

Surinder Kumar Vs. State

Surinder Kumar Vs. State

SooperKanoon Citation : sooperkanoon.com/693635

Court : Delhi

Decided On : Aug-21-1991

Reported in : 1992CriLJ616; 1991(3)Crimes709; 45(1991)DLT372; II(1991)DMC473

Judge : A.B. Saharya and; P.N. Nag, JJ.

Acts : Evidence Act - Sections 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Criminal Appeal No. 221 of 1987

Appellant : Surinder Kumar

Respondent : State

Advocate for Pet/Ap. : Geeta Mittal,; amices Curiae and; B.K. Sharma, Advs

Judgement :

P.N. Nag, J.

(1) The decision of this appeal substantially depends upon the question as to how far the dying declarations made by the deceased, Neelam, can be relied upon.

(2) By this appeal, the appellant, Surinder Kumar has challenged his conviction under Section 302 of the Indian Penal Code for burning his wife by pouring kerosene oil on her from the stove and thereafter setting her on fire. The appellant

has been mainly convicted by the Additional Sessions Judge vide his judgment dated 20-8-1987 on the basis of dying declaration of the deceased and the statement of Miss Kiran,

(3) The case set up by the prosecution, in substance, is that Smt. Neelam, deceased was married to the appellant on 14-10-1983 and they were living together at C-106 J. J. Colony, Shakurpur, Delhi. On 2-6-1985, in the morning, the appellant asked Neelam to bring a sum of Rs. 500 from her parents, failing which she would be finished by him. The appellant, who was working in Samrat Cinema. Shakurpur, returned at midnight, at about 00.15 A.M., to his house after taking liquor and asked Neelam, the deceased, whether she had brought the money from her parents. On having, found the answer from Neelam in the negative, the appellant started beating. Neelam and in fact gave 2-3 blows to her. thereforee he took the stove, opened its lid and poured kerosene oil on her head and thereafter, he lighted a match stick on her clothes, with the result, her clothes were set on fire. Neelam ran out of the house and fell into the water-drain, perhaps with a view to put out the fire. The appellant, however, took Neelam with burn injuries to the house of Smt. Prakash Kaur, maternal grandmother of the deceased. There her sister, Kiran, was also present. It appears, the appellant took Neelam in a scooter to her father's house first and thereafter she was taken to her maternal grandmother's house. The maternal grandmother, Smt. Prakash Kaur, and her maternal uncle, Shammi, took the deceased to Safdarjung Hospital in a Three Wheeler scooter and got her admitted in that Hospital. The information about this incident was given to the Police Station Punjabi Bagh and thereafter Sub-Inspector Dharam Singh recorded the statement of Neelam in the Hospital. Ext. Public Witness -7/A, of this incident and on the basis of which the case was registered against the appellant under Section 307 Indian Penal Code . On 3-6-1985, Shri G. C. Pillai, Executive Magistrate, reached the Safdarjung Hospital at 1.35 P.M. and recorded the statement of Neelam. The said statement was concluded at 2.00 P.M. On such statement having been recorded by the Executive Magistrate, the accused was arrested. Neelam remained in the Hospital till 17-6-1985 when she succumbed to her injuries. The information about the death of Neelam in the Hospital on 17-6-1985 was passed on by wireless message at 6.25 P.M. to the Duty Room of Police Station Punjabi Bagh. Inspector of Police, Shri Ram Gopal,

Public Witness 13, took over the investigation on 18-6-1985, after Neelam's death. He prepared inquest report, Ext. Public Witness 13/A and recorded supplementary statements of witnesses. In the post-mortem report of the body of the deceased Neelam conducted by Public Witness 2, Dr. L. T. Ramani, it was opined that the death was caused due to the burns which are entemortem caused by fire and death was due to septicemia following infected burns and there were 40-45 per cent burns. The doctor also found that old burn marks on different parts of the body of the deceased.

(4) The appellant did not plead guilty and produce any evidence in defense.

