

Kishore Vs. State of Rajasthan

Kishore Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/760069

Court : Rajasthan

Decided On : May-13-1988

Reported in : 1988(2)WLN102

Judge : Surendra Nath Bhargava and; Gopal Krishna Sharma, JJ.

Appeal No. : D.B. Cr. Appeal No. 116 of 1986

Appellant : Kishore

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Shri. K.K. Sharma

Disposition : Appeal allowed

Judgement :

Gopal Krishna Sharma, J.

1. This appeal has been preferred against the judgment dated 14-2-1986 passed by the Sessions Judge, Jaipur City Jaipur by which, he found the appellant guilty under Section 302 I.P.C. and sentenced him to life imprisonment.

2. According to the prosecution, the Police received a telephonic message from Shri Narain Singh that a woman has died on account of burns. After receiving this information the Police reached at the hospital and recorded Parcha Bayan of Smt.

Guddi. In this Parcha Bayan Guddi has stated that her marriage had taken place 8-9 years before and she has a female child. Her husband runs a barber shop. Her mother-in-law used to quarrel with her and she instigated her son to burn her. At this her husband poured kerosene and then burned her. The cause of burning is that her mother-in-law and her husband used to tell her to earn something. She refused to earn so they were annoyed with her. On the basis of this Parcha Bayan a regular FIR was registered. It is also alleged that a dying declaration was recorded by the Magistrate on the same night. On account of the burns Mst. Guddi died and her post mortem was conducted on 22-6-1984. In the post mortem report the Doctor has mentioned 8 injuries and according to his opinion the cause of death was shock due to extreme flame burns. The Doctor preserved pieces of liver and both kidneys, pieces of small intestine, scalp hairs and blood from hairs for Chemical Examination and they were handed Over to the Police Constable along with the post mortem report.

3. This incident took place on 21-6-1984. Smt. Guddi was taken to the hospital but she could not be saved and she died on 22-6-1984. After completing usual investigation the Police submitted challan against the appellant Kishore and his mother Mst. Pushpa.

4. The learned trial Court framed charge against Kishore under Section 302 I.P.C. and against Smt. Pushpa under Section 302/109 I.P.C. Both the accused pleaded not guilty and claimed trial.

5. The prosecution examined 10 witnesses. The accused-persons also examined two witnesses in defence. According to the accused-persons Smt. Guddi committed suicide by pouring kerosene oil on her body and then lit the match stick. The trial Court did not agree with the contention of the accused persons. After hearing both the parties the trial Court came to the conclusion that the case against Smt. Pushpa has not been established beyond reasonable doubt and she was acquitted. The trial Court, however, found the appellant Kishore guilty of the offence under Section 302 I.P.C. and sentenced him as mentioned above.

6. We have heard both the learned Counsel at great length. Shri K.K. Sharma, learned Counsel for the appellant argued that the conviction of the accused is

based on the evidence of dying declaration made by Smt. Guddi because two Police personals and Judicial Magistrate Shri Hari Singh Punia. It was argued that it is unsafe to base conviction on the basis of dying declaration which was partly not believed so far as co-accused Smt. Pushpa is concerned. In the dying declaration Smt. Guddi stated that Mst. Pushpa instigated her son to pour kerosene oil and burn her and Kishore, her husband accordingly did so. The aspect regarding Smt. Pushpa was not believed and, therefore, she was acquitted. So the argument is that it is unsafe to partly rely on the dying declaration and partly dis-believe the same dying declaration. We will discuss his argument later on. It was also argued that the prosecution has not examined material witnesses who were named by the prosecution witness Narain Singh PW 4. Amar Singh and Gopal Singh were those persons who were present at the place of incident but they were not examined. It was also argued that the report of Forensic Science Laboratory does not support the prosecution. It was further argued that other material witnesses namely; the doctor who examined Smt. Guddi in the hospital, the doctor who admitted Smt. Guddi in the hospital have not been examined and the bed-head ticket has not been produced. It was also argued that there are three dying declarations of Smt. Guddi and all these dying declarations are contradictory and unreliable.

7. The learned Counsel for the appellant gave much stress on the dying declarations and argued that three dying declarations are of no value. The trial Court has already dis-believed these three dying declarations in connection with the co-accused Smt. Pushpa and acquitted her. Thus, the conviction of the appellant cannot be sustained on the basis of the same dying declaration. It was argued that the dying declarations Ex. P 16 and Ex. P 19 which were recorded by the Police-personnel are concocted and fabricated. Smt. Guddi was not in a position to make any statement looking to her condition. According to Dr. MR. Goyal (PW 7) she died on account of shock due to intensive burns. It was also argued that there is no evidence available on record to show that Mst. Guddi was mentally fit and in a position to give statement, so no conviction could be sustained on the basis of such dying declarations.

