

Shashi Bala Vs. the State of Nct

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Court : Delhi

Decided On : Nov-06-2006

Reported in : 138(2007)DLT553

Judge : R.S. Sodhi and; P.K. Bhasin, JJ.

Acts : Indian Penal Code (IPC) - Sections 34 and 302

Appeal No. : Criminal Appeal No. 380 of 2004

Appellant : Shashi Bala

Respondent : The State of Nct

Advocate for Def. : Anil Soni, APP and ; Jagdish Prasad, Adv.

Advocate for Pet/Ap. : Ritu Gauba, Adv

Disposition : Appeal allowed

Judgement :

P.K. Bhasin, J.

1. This Appeal has been filed by the convict Shashi Bala to challenge the judgment dated 10.02.2004 of the Additional Sessions Judge, Delhi in Sessions Case No.100/01 whereby she has been held guilty under Section 302 IPC and the order dated 13.02.2004 whereby she has been sentenced to undergo

imprisonment for life and also to pay a fine of Rs.500/-, in default to undergo further simple imprisonment for one month.

2. Appellant Shashi Bala along with her husband Surender Kumar were charged under Section 302/34 IPC for the murder of one Satish Kumar. During the trial before the trial court appellant's husband Surender Kumar expired and so the case against him stood abated.

3. The prosecution case is that the deceased knew about the extra-marital affair of the appellant Shashi Bala with his ustad Pramod Kumar. The appellant's husband also knew about the relationship between her and Pramod Kumar and to avoid that relationship becoming known to every one through the mouth of the deceased the appellant and her husband killed him in their own house when he was called there by them on 31-03-1985. As per the prosecution case the appellant Shashi Bala had sprinkled kerosene oil on the deceased and her husband ignited the matchstick and had put him on fire. At the time of the incident Pramod Kumar was also present in the house of the appellant and he had tried to put off the fire by pouring water on the deceased and also took him to the hospital. However, the deceased could not survive and succumbed to the burn injuries in the hospital on 5-4-1985.

4. The prosecution sought the conviction of the two accused on the basis of two dying declarations of the deceased one of which(Ex.PW-20/B) was recorded by the investigating officer on 01-04-1985 since the deceased was not fit for statement on 31-03-1985 and the second (Ex.PW-15/A) was recorded on 02-04-1985 by the SDM(PW-15). The deceased had claimed in his dying declarations that Shashi Bala was having an affair with his ustad Pramod Kumar and that even though the husband of Shashi Bala was also aware of that relationship between Shashi Bala and Pramod Kumar but they were afraid that he (the deceased) might not make it public bringing disrepute to them and to avoid that they brought him to their house on the fateful day on some pretext when Pramod Kumar was also present there and the two accused then set him on fire and Pramod Kumar poured water on him and also took him to a hospital. The trial court relying on the two dying declarations of the deceased has convicted the appellant

Shashi Bala under Section 302 IPC. Feeling aggrieved she has come up in appeal.

5. It has been argued by the learned Counsel for the appellant that none of the two dying declarations relied upon by the prosecution inspires confidence. In support of this submission she has pointed out that the deceased had received 100% burns and so could not have been expected to make any of the dying declarations both of which are quite detailed ones and in fact on the date of incident itself he was unfit to make statement as per the prosecution case. It has further been contended by the learned Counsel that the fact that the deceased was unfit to make any statement even on 1st April, 1985 becomes evident from the fact that when immediately after recording of the said dying declaration by S.I. Kartar Singh the SDM reached the hospital he could not record the statement of the deceased because at that time he was declared unfit for statement. Learned Counsel further contended that the second dying declaration made by the deceased on 2nd April, 1985 before the SDM Sh. V.P. Rao also for the same reason cannot be relied upon because there is no evidence of any doctor to show that the deceased was fit for statement on that day. It has also been contended that there is a material infirmity in the prosecution case and that is that prosecution has failed to examine Pramod Kumar who as per the two dying declarations was an eye-witness of the incident and there is no Explanationn for his non-examination and due to that this Court should raise an inference that in case he had been examined he would not have supported the prosecution. Learned Counsel further submitted that in any case both the dying declarations are inconsistent and the version of the deceased is highly improbable.