(5) There cannot be any dispute about certain facts, which stand established that the deceased Neelam had burn injuries on her body and she was taken to Safdarjung Hospital on 3-6-1985 and was admitted for treatment of burn injuries. She died on 17-6-1985 in the Hospital. According to Dr. L. T. Ramani, Public Witness 2, who conducted post-mortem on the dead body of Neelam on 18-6-1985, the death was caused due to the burns which are entemortem caused by fire and death was due to septicemia following infected burns and there were 40-45 per cent burns. The doctor also found certain old burn marks on different parts of the body of the deceased, which of course had nothing to do with the cause of the death of the deceased, as these marks were not of recent origin.

(6) The question that arises for consideration is whether the appellant has caused burns to Neelam, deceased by pouring kerosene oil out of the stove by removing its lid and by setting her on fire. In this context, the prosecution has relied principally on the dying declaration made by the deceased before the Executive Magistrate, Shri G. C. Pillai, Public Witness 15, on 3-6-1985.

(7) Other two dying declarations, which have been relied upon by the prosecution, are the statements made by the deceased before Kiran,, deceased's sister (Public Witness 1) about the cause of her death and before Sub-Inspector Dharam Singh, Ext. Public Witness 7/A. It may be noted here that since Dharam Singh had died, the statement, Ext. Public Witness 7/A, made by the deceased Neelam before Sub-Inspector Dharam Singh. has been got proved by Constable Ram Dhari, Public Witness 14.

(8) The factors, which should be taken into consideration by the courts, whether or not the dying declaration should be relied upon, have been well settled by the Supreme Court in a series of decisions. Suffice it to refer to *K. Ramachandra Reddy and another v. The Public Prosecutor* : 1976 CriLJ1548 where at page 1997 the Supreme Court has held that the dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be testified 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 rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. The Supreme Court, while relying upon their earlier judgment on dying declaration in *Khushal Rao v. State of Bombay* : 1958 CriLJ106 further reproduced and affirmed the observations in the aforementioned case (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers 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; and .(6) that 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; that the statement has been consistent throughout if he had several opportunity of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

(9) Since the prosecution is principally relying upon the declaration made by the deceased Neelam before the Executive Magistrate, Public Witness 15, it will be appropriate to produce this dying. declaration as follows : 'I was married on 14th Oct. 1983 with Surinder Kumar S/o Kishan Lal resident of Ambala. I was living with him and I have no children. I was living at Shakurpur. He is selling ice-cream in the canteen of Samrat Cinema. On 2-6-85 at 12-15 p.m. (night) he came to the house. Before going for work he told me that I should bring Rs. 500 from my father failing which he will finish me. I did not bring the amount. He beat me at 2 p.m. on 2-6-85 and then went for work. At the time of interval he came to the house of neighbour and he took liquor and again went for duty. After the cinema was over at 12.15 p.m. he came to house and asked for money and I asked him I did not get the, money. Then he asked me whether you wanted to live or die and asked me to get out of the house. I asked him that I cannot go out in the midnight and I will go in the morning. He there gave me two-threeblows. He took the stove and opened the cork and poured K. oil on my head and gone all over my body. He then lighted a matches on my cloth. I was having Selwar commis. I then came out and fell on the Nalla near the house. He took out my selwar commis and put another doth (suit) and took me to my father's house Janta Colony, near Raghbir Nagar. From there I was brought to the house of Prakash Kaur, Nanni at E Block RagbbirNagar. I was brought to hospital by my father Raj Kumar, Shammi my uncle, Prakash Kaur, Nanni and Kiran my sister at 2 p.m. and admitted in the hospital at 3.45 p.m. (3-6-85). My husband poured K. Oil and lighted fire and due to this all my body has been burnt. From the date of my marriage he was giving me all sorts of trouble and used to give all sorts of rubbish languages. I have nothing more say.'

(10) We are afraid that no credence or reliance can be given to such a declaration made by the deceased before the Executive Magistrate if we test the truth of such declaration with reference to the law laid down by the Supreme Court.

(11) Head Constable Kuldip Singn, Public Witness 5, who visited the spot, i.e. C-106, J. J. Colony Shakurpur. on the direction of the Inquiry Officer on 3-6-1985, has stated, that on 3-6-1985 he has taken photographs from different angles and which are Ext. Public Witness 5/A-1 to Public Witness 5/A-15 and their negatives, After having perused the photographs, more particularly Ext. Public Witness 5/A-1 to Public Witness 5/A-3, a glaring discrepancy is found in the prosecution's case that a sort of frying pan has been found intact on the plate of the stove (upper part (tava) of the stove), which makes the prosecution story highly unreliable. In case the prosecution version is accepted that the appellant has taken out the lid of the stove and poured kerosene oil on the head of the deceased, then certainly the pan Would not have remained intact in the position as shown in the photograph on the plate (tava) of the stove. In that situation, the pan would have fallen down. The mere fact that the pan has been found to be intact on the plate of the stove, clearly shows that the appellant has not thrown kerosene oil on the Head of the deceased. No doubt lid of the stove has been found separately lying in the room but the way the prosecution has tried to substantiate that the oil has been sprinkled on the head of the deceased by; the appellant, such a situation cannot arise in the face of the pan remaining intact on the stove.

(12) Further, the Executive Magistrate. Public Witness 15, in his statement although has stated that Neelam was able to speak and able to give rational answers but no attempt has been made by him to contact the doctor who was treating her or some other doctor in the hospital and to find out from him whether or not Neelam was in a fit state of mind that she is able to make a conscious and voluntary statement with normal understanding. The mere statement of the Executive Magistrate that she was able to speak and was able to rationally answer is not enough to substantiate that she was conscious and in a fit state of mind to give voluntary statement, more particularly when no certificate to this effect was obtained by the Executive Magistrate nor was any attempt made in this direction, In this context, a reference may be made to Lallubhai Devchand Shah and others

v. The State of Gujarat : 1972 CriLJ828 in which their Lordships have observed : 'It would be) very unsafe to record a conviction for the offence of murder, relying solely upon a statement recorded as a dying declaration which is not shown to be made by a person in a fit state of mind.,' There can be no doubt that when a dying declaration is recorded the person who records the statement must be satisfied that the person who makes the statement is consciously making the statement understanding the implications of the words he uses.'

(13) Such a statement given by the Executive Magistrate is too vague. Doctor has also stated that he cannot say that she was in a feeble condition but she was able to talk. Merely the deceased was able to talk does not necessarily mean that she was in a fit state of mind and is able to make conscious and voluntary statement.

(14) The dying declaration suffers from another serious infirmity that it is not in question and answer form. and in the words and language of the deceased. The statement of the deceased has been recorded in and not signed in English language. It has not been shown as to why the Executive Magistrate failed to take the statement of Neelam in her own language and words, i.e. in Hindi. No doubt according to Public Witness -1 Kiran, the deceased had studied up to 10th standard in Tagore Garden Government School No. 1. But this itself does not suggest that she was well versed with the English language and could understand the questions in English as were asked by the Executive Magistrate A hailing from South with different accent. There is no explanation why the statement was recorded in English.

(15) Furthermore, the incident took place on 2-6-1985 midnight. According to the statements of Kiran, Public Witness -1 Smt. Prakash Kaur, maternal grandmother. Public Witness -3, and Shammi, maternal uncle of the deceased, Public Witness -4 it appears, that Neelam was taken first to her father's house, then maternal grandmother's house where her sister, maternal uncle and maternal grandmother were present. Thereafter she was taken to Safdarjung Hospital and got admitted by them. In the next date, 3-6-1985 her statement was recorded at 1 35 P.M. and was concluded at 2 P.M. In other words, the declarant was in the midst of nearest relatives and the evidence was recorded by the Executive Magistrate after 12

hours of the incident. In such a situation, such a declaration could, therefore, naturally be influenced by her relatives and could be tutored one. therefore, it would not be safe and prudent to rely upon such a dying declaration. In this connection, reference may also be made to Balak Ram and another vs. State of U.P. : 1974 CriLJ1486 .