8. We have considered this argument and it has great force. Smt. Guddi was taken to hospital in intensive burn condition. The Doctor must have examined her in the hospital where the Police recorded her Parcha Bayan. Some doctors must have attended her and must have prepared the ticket for admitting her in the Ward. Who was that doctor who examined Smt. Guddi first of all when she was taken to the hospital. The prosecution should have examined that doctor who could have cleared the position of Mst. Guddi. The fact, whether she was in a serious condition or she was in a fit condition to give Parcha Bayan, should have been proved by the prosecution. So the non-examination of the doctor who first of all examined Smt. Guddi gives adverse inference against the prosecution and creates serious doubt about her mental condition. It can also be said that by not examining the doctor who at the initial stage examined the injuries of Smt. Guddi and non-production of the bed-head ticket shows that the prosecution has suppressed the evidence and withheld the evidence in connection with the condition of Mst. Guddi. The Parcha Bayan (Ex. P 16) has been recorded by the ASI, but no time has been mentioned on this Parcha Bayan. The statement Ex. P 19 was recorded by another Police Officer and in that statement also no time has been mentioned as to when it was recorded.

9. It was also argued that PW 6, the Sub-Inspector, Shri Ram Prasad has recorded the statement of Smt. Guddi but did not obtain any certificate from the doctor that Smt. Guddi was in position to give any Parcha Bayan. Therefore, it is unsafe to rely on the statements Ex. P 16 and Ex. P 19.

10. It was also argued that it is unsafe to rely on the dying declaration Ex. P 8 recorded by Hari Singh Punia, the Judicial Magistrate. This statement was recorded in the hospital on 21-6-1984 at 10.50 p.m. This statement was not recorded in presence of doctor or any other witness. Hari Singh Punia (PW 1), ACJM has stated that he recorded the statement Ex. P 8. He did not read over the statement to Mst. Guddi after recording it but it was written as stated by her. He has not stated in his statement that who took him to the Ward where Smt. Guddi was lying. He did not ask anybody to identify Smt. Guddi. The Magistrate did not know Mst. Guddi. He was not accompanied by any Police Officer. It is strange that he went straight to bed No. 11 and without satisfying himself that the lady who is

giving statement was Mst. Guddi or not he recorded the statement. Ex. P 8. Apart from this, the statement was recorded in the hospital where a duty doctor always remains. He has stated in the cross-examination that he called for the doctor but the doctor did not come and after 40 minutes he recorded this statement. This is unbelievable statement. It cannot be believed that there would be no doctor, nurse or Ward boy. There is no endorsement on the statement Ex P8 of the Magistrate that he was satisfied with the condition of Mst. Guddi and he found that she was in a fit condition to give statement. It was his duty to call the duty doctor and get a certificate of the doctor that Smt. Guddi was in a fit condition to give statement before recording the dying declaration. In cases where doctor is not available then it is duty of the Magistrate to put a note before recording a statement that he was satisfied that the condition of Mst. Guddi was fit and in conscious state to give statement. It is expected from a Magistrate to note these provisions of law. But in the present case Shri Hari Singh Punia PW 1 did not observe these formalities. Therefore, no reliance can be based on the dying declaration Ex. P 8 also.

11. If no doctor was available in the hospital when Ex. P 8 was recorded, this fact could be proved very easily by calling the record of the hospital. When a patient is admitted in the Ward a bed head ticket is always prepared and in that ticket the treatment and the condition of the patient is mentioned. So a bed head ticket is a very important document which should have been produced by the prosecution to show the condition of Mst. Guddi when she was admitted and sent in the Ward and her statement Ex. P 8 was recorded. This bed head ticket has not been produced. The suppression of this material document creates suspicion in the correctness of the prosecution case.

12. In the case of K. Ram Chandra Reddy and Anr. v. Public Prosecutor 1976 SC 1994, the circumstances were similar to the present case. In that case also the Magistrate recorded the dying declaration and the Magistrate admitted that the injured was taking time to answer the questions and the patient was suffering with severe pain. It was observed in that case that 'inspite of these facts the Magistrate appears to have committed a serious irregularity in not putting a direct question to the injured whether he was capable mentally to make any statement'.