6. On the other hand it has been contended by the learned Additional Public Prosecutor that the two dying declarations cannot be discarded on the grounds urged by the appellant's counsel and that as far as the so-called discrepancies in the two dying declarations are concerned they cannot be said to be material at all and that in fact in both the dying declarations the deceased has categorically implicated both the accused persons. He, thus, has fully supported the trial Court's judgment holding the appellant guilty.

7. We have given our due consideration to the rival submissions and have also carefully examined the two dying declarations relied upon by the prosecution since admittedly there is no other evidence of the incident. There is no doubt that conviction of an accused can be based solely on a dying declaration of the deceased but only if the dying declaration is found to be wholly reliable and truthful. When there are more than one dying declarations they have to be tested on the touchstone of consistency and probabilities also. This has been so held by the Hon'ble Supreme Court in a case reported in 2004(13) SCC 314 State of Maharashtra v. Sanjay wherein it has also been held that 'It is not the plurality of the dying declarations that adds weight to the prosecution case, but their qualitative worth is what matters. It has been repeatedly pointed out that the dying declarations should be of such nature as to inspire full confidence of the Court in its truthfulness and correctness.' Keeping in view these observations and on careful examination of the two dying declarations (Ex. PW-20/B and Ex. PW-15/A) we have no manner of doubt that none of them inspires confidence. We are in full agreement with the submission of the learned Counsel for the appellant that in both the dying declarations there are material discrepancies which make them doubtful. Besides, there are other reasons also to reject the same. In the first dying declaration, Ex.PW-20/B, the deceased had told the Investigating Officer (who has not been examined by the prosecution) that he had gone to the house of the accused on the day of incident along with appellant's husband from Pant Hospital where Pramod Kumar's brother was admitted. The appellant and Pramod Kumar had also gone to the hospital. He further claimed in his dying declaration that he had accompanied Surender (the deceased accused) while the appellant Shashi and Pramod came together on a rickshaw up to Nathu Colony around 5.00 p.m. and there they left the rickshaws and started walking on foot and when he (the deceased) was about to go to his house Shashi told him to come to her house. He accordingly went to their house and there when he was about to take bath he went to the room, where Shashi and Surender lived, to take a bucket Shashi threw kerosene oil on him and Surender lit the matchstick and put him on fire and when he ran outside on being set on fire his ustad Pramod Kumar poured water on him and tried to douse the fire and then took him to his (Pramod's) house and from there Pramod took him to Shahdara hospital. The deceased further claimed that

there was a love affair going on between his ustad Pramod Kumar and Shashi and he had been telling Pramod Kumar not to meet Shashi and to have any relationship with her and that all this he had told to Pramod Kumar a day before only in the presence of Shashi and because of that Shashi and her husband Surender had felt bad. He further claimed that Shashi and Surender had brought him to their house and there with the intention of killing him had set him on fire.

8. In the second dying declaration, Ex. PW-15/A, which the deceased, as per the prosecution case, made before the SDM Sh. V.P. Rao (PW-15) on 02.04.1985 the deceased claimed that on 31.03.1985 he had gone to the house of Shashi with his ustad Pramod at 6.00 p.m. where Shashi's husband Surender was also present. He further stated that his ustad Pramod had illicit relationship with Shashi and that he had told his ustad once that he was doing a wrong thing. The deceased further claimed that he had also threatened Pramod that he would tell about that relationship to Shashi's husband. The SDM when asked the deceased whether Shashi's husband was aware of the relationship between Pramod and Shashi the deceased answered in the affirmative and stated that because of the fear of getting bad reputation they (Shashi and her husband) had set him on fire. The deceased had further claimed in his second dying declaration that two days back Pramod had told him that he should not name Shashi and Surender but he could implicate him (Pramod) in case he wanted to do so. However, Pramod informed him a day before that he should not be implicated but he(the deceased) told Pramod that he had already told the people all the things. When the SDM asked the deceased if there was any enmity between him and the two accused he answered in the affirmative. In reply to another question of the SDM about the reason of his going to the house of Shashi on the day of incident when there was enmity the deceased answered that his ustad had taken him there saying that he should not be afraid when he (Pramod) was with him. The deceased also replied to a question of the SDM that he was afraid of going to the house of Shashi because he suspected that they may not kill him. The deceased also told the SDM that he had been burnt by Shashi and her husband Surender and that Pramod had tried to save him. When asked by the SDM as to why he had not run away from there after kerosene oil had been thrown on him the deceased replied that Surender had locked the door from outside.

