

Shri Niwas Vs. State

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Court : Delhi

Decided On : Mar-04-2005

Reported in : 118(2005)DLT247; 2005(81)DRJ55

Judge : D.K. Jain and; A.K. Sikri, JJ.

Acts : [Evidence Act, 1872](#) - Sections 32 and 32(1); [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 376; Code of Criminal Procedure (CrPC) - Sections 162(1) and 162(2)

Appeal No. : CRLA 285/1997

Appellant : Shri Niwas

Respondent : State

Advocate for Def. : Ravinder Chadha, Adv.

Advocate for Pet/Ap. : Rajesh Mahajan, Adv. (amicus Curiae)

Disposition : Appeal allowed

Judgement :

D.K. Jain, J.

1. This appeal is directed against the judgment and order of the learned Additional Sessions Judge, Delhi in Sessions Case No.41/1993, arising out of FIR

No.446/92.

2. Appellant Shri Niwas faced trial along with three other accused for commission of offences punishable under Sections 302 and 376 read with Section 34 of the Indian Penal Code, 1860 (IPC for short) for allegedly committing rape and causing homicidal death of one Smt.Shefali (hereinafter referred to as the deceased). The learned Additional Sessions Judge, disbelieving the case of the prosecution as against the remaining three co-accused has acquitted them of the charges framed against them, but found the appellant guilty and convicted him under Sections 376 and 302 read with Section 34 of the IPC. He has been sentenced to undergo imprisonment for life and pay a fine of Rs.5,000/- with a stipulation that in case of default in payment of fine, he shall undergo further rigorous imprisonment for one year for offence under Section 302 read with Section 34 IPC. He has also been sentenced to undergo rigorous imprisonment for ten years and pay a fine of Rs.2,000/- with further stipulation that in default of payment of fine, he shall undergo rigorous imprisonment for six months for offence under Section 376 read with Section 34 IPC. Both the sentences are to run concurrently. The said convictions and sentences are questioned in the present appeal.

3. The case of the Prosecution may be stated thus:

At about 5.30 a.m. on 16 August 1992, when the deceased, who was living with her husband and an infant daughter in a Jhuggi situated in Bhumiheen Camp, Kalkaji, New Delhi, had gone to ease herself, four persons forcibly took her in a park; committed rape on her and, thereafter, set her on fire. On the date of the incident the husband of the deceased is stated to have gone to the house of his sister in Chittranjan Park, New Delhi along with the child. On receipt of information about the occurrence, a DD entry was recorded by ASI Siri Chand, PW-16, who went to the spot and found the deceased lying in a burnt condition. He removed her to Safdarjung Hospital in a PCR van. Head Constable Rati Ram, Constables Harish Kumar, Madan Lal and a lady constable of the area accompanied him. It is the case of the prosecution that on way to the hospital, the deceased told them that four persons had committed rape on her and had burnt her. On receiving the information about the incident, Inspector Suresh Kaushk, (PW-24), in charge of the

police post, Govindpuri, also reached the hospital and informed the SDM about the incident. The SDM, namely, Shri B.K. Sehgal, PW-23, reached the hospital. The Investigating Officer moved an application before the Doctor for recording of statement of the deceased.

The Doctor declared the deceased to be fit for making statement. The SDM, who reached the hospital around 9 A.M. got the statement of the deceased (Ext.PW 1/A) recorded by the Investigating Officer Suresh Kaushik, PW-24, in his presence as he himself could not record it in his hand because of some rheumatic problem. The deceased gave her statement in Bengali language which was translated into Hindi by her sister-in-law, Manju Biswas, PW-1, in the presence of the SDM. In the statement the deceased stated that out of the four persons, one person had small pox marks on his face and that the man with small pox marks had poured kerosene oil on her. The statement was signed by the deceased, the SDM and the sister of the deceased. On the basis of the sai statement, an FIR was registered.

The Investigating Officer went to the spot and got the scene of the occurrence photographed. As per the description given by the deceased, the Investigating Officer apprehended the appellant along with two other persons on 16 August 1992 and produced them in the hospital before the deceased. The deceased identified the appellant being the person who had picked her up; committed rape on her along with three other persons and had put her on fire after pouring kerosene oil. The identification memo (Et. PW 1/B) to that effect was prepared in the presence of her sister-in-law and her husband (deceased's brother-in-law). Since the deceased was not in a position to sign, her thumb impression was obtained on the memo.

