective of the fact whether the doctor has present or not and if the patient was not fit for making statement and was talking incoherently, then we felt the need of our presence. The doctor also told me that the deceased would be able to be fit for making statement for about one hour, thereafter, she would not be able to talk or make statement.'

In his cross-examination he stated that :

'When I contacted the doctor for the first time he told me that the deceased would be in a position to make statement after about two hours as she had been given an injection. I did not contact any Magistrate or Senior Police Officer during these two hours for recording the statement of the deceased. Volunteered, I did not do so as I did not expect that the doctor would not be ready to be a witness to the statement and would not be ready to be present at the time of recording the statement as he had not stated so when I contacted him for the first time when he declared the patient unfit for statement. According to my knowledge, there is no such rule that at the time of recording the statement of any injured either one doctor or two police officials of Sub-Inspector rank or above or two public persons should be present.'

Thereafter on this aspect he said :

'In the burnt ward, Shakuntla was lying under the cover of blanket which was not wrapped over her. In the burn ward, there were other patients also besides the nurses and staff. I had mentioned in the zimini that the doctor on duty has refused to be the witness of the dying declaration. The ward in charge had also refused to be a witness. I had mentioned the name of the doctor in the zimini who had refused to be as witness as Pooran Arya. I have not mentioned the name of the ward in charge. It is incorrect that I did not request Dr. Pooran Arya for being a witness as a matter of fact the ward in charge had declined to be the witness and also said that no doctor would be witness to the dying declaration when Dr. Pooran Arya was also there. It is incorrect that I did not make any request to Dr. Pooran Arya for being the witness. I do not remember the name of the doctor who was in charge of the ward.'

6. We have closely scrutinised the evidence of the Investigating Officer (P.W. 24) Sis Ram as well as of Dr. Pooran Arya (P.W. 14). We are of the view that the latter's statement that he was not asked by the Investigating Officer to be present at the time of recording of the statement of the deceased, is to be preferred though according to the prosecution Sis Ram's testimony is corroborated by P.W. 23 Dev Pal Singh. This witness has accompanied the Investigating Officer to the hospital from Police Station Sadar Bazar where they were both posted. He stated that the dying declaration was recorded in his presence. In his examination-in-chief he deposed that on reaching the hospital at about 10/10.15 a.m. they were told that the injured was unfit to make the statement. The Investigating Officer only stayed there for 10/15 minutes and left the hospital for the place of occurrence, i.e., the house where the incident took place. At about 12.30 p.m. after conducting some proceedings at the spot they came back to the hospital where the doctor declared that Shakuntla was fit for making the statement. The Investigating Officer then recorded the statement in the ward in this witness's presence where she had been admitted. In his testimony he practically repeated the statement of Shakuntla (Ex.P.W. 4/B).

7. In his cross-examination this witness admitted that on reaching the hospital in the morning, after obtaining the MLC, they went to the ward where Shakuntla was admitted and the Investigating Officer had a talk with the doctor and that 'The I.O. had asked the doctor that he would have to sign the statement of the injured to be recorded by him but the doctor refused to do so. We remained at the hospital for about 10/15 minutes and from there we came back to the spot.' He further stated that 'At 12.30 p.m. when we went to the hospital again and when I.O. recorded the statement of deceased, she was in burnt ward and other patients were also lying in that ward and nurses and doctors were also present there. She was already given treatment. The doctors did not attend to her in our presence.' When asked whether any doctor was called when the thumb impression of Shakuntla was obtained on the statement, he admitted that no doctor or nurse was called. He, however, volunteered that Investigating Officer had requested the doctor to be the witness to the statement before he recorded the statement of the deceased went on to say that 'The I.O. had requested the doctor after completing the statement and obtaining the thumb impression and after attesting it, to sign the statement. Again said, I do not remember nor do I know that the I.O. had asked the doctor later on after the statement, to be the witness. It is incorrect to suggest that today I have been tutored by the I.O. or the prosecution to state that the doctor was requested to record the statement before the I.O. started recording the same.'