9. There is no doubt that in both the dying declarations the deceased implicated both the accused persons. However, a perusal of both the dying declarations shows that they are not consistent. In the first dying declaration the deceased had claimed that on the fateful day he had gone to the house of the accused persons along with the deceased accused Surender and Shashi and Pramod had come together on a separate rickshaw. In the second dying declaration, however, the deceased claimed that he had gone to the house of the accused along with Pramod and that Shashi and her husband Surender were already present there. In the first dying declaration the deceased also claimed that when he had been put on fire he had come out of the room and then Pramod Kumar had poured water on him in an attempt to douse the fire. However, in the second dying declaration made before the SDM when the deceased was asked as to why he had not run away after kerosene oil had been thrown on him the deceased had replied that he did not do so because Surender had locked the house from outside. This he had not claimed in his first dying declaration. In the first dying declaration the deceased had not stated that Pramod had told him not to implicate him as was stated by him before the SDM in his second dying declaration. In our view these are material inconsistencies in the two dying declarations which make both of them unreliable. It was held by the Supreme Court in a judgment reported in : (2005)9SCC769 State of Punjab v. Parveen Kumar that if there are two dying declarations giving different versions, a serious doubt is created about the truthfulness of the dying declarations.

10. We are also of the view that the version about the incident as narrated by the deceased in both the dying declarations appears to be in any case highly improbable. The deceased had claimed in his dying declarations that there was a love affair going on between the appellant Shashi and his employer/Ustad Pramod Kumar. In the second dying declaration the deceased claimed that the two accused had set him on fire apprehending that he may not disclose to the people about the illicit relationship between Shashi and Pramod Kumar as in that event it would bring disrepute for them. He had also claimed that in fact he had told everyone about that relationship and also that even the husband of Shashi knew about that relationship. Now, if the appellant's husband already knew about the relationship between her and Pramod and did not care about that then how he

could be bothered about people coming to know about that relationship and to kill the deceased. We cannot accept this motive. The prosecution, in any case, has not adduced any evidence to establish even this motive.

11. As per the two dying declarations Pramod Kumar had taken the deceased first to his(Pramod's) house and then to a hospital. That version also appears to be doubtful because the deceased himself had claimed in his second dying declaration that Surrender had locked the house from outside and due to that he could not run away from there when kerosene oil was poured on him. Apart from that, this version of the deceased becomes unreliable also for the reason that Pramod Kumar, who according to the two dying declarations was an eye witness of the incident, has not been examined by the prosecution and there is no Explanationn forthcoming for his non-examination. We are also of the view that if actually Pramod Kumar was present at the time of occurrence and had taken the deceased to the hospital as claimed by the deceased in his dying declarations then the FIR of this case would have been recorded on his statement on the day of the incident itself. However, in the present case the FIR was recorded not on the day of the incident but on 1-4-85 and that too not on the statement of Pramod Kumar but on the statement of the deceased made to the investigating officer which is being relied upon by the prosecution as his first dying declaration. The prosecution has placed on record one document which purports to be the MLC of Pramod Kumar which the doctor of S.D.N.Hospital prepared on 03-04-1985 when Pramod Kumar was taken there by SI Kartar Singh for medical examination with alleged history of burn injuries on both hands. This document appears to have been filed by the prosecution to show that Pramod Kumar had also got burnt in the incident while saving the deceased. However, even in this document the alleged history does not show that Pramod Kumar was burnt while saving the deceased as claimed in the two dying declarations. PW-6 Dr. S.K.Arora who had examined Pramod Kumar had stated in his cross-examination that he had not asked the injured as to how he had sustained the burn injuries.

12. We are not inclined to place any reliance on any of the two dying declarations of the deceased also for the reason that even though as per the evidence of Dr. T.S.Vimal(PW-7) of Swami Dayanand Hospital where the deceased was brought

after the incident Pramod Kumar had brought the deceased there Pramod Kumar himself did not claim that the two accused had burnt Satish. The alleged history recorded in the MLC at least does not show that. This fact also renders the version in the two dying declarations highly doubtful.

13. Yet another reason for not placing any reliance on the dying declarations relied upon the prosecution is that the deceased himself claimed before the SDM that he had an enmity with the accused. Not only that he had also claimed that Pramod Kumar had threatened him not to involve him in the incident. So, it is quite possible that the deceased implicated the two accused being afraid of Pramod Kumar who allegedly was having illicit relationship with the appellant Shashi and about which the deceased knew and in the facts and circumstances we are also of the view that the deceased husband of the appellant Shashi may not be knowing about the relationship between his wife Shashi and Pramod Kumar.