13. In the present case Mst. Guddi died on account of burning her body by 80 per cent. There is nothing on the record to show about her condition when she was admitted in the Ward. Intensive burns lead, the patient in a painful condition. In such intensive burns it cannot be believed that the patient was in a fit condition or was mentally fit to give statement. It was the duty of the Magistrate before recording the statement to put direct questions to Mst. Guddi whether she was capable mentally to make any statement. No question was asked by Shri Hari Singh Punia PW 1 in this regard. This omission is serious one because it is expected from a Magistrate that he knew the law well. This omission throws doubt on this fact whether Smt. Guddi was really in a fit state of mind to give statement. Therefore, the dying declaration Ex. P 1, cannot be relied at all and it is unsafe to convict a person on the basis of such dying declaration.

14. The Magistrate has also admitted that the dying declaration was not read over to Mst. Guddi. It was recorded when no body was present. The Magistrate has also admitted that he took 40 minutes to record the statement of Mst. Guddi. The statement Ex. P8 is a very small statement which has only eight questions. These questions and answers are covered in one page only It means that with great difficulty she might be giving answers to questions Under such circumstance, it was more imperative on the Magistrate to note the condition of Mst. Guddi. The Magistrate did not care to get the identity of Mst. Guddi and did not call any doctor before recording statement. Therefore, a serious doubt is created in the correctness of this dying declaration Ex. P 8.

15. We have perused all the three dying declarations, i.e., Ex. P 8 Ex. P 16 and Ex P 19 and after careful reading of these dying declarations' we find that they are contradictory to each other. In Ex. P 8, while replying a question as to who had extinguished the fire, the reply was that Mohalla-People extinguished the fire. Two persons of Mohalla came but she does not know their name. She has not stated such in Ex. P 16 and Ex. P 19. In Ex. P 19 she has stated that when she cried her husband closed the door of the house and did not permit any Mohalla People to come inside the house. What has been stated in Ex. P 19 has not been stated in Ex. P 16. Then in Ex. P 19 she has stated that with great difficulty Mohalla People came inside the house and then her mother-in law dragged her into the room and

changed her clothes. Such statement has not been given in Ex. P 16 and Ex. P 8. So this shows that every time there was improvement in the statement. It is highly doubtful that in a case of 80 per cent burn of body Smt. Guddi would be able to give statement. The difference and inconsistency in the statements proves that all these statements are false and concocted one. No reliance can be placed on such dying declarations and it is most unsafe to base conviction on such dying declarations.

16. The trial Court has disbelieved the dying declarations so far as accused Mst. Pushpa was concerned and she was acquitted. So the dying declarations were disbelieved as regard to one co-accused but were believed with regard to other co-accused. If a part of the dying declaration is untrue then it is unsafe to place reliance on the remaining part.

17. In case of Provincial Government, Central Provinces and Berar v. Jagan Bhat Sitaram and Ors. 1946 Nagpur 301, it has been observed as under:

It cannot be laid down as a general proposition of law that if a portion of a dying declaration is untrue, the rest of it must be necessarily rejected. It becomes almost always a question of fact as to whether a dying declaration should be relied upon or not. If part of such statement has been deliberately concocted, the Court would decline to believe the rest of it without corroboration and in such cases the jury ought to be properly cautioned. If any part is untrue owing to failure of memory or lack of powers of observation and so on, there is no reason why the jury should be debarred from accepting the rest.

18. In case of Lalaram Surajmal v. The State 1953 Madhya Bharat 249, it has been observed as under:

If a portion of dying declaration is untrue, the rest of it cannot necessarily be rejected. However, if a part of such statement is shown to have been concocted deliberately, the Court may decline to believe the rest of it without corroboration.

19. In case of Kishan Singh Mansha Singh v. The State of Punjab AIR 1963 Punjab 170, it has been observed as under:

Ordinarily a dying declaration should be either accepted or rejected as a whole. According to the dying declaration on which the Court below has placed reliance in the case in hand, both Kishan Singh and Kabul Singh gave injuries to the deceased. If Prakash Chand is to be considered to have falsely implicated Kabul Singh, I do not see any convincing reason for holding this very declaration to constitute a safe piece of evidence for convicting Kishan Singh. No plausible reason has been urged distinguishing the case of one from the other so far as the declaration goes, and the State having not appealed against Kabul Singh's acquittal it is obvious that his acquittal is considered to be justified by the State.