The deceased died on the night of 16 August 1992. Inquest proceedings were completed and the dead body was sent for post mortem. The appellant was arrested on 17 August 1992. On interrogation, he is stated to have made disclosure statement. Thereafter the other three accused persons were also arrested. On interrogation they are also stated to have made disclosure statements.

4. To further its case, the Prosecution examined 24 witnesses. The appellant examined two witnesses in defense. Relying primarily on the two dying declarations of the deceased, namely, Ext.PW 1/A and PW 1/B and the testimonies of the PW-1 (sister-in-law of the deceased), PW-2 (brother-in-law of the deceased) and PW-19 (husband of the deceased), the Trial Court came to the conclusion that the Prosecution has successfully brought home the guilt of the appellant under the aforementioned provisions of the PC. Hence the present appeal.

5. We have heard Mr. Rajesh Mahajan on behalf of the appellant, who was appointed as the amicus Curiae, and Mr. Ravinder Chadha, learned counsel appearing for the State, who have also taken us through the evidence on record.

6. Mr. Mahajan has strenuously urged that the Prosecution has miserably failed to prove the identity of the appellant as being the perpetrator of the alleged offence. It is urged that the Prosecution has failed to connect the appellant with alleged offence particularly because in the dying declaration Ext.PW1/A, recorded in the presence of the SDM, the deceased had stated that the man with small pox marks on his face had thrown kerosene oil on her and had told his associates to set her afire as she would implicate them if she was alive. It is pointed out that the deceased categorically specified the role of the man with small pox marks and the one who had poured kerosene oil on her and thereafter, in the alleged dying declaration Ext.PW1/B, the deceased allegedly identified the appellant as one of the culprits and the main person who had poured kerosene oil on her. It is contended that if the two dying declarations are read together in conjunction and harmoniously, it would clearly flow there from that the person identified by the deceased was the one who had small pox marks on his face. However, the appellant does not have any such small pox marks on his face, which clearly shows that the appellant was falsely implicated by the police.

7. Mr. Mahajan has also contended that Ext.PW1/B, styled as identification memo, is not only a fabricated document, it can be admissible in evidence only if it is treated as a dying declaration given by the deceased regarding the identification. According to the learned counsel if it is not to be considered as a dying

declaration, it is a statement made by a person to a police officer in the course of investigation and, as such, cannot be used for any purpose in any inquiry or trial in respect of any offence under investigation. Learned counsel submits that such a statement would be clearly hit by Section 162 of the Code of Criminal Procedure (Cr PC for short) and as such was inadmissible in evidence. In support of the proposition, reliance is placed on a decision of the Supreme Court in Mukesh Kumar v. State of Delhi : (1997)6SCC171 . Learned counsel has submitted that once Ext.PW1/B was considered as a dying declaration, it has to pass all the tests of strictest scrutiny and closest circumspection laid down by the courts for acceptability of a dying declaration before it can be used for basing a conviction. In this behalf learned counsel has relied on the decisions of the Supreme Court in Kushal Rao v. State of Bombay : 1958 CriLJ106 ; K. Ramachandra Reddy v. PP 1976 SCC 447 and Laxmi (Smt) v. Om Prakash and Ors. : 2001 CriLJ3302 .

8. Challenging the veracity of Ext.PW1/B Mr. Mahajan has contended that the said document is otherwise surrounded by suspicion because:

(i) despite there being sufficient time available, no effort was made to call the SDM for recording the second dying declaration;

(ii) the time gap between the recording of Ext.PW1/A and PW1/B and the time of death of the deceased clearly shows that there was enough time available for calling the SDM for recording the alleged dying declaration Ext.PW 1/B;

(iii) at least the Investigating Officer could have availed of the services of a doctor in the hospital for recording the statement of the deceased or for attesting as a witness to Ext.PW1/B, recording identification, but it was not done;

(iv) it has not been proved that the deceased was in a fit state of mind at the time when the identification parade had purportedly taken place as per Ext.PW1/B;

(v) Ext.PW1/A was signed by the deceased while Ext.PW 1/B has been thumb marked and

(vi) Ext.PW1/B does not bear the time of recording. In support of the proposition that the Courts have been discouraging the practice of recording of dying

declarations by Police Officers, who are themselves interested in the success of the case, reliance is placed on the decisions of the supreme Court in *Munnu Raja v. State of Madhya Pradesh* : 1976 CriLJ1718 , *State (Delhi Admn.) v. Laxman Kumar and Ors* 1986 SCC 2, *Balak Ram and Anr v. State of UP* : 1974 CriLJ1486 . Learned counsel has also relied upon the decision of the Apex court in *Deepak Baliram Bajaj v. State of Maharashtra* : 1993(3)BomCR72 , *Jaikaran v. State (NCT Delhi)* : 1999 CriLJ4529 to contend that where a dying declaration is given in a particular language it is desirable to record the same in vernacular, thereafter it should be translated; read over and explained to the maker of the statement, which has not been done in the present case.