8. The testimony of this witness highlights that the Investigating Officer in the morning of 13 the April, 1981 at about 10/10.15 a.m. on reaching the hospital and after obtaining MLC had asked the doctor that 'He would have to sign the statement of the deceased to be recorded by him but the doctor refused to do so' and after recording the statement and obtaining the thumb impression of the burnt wife after about two hours of the earlier talk, he requested the doctor to sign it but he refused. He admits that at the time when the statement was recorded neither any doctor nor any nurse was present. The statement of Constable Dev Pal Singh shows that most probably the Investigating Officer after recording the dying declaration (Ex.P.W. 4/B) asked the doctor in the Burn Ward to attest it. Since the statement was not recorded in the presence of any doctor, no doctor was expected to attest the same.

9. The barest minimum precautions which were necessary to be taken, were not taken by the Investigating Officer. He did not consider it proper, as admitted by him, to ask Constable Dev Pal Singh to attest it. Dr. Arya's statement as we have stated clearly shows that at least he was not asked by the Investigating Officer to be present at the time of recording of the statement. Sis Ram (the Investigating Officer) has candidly admitted in his cross-examination which we have quoted above, that he did not contact any Magistrate for recording the statement of Shakuntla as he thought a doctor would be available for attesting the same at the time of recording it. It is his case that when he reached the hospital after the receipt of the telephonic message about the incident from Raghbir Singh, the Constable on duty at the hospital, at about 10.30 a.m., he was told that the injured namely Shakuntla was unfit to make a statement by might be able to do so after about two hours. He also knew or ought to have known that Shakuntla had suffered over 80% burn injuries. His understanding seemed to be that it was not at all necessary for the Magistrate to record the dying declaration and it was open to him to record it but in the presence of a doctor. He was of the view that as the doctor was available, he was merely to ask the doctor to attest it. From the testimony of Dev Pal Singh (P.W. 23) it seems that that Investigating Officer requested the doctor to attest the statement although it was not recorded in his presence. Sis Ram showed complete ignorance of the rules of caution applicable in Delhi that the Investigating Officer is not to scribe the dying declaration. He also did not know as is evident to or to attest it. From the testimony of Dev Pal Singh (P.W. 23) it seems that the Investigating Officer requested the doctor to attest the statement although it was not recorded in his presence. Sis Ram showed complete ignorance of the rule of caution applicable in Delhi that the Investigating Officer is not to scribe the dying declaration. He also did not as is evident from his statement that such like statement is to be recorded in question and answer form.

10. The Explanationn given by the Investigating Officer for not contacting a Magistrate for recording the statement is completely unsatisfactory. The justification given by him that as he thought the doctor would be available to attest the dying declaration and, therefore, he did not contact a Magistrate, is to be rejected. The Doctor, P.W. 14 Pooran Arya was available in the Ward as he had declared Shakuntla fit for making a statement at 12.40 p.m. a little prior to making

of the statement. He categorically submitted and we accept his version that he was not asked by the Investigating Officer to be present at the time of recording of the statement. In fact it was incumbent on the Investigating Officer to have requested the doctor to record the statement.

11. The question whether a dying declaration recorded by the Police Officer even when a doctor had attested it, can be accepted, was considered by the Supreme Court in *State v. Laxman Kumar*, reported in : 1986 CriLJ155 . In that case, the dying declaration was also scribed by the Investigating Officer. Although it was attested by a doctor, yet it was rejected from considering. It was noticed in that case that under the relevant rules applicable to Delhi area, the Investigating Officers were not to scribe the dying declaration. In paragraph 28 of the reported judgment it is held :

'We also find that under the relevant Rules applicable to Delhi area, the Investigating Officer is not to scribe the dying declaration. And unless the dying declaration is in question and answer form, it is very difficult to know to what extent the answers have been suggested by questions put. What is necessary is that the exact statement made by the deceased should be available to the Court. Considered from these angles, the dying declaration in question is not acceptable. The High Court obviously lost sight of all these aspects when reversing the conclusion of the trial Court with regard to the document and agreeing to act upon it.'