20. Narain Singh (PW 4) has stated that Kishore's wife had died on account of burns. He does not know as to how she was burnt. 4-5 persons of mohalla-people were there. Amar Singh and Gopal Singh were amongst them. Kishore was not opening the gate and was abusing. This witness was declared hostile. So this witness has not supported the case of the prosecution but at least it is clear that Amar Singh and Gopal Singh were amongst those people who arrived at the house when this incident took place. Similarly Sampat Singh (PW 3) was produced by the prosecution but he too does not support the prosecution case. From the statements of these two witnesses it is clear that Amar Singh and Gopal Singh were present at the time of taking place of the incident. But the prosecution has not examined these two witnesses. An adverse inference is, therefore, drawn that had they been examined by the prosecution they would not have supported the prosecution story. Non-examination of these witnesses is certainly fatal to the prosecution.

21. The post mortem report is Ex. P 21 and in this report the doctor has mentioned that 'no smell of kerosene oil found'. The incident took place on 21-6-1984 in the evening and she died on 22-6-1984 and the same day her post mortem was conducted. The doctor did not find any smell of kerosene either on the body or on the cloth. This also creates some doubt. Then the doctor has taken pieces of liver spleen and kidney and also bunch of black hair of Mst. Guddi. These articles were sent to the Forensic Science Laboratory for examination and the report of it is Ex. P 13. The jar containing scalp hair is described in the report as 'C' which was containing scalp hair was sent for examination for ascertaining about kerosene oil,

and the report about this is that Item No. 'C' does not have smell of kerosene oil. So the report of the Forensic Science Laboratory does not support the prosecution.

22. Ex. P 1 is the seizure memo of burnt clothes of Mst. Guddi. These clothes were sealed but there is no report of the Chemical Examiner about these clothes. PW 6 Shri Ram Prasad, the Investigating Officer has not stated that the seized clothes were sent to the Forensic Science Laboratory for examination. The clothes were sealed by the Police but were not sent to the Chemical Examiner. Very strange that the clothes were seized but were not sent to the Chemical Examiner for examination. The prosecution has not replied with regard to this fact i.e. not sending the clothes of Mst. Guddi for examination.

23. It was also argued that there is difference of time when this incident have taken place. Ex. P 22 is the true copy of the Rojnamcha dated 21st June, 1984 which shows that Narain Singh Tanwar on telephone.informed that one woman had received burn injuries and on the basis of this telephonic message the SHO Madan Mohan Sharma along with Ram Prasad SI and other Police Officials came to hospital. There is no mention in this copy of Rojnamcha as to when this telephonic message was received. After receiving this telephonic message the Police came to hospital. The Parcha Bayan Ex. P 16 was recorded by the Police and in that statement she has stated that at about 4-5 p.m. she was burnt. In the statement Ex. P 19 also she has stated that this incident took place at 4-5 p.m. In the dying declaration Ex. P 8 which was recorded by the Magistrate the first question asked was that at what time this incident took place and she replied the at 2 p.m. she was burnt. The FIR Ex. P 20 was prepared at 7.30 p.m. in which the time of incident as been mentioned as 4-5 p.m. So the difference about the time also creates doubt and benefit of doubt always goes to the accused.

24. In the statement Ex. P 19 she has stated that at the time of incident her father-in-law was not at the house but her sisters-in-law namely; Shanti, Chukki, Sugni and Munni were present. The accused has examined Smt. Santosh his sister and she has stated that her sisters Sampat and Suman were present at the house. She has not stated that Shanti Sugni, Munni and Chukki as her sisters. In the

cross-examination she was asked about Munni and she has stated that she has no sister named Munni. She has admitted that Sugni is her sister. So the difference in the names of the sisters-in-law of Mst. Guddi creates doubt in the correctness of the statement Ex. P 19 and the benefit of doubt is given to the accused.

25. Thus, we find that there is only evidence for convicting the accused-appellant and i.e. the dying declarations. We have discussed above the value of all the three dying declarations and we are of this opinion that it is not safe to rely upon such dying declarations.

26. In *Surja Ram and Ors. v. State of Rajasthan* 1984 WLN (UC) 372, the Division Bench of this Court held as under:

The declaration should be recorded by the Investigating Officer in the presence of two or more reliable witnesses not connected with the Police Department and with the parties concerned in the case. It was, therefore, obligatory on the Investigating Officer to have called two more respectable persons at the time of recording the dying declaration.

27. In the present case the dying declaration was recorded by the Magistrate and that too in the hospital. The Magistrate while recording the statement did not call any doctor, nurse or ward boy and the attendants of the other patients. Therefore, the dying declaration (Ex. P 8) recorded by the