9. On the merits of the evidence adduced by the Prosecution, learned counsel has submitted that the testimony of the Investigating Officer PW-24 shows that he was not even present when the alleged dying declarations including Ext.PW1/B were recorded. The husband of the deceased PW-19, who is stated to have taken the deceased to the hospital at 8.30 a.m. On 16 August 1992, was not asked to be present when the two dying declarations were allegedly recorded. Learned counsel has also urged that the Prosecution has failed to take a firm stand with regard to the date and time when the appellant was arrested. According to the learned counsel, in case Ext.PW1/B was prepared at the time it is purported to have been prepared, (i.e. 11 a.m. On 16 August 1992 there was no reason for the Police to set him free on 16 August 1992 and then re-arrest him on the next day i.e. 17 August 1992.

10. Per contra, Mr.Ravinder Chadha, learned counsel for the State, while supporting the decision of the Trial court has urged that though after the death of the deceased Ext. PW 1/B has taken the shape of a dying declaration but being in the nature of an identification report, it does not lose its evidentiary value merely because all requirements of a dying declaration have not been strictly complied with. It is submitted that the witnesses to the identification parade, namely, PW-1 and PW-2 have also corroborated Ext.PW 1/B and that the veracity of Ext.PW1/B is further established by the fact that the deceased had identified only one person, namely, the appellant, out of the three persons produced before her.

11. It is evident from the afore-noted factual scenario that there is no eyewitness to the occurrence and the case of the prosecution rested entirely on the dying declaration Ex.PW 1/A and the identification memo Ex. PW 1/B. We may note at the threshold that if Ex. PW 1/B is to be treated only as an identification memo, as is sought to be pleaded by learned counsel appearing for the State, then the statement of the deceased recorded in this memo would be hit by Section 162 Cr PC, being a statement made by a person to a police officer in the course of investigations and cannot be used for any purpose in any enquiry or trial in respect of any offence under investigation, except when it attracts Section Sec of the Evidence Act. In any case, the issue need not detain us further as the trial court has treated Ex.PW 1/B as a dying declaration and based appellant's conviction thereon.

12. Thus, the question which emerges for consideration is as to whether the statement of the deceased, Ext.PW1/B, even if it was treated as a dying declaration, is reliable and conviction of the appellant could be based on the same?.

13. Section 32 of the Indian [Evidence Act, 1872](#) deals with cases in which the statement of relevant fact by a person, who is dead or cannot be found etc., is relevant. Though in the said section no expression like dying declaration has been used, but Clause (1) of the said Section makes relevant what is generally described as dying declaration. It means a statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding, hearsay evidence, it is admitted on the precise that ordinarily a dying man would not falsely implicate an innocent person in the commission of a crime. The principle on which a dying declaration is admitted in evidence is indicated in the legal maxim *Nemo moriturus praesumitur mentire* - A man will not meet his Maker with a lie in his mouth. The principles of dying declaration were succinctly summed up by the Supreme Court in *Paniben (Smt) v. State of Gujarat* : 1992 CriLJ2919 :

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the 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 declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

14. Recently in *Laxmi (Smt) v. Om Prakash and Ors.* : 2001 CriLJ3302 while taking note of the aforementioned philosophy in law underlying admissibility of dying declaration in evidence, their Lordships of the Supreme Court reiterated the statement of law summed up in *Kundula Balasubramanyam V. State of A.P.* (1993) 3 SCC 684 as under:

A dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment, such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration.

Their Lordships further observed that the weak points of dying declaration serve to put the Courts on its guard while testing its reliability and impose on the Court an obligation to closely scrutinise of the relevant attendant circumstances. It was also observed that one of the important tests of reliability of the dying declaration is a finding arrived at by the Court as to the satisfaction that the deceased was in a fit state of mind and capable of making statement at the point of time when the dying declaration purports to have made and/or recorded. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which is relevant. If the Court finds that the capacity of the maker of the statement to narrate the facts was impaired or the Court entertains grave doubts whether the deceased was in a fit physical and mental state to make a statement, the Court may in the absence of corroborating evidence lending assurance to the contents of the dying declaration refuse to act on it.

15. In *Dalip Singh v. State of Punjab*, AIR 1979 SC 1173, it was observed by the Apex Court that although a dying declaration recorded by a police officer during the course of an investigation is admissible under Section 32 of the Indian Evidence Act and in view of the exception provided in Sub-section (2) to Section 162 of the Code of Criminal Procedure, it better to leave such dying declaration 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. In fact in *Munnu Raja and Anr. v. The State of Madhya Pradesh* : 1976 CriLJ1718 the Apex Court deprecated the practice of the investigating officer himself recording the dying declaration during the course of investigation.

16. Testing the case in hand on the touchstone of the aforementioned principles, underlying the admissibility of dying declaration in evidence, we are of the considered view that the alleged dying declaration Ex. PW 1/B does not inspire our full confidence in its correctness and it could not form the sole basis for conviction of the appellant.

17. As noticed above, the SDM had recorded the first dying declaration Ex. PW 1/A only about 1 -+ to 2 hours prior to the time when the second dying declaration Ex. PW 1/B was allegedly recorded. The deceased died after about 13 hours of

the alleged recording of the Ex.PW 1/B. Short gap in between the recording of Ex. PW 1/A and Ex. PW 1/B and the time gap between recording of Ex. PW 1/B and the death of the deceased indicate that there was enough time for calling the SDM for recording the identification memo or the dying declaration Ex. PW 1/B but the investigating officer made no effort to arrange for the SDM. It is pertinent to note that it is not the case of the prosecution that the SDM was not available the second time or that there was absolute urgency to record deceased's statement as her condition was deteriorating, after recording of the first statement.

18. Admittedly, the deceased was in a precarious condition with more than 90% burns and, therefore, must have been attended to by the doctors, yet the investigating officer did not think it proper to avail of the services of some doctor present in the hospital for recording or for at least attesting as a witness the second dying declaration Ex. PW 1/B.

19. There is no iota of evidence on record to prove that the deceased was in a fit state of mind at the time when Ex. PW 1/B was prepared. It is significant to note that before getting the first statement Ex. PW 1/A recorded by the SDM, the investigating officer had moved an application to the CMO, Safdarjung Hospital, PW 24/A and got an endorsement of Dr. Sunil thereon that the patient was fit to give a statement. But no such application was moved nor any effort was made by the investigating officer in this behalf. In the absence of any evidence in regard to the fitness of the deceased there cannot be any presumption with regard to her fitness to make a statement. If the stand of the prosecution that the condition of the patient was deteriorating since the recording of the first statement Ex. PW 1/A was to be accepted, then the question of capability of the deceased to give a coherent statement and her mental and medical fitness at the time of recording of statement Ex.PW 1/B assumes still greater importance. Ex. PW 1/B also does not bear any time as to when it was recorded. It is again a very significant circumstance casting a serious doubt on the veracity of the statement.

20. Though the case of the prosecution is that both the statements were given by the deceased in Bengali language and were translated to Hindi by Smt. Manju Biswas, PW-1 but there is no evidence on record to prove that Ex. PW 1/B was

read over and explained to the deceased after it was recorded and before she had put her thumb impression.

21. Again it is in evidence that PW -19, the husband of the deceased, had taken the deceased to the hospital himself at 8.30 A.M on 16 August 1992. Surprisingly he was neither made a witness nor asked to be at least present at the time of recording of both the statements, Ex. PW 1/A and Ex. PW 1/B. His absence from the hospital, when the deceased was fighting for life, has not been explained.

22. In the light of the afore-noted circumstances, emerging from the evidence on record, we are of the view that it will not be safe to rely on the alleged dying declaration Ex. PW1/B and the trial court committed an error in convicting the appellant solely on that basis. Consequently, the appeal is allowed; the impugned judgment of the learned Additional Sessions Judge is set aside and the appellant is acquitted of the charges framed against him. Let the appellant be released forthwith.

23. Before parting with the case, we place on record our appreciation for the invaluable assistance rendered to the Court by Mr. Rajesh Mahajan, Advocate, who appeared amicus curiae for the appellant.

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