12. Earlier on in this decision it has been noticed by the Supreme Court that a patient who has been given a Pethidine injection would not have normal alertness. In the present case also Pethidine injection had been given to Shakuntla. The dying declaration does not record the questions put to the patient and therefore it is difficult to know as to what were the exact answers. Shakuntla having received 80% burn injuries, must have been in state of acute shock and physical pain and could not have been alert enough to give such a statement (Ex.P.W. 4/B) (quoted at the outset) specially after having been given an injection of Pethidine. Mr. Lao learned counsel for the State however, submitted that the fact recorded in that statement (Ex.P.W. 4/B) regarding the love affair of Chetan Dass with Om were

only known to Shakuntla and could not have been devised by the Investigating Officer. Those facts must have been disclosed to him and, therefore, the statement must be accepted as true and voluntary. A careful scrutiny of the Investigating Officer's testimony, however, does not show as to who exactly was that woman being called 'Om', whose father's name as well as husband's name and also that locality where she resided were known to him. In his examination-in-chief he has not even suggested that he had interrogated that woman or tried to investigate whether Chetan was in fact having an affair with Om, who is referred to in the declaration itself as a married woman living with her husband. It is rather strange that the sister-in-law of Chetan Dass would encourage him in this affair and would act in accordance with the wishes of the other married woman namely Om. If there was such an affair as suggested, it would not have been difficult at all to produce some evidence in support of the suggested motive of the sisters-in-law and Chetan Dass to do away with Shakuntla.

13. In *Dalip Singh v. State of Punjab*, : 1979 CriLJ700 , the Supreme Court has pointed out that :

'27. We may also add that although a dying declaration recorded by a Police Officer during the course of the investigation is admissible under S. 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of S. 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declarations out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor. As observed by this Court in *Munnu Raja v. State of Madhya Pradesh*, : 1976 CriLJ1718 the practice of the Investigating Officer himself recording, a dying declaration during the course of investigation ought not to be encouraged.'

14. Applying the law enunciated by the Supreme Court the dying declaration (Ex.P.W./4B) cannot be acted upon. We may now advert to another statement alleged to have been made by Shakuntla at the time when she was admitted in the said hospital.

15. According to P.W. 19 Constable Raghbir Singh he was on duty in 'Casualty Ward' of Lok Nayakan Jai Prakash Narayan Hospital on 13th April, 1981. He

stated that at about 8.30 a.m. Shakuntla was brought to the hospital by her mother-in-law Mam Kaur in a burnt condition. He stated that Shakuntla was crying and saying that she had been burnt by her husband and her two jethanis, i.e. wives of the brothers of her husband. We quote him, 'I accompanied her to the Burns Ward as she was crying and was in great pain. She also said the same thing before the doctor who was on duty in the Burns Ward. I then gave the information to the Police Control Room on telephone about this'. That Raghbir Singh was present when she was brought to the hospital is borne out from the MLC (Ex.P.W. 24/A). His name is written in the column 'No. and name of Constable' but as we have noticed earlier, the particulars of injuries stated in that certificate are Alleged history of 'burns from stove'. If Raghbir Singh is to be believed that 'Shakuntla was crying and saying that she had been burnt by her husband and her two jethanis, i.e. wives of the brothers of her husband' and had said so to the doctor, surely the doctor would have written the same instead of writing 'burns from stove'. Probably Shakuntla although conscious yet was in such a state of shock that she did not tell the doctor anything. In that event Raghbir Singh would not have heard anything either. therefore, the argument of the learned counsel for the appellate that the message on telephone which was sent by this Constable to the effect that injured 'had made a statement that her in-laws have set her on fire in order to kill her' was probably on the information given to him by Shakuntala's brother who had admittedly reached the hospital is to be accepted. We hold that Shakuntla did not make any statement at the time of admission. The argument is that even that message was not sent at the time when it is stated to have recorded but was much later. At that time according to Mr. Bawa, neither details of the incident nor the names of the accused were given and it was only after the Investigating Officer had met the brothers of Shakuntla who had admittedly reached the hospital by then that a theory was propounded. In the view which we have taken it is not necessary to analyze the other submissions made before us or the evidence on the record. Mr. Lao has frankly conceded that apart from the dying declaration, there is no other evidence which involves the present appellants. The said dying declaration (Ex.P.W. 4/B) if excluded from consideration, the learned counsel agrees that conviction cannot be sustained. As we have noticed, the said dying declaration cannot be acted upon. We set aside

the finding of the learned trial Court that the dying declaration is worthy of credit. It must be excluded from consideration. In the result we hold that the prosecution is unable to prove the charges as framed. The appeal is allowed and the conviction of the appellants for the offence under S. 302 read with S. 34 of the Penal Code is hereby set aside. The sentence of imprisonment for life is also set aside.

16. Appeal allowed.

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