(16) Next reliance has been placed on the dying declaration made by Neelam before the Investigation Officer Shri Dharam Singh, S.I. Ext. 7/A on the basis of which the case was registered. According to this document Neelam had stated that she was married one and a half year back with Surender Kumar, 810 Kishan Lal resident of Ambala and since then she has been maltreated by her husband who has been using all sorts of abusive language against her and beating her. On 2-6-85 in the morning her husband asked her to bring Rs. 500 (Rupees five hundred only) from her parents. She did not bring the money from her (parents) house because of shame. In the night at about 12.15 A.M. her husband came after finishing his duty at Samrat Cinema. He was little drunk. Immediately on his arrival he asked her whether or not she brought the money from her parent's as was asked by him. She replied in negative where on he started giving beatings to her. He removed the lid of stove tank poured the kerosene oil on her and set her wearing clothes on fire by lighting a match stick. She came out of the room and fell into the water drain so that the fire could, put off. From her house her husband left her to her father's house in Janta Colony in a Scooter. Her maternal grandmother Smt. Prakash Kaur and maternal uncle Shri Shammi removed her to the hospital and got her admitted there.

(17) It would again not be prudent to base conviction on a dying declaration made before the Investigation Officer In Balak Ram and another v. State of U.P. (supra), the Supreme Court has laid down that the Investigating Officers are keenly interested in the fruition of their efforts and though they do not suggest that any assumption can be made against, their veracity, it is not prudent to base conviction on a dying declaration made to Investigating Officer. Apart from this, such a dying declaration cannot, again, be relied upon in view of the reasons given earlier in respect of the dying declaration made to the effect that the position of the paper lying intact on the tava of the stove clearly makes the theory of the prosecution

wholly unreliable. Furthermore, the Investigating Officer Sub- Inspector Dharam Singh has died and has not been produced and the appellant, therefore, has been denied the benefit of cross-examining that witness. Apart from that right thumb impression of the deceased was taken by the Investigating Officer on the dying declaration. It had not been shown as to why right thumb impression was taken when the deceased was educated up to 10th standard and the taking of thumb impression, therefore, was highly unintelligible. The Mlc, Ext. Public Witness -19/A prepared by the Doctor Shri K. Murthy also does not indicate or suggest that the deceased was in such a critical condition that she was not able to sign the document. This makes the story of the prosecution doubtful. It appears again, strange that while making the site plan etc. and after recording the statement of Kiran and others, he did not take .the statement of anybody in the locality to have the information whether the deceased and the appellant were on good terms or whether they were quarrelling with each other.

(18) Another oral declaration made by the deceased Neelam to her, sister Kiran Public Witness -1 is unreliable for the reason that she- was contradicted by her grandmother and maternal uncle Shammi who were accompanying the deceased along with Kiran to Safdarjung Hospital for getting her admitted. She has stated that there was a quarrel between her and the appellant had burnt her. Prakash Kaur and Shammi have clearly contradicted the statement of Kiran inasmuch as they have stated that Neelam did not tell them anything about he quarrel an also as to how she had been caused burns by her husband although they were also traveling in the same scooter. No doubt those witnesses have been declared hostile but they have stood the test of cross-examination and have stuck to this position that Neelam did not tell. them as to how she had been caused burn injuries by her husband. Moreover, the deceased, according to PW-1 Kiran, herself did not tell her as to how her husband has set her on fire which makes the story of prosecution doubtful.

(19) Once, these declarations are discarded, there is no other evidence which could connect the accused with the commission of the offence and, therefore, it will be highly unsafe to convict the appellant', more particularly in case of murder, on the basis of such declarations.

(20) Apart from the above, the prosecution for the reasons best known to them have not joined any persons from the locality while showing the recovery of the stove etc. from the house of the appellant. Furthermore, having regard to human conduct, in case the appellant has really caused burn injuries to the deceased by pouring kerosene oil and setting her on fire as alleged by the prosecution, he would not have taken that lady to her father's house, then maternal grandmother's house and thereafter to the hospital.

(21) The result of our above discussion is that the prosecution has failed to establish the case against the appellant beyond reasonable doubt. The appeal, therefore, is allowed, the judgment of the Addl. Sessions Judge dated 20-8-1987 is set aside. The conviction of the appellant for the offence under Section 302 I.P.C. and the sentences of life imprisonment imposed on him are set aside. In case the appellant is on bail, his bail bond and surety bond shall be treated as cancelled.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com