14. As per the statement of PW-4 Ct. Ram Chander made in his cross-examination he had gone to the house of the accused on 1-4-85 with the investigating officer when Pramod Kumar was also there besides Shashi Bala and her husband Surrender. As per the prosecution case, the accused were arrested on 3-4-85. If on 1-4-85 both the accused were present in their house when the police visited there and Pramod Kumar was also present both the accused would have been arrested on 1st April itself because as per the first dying declaration of the deceased Pramod Kumar was an eye witness and if that dying declaration was true Pramod Kumar must have informed the police at least at that time that the accused were responsible for the burn injuries of the deceased. The accused were, however, not arrested on 1st April and that fact also renders the two dying declarations implicating the accused doubtful.

15. As per the prosecution case SI Kartar Singh had obtained the signature of the deceased on the first dying declaration and the SDM claims to have taken the impression of the thumb of the foot of the deceased on the second dying declaration. However, PW-7 Dr. T.S. Vimal has claimed in his cross-examination that a person having 100% burns, which the deceased had, on different parts of his body, cannot put his signature. He also admitted that the thumb impression of

the foot were also burnt and it was not possible to take even the thumb impression of the foot as well as of the hands. This statement of the doctor also casts doubt about the reliability and genuineness of the two dying declarations. Apart from this we are also of the view that considering the fact that the deceased despite having received 100% burns and being unfit to make any statement on the date of incident and even after recording of the first dying declaration on 01-04-1985 when the SDM came to the hospital he could not have been in a position to make very detailed statements as have been relied upon by the prosecution. Giving of detailed statements by the deceased also makes his dying declarations doubtful. Even Hon'ble Supreme Court in two cases reported as (2005) 10 SCC 259 Mannulal Sahu and another v. State of M.P. and (2004) 14 SCC 314 State of Maharashtra v. Sanjay had observed that a person with almost 100% burn injuries could not be expected to give minute details in his statements and in those cases the dying declarations which were quite detailed were considered to be doubtful for this reason.

16. The trial Court has convicted the appellant simply on recording its satisfaction that the deceased had made the two dying declarations in a fit state of mind but without making any effort to notice the infirmities in the two dying declarations which we have noticed. The trial Court has noticed the plea of the accused that the deceased had caught fire while he was making tea but that plea has been rejected on the ground that if that was true the appellant and her husband would have attempted to put off the fire but as per the record it was Pramod Kumar who took Satish Kumar first to his residence and then to hospital and there was nothing on record to show that the two accused had bothered to remove the injured to the hospital and that conduct of theirs showed their guilt. In our view, this conclusion of the trial Court cannot be sustained because Pramod Kumar has not been examined and as far as the conduct of the accused is concerned learned Counsel for the appellant pointing towards an MLC Ex. PW-8/B in respect of the appellant Shashi wherein it is mentioned that she had undergone abortion on 30th March, 1985 submitted that she herself having been in a bad state of health could not have gone to the hospital with the deceased. This MLC of the appellant was prepared on 3-4-85 when she was got examined by the police at Swami Dayanand Hospital, Shahdara. We are in agreement with the submission of learned Counsel

for the appellant that her not accompanying the deceased to the hospital cannot be in view of her health condition considered as a circumstance pointing towards her guilt. As far as the deceased accused is concerned he was also got medically examined on 3-4-1985 with alleged history of burn injuries. Learned Counsel for the appellant has also rightly submitted that the deceased accused must have suffered the burn injuries while trying to save the deceased.

17. For all these reasons, we feel that the prosecution cannot be said to have established its case against the appellant beyond reasonable doubt. The two dying declarations relied upon by the prosecution cannot be said to be free from doubts and since there is no other evidence led by the prosecution to establish its case or even to corroborate the two dying declarations relied upon by it the appellant deserves to succeed in her appeal against the impugned judgment of the trial Court.

18. In the result, we allow this appeal of the appellant Shashi Bala and set aside the judgment dated 10.02.2004 and order on sentence dated 13.02.2004 passed by the trial court in sessions Case No.100/01 in respect of FIR No.130/85 registered at police station Seema Puri and consequently she stands acquitted of the charge of murder. She is directed to be released from jail forthwith, if not required to be detained in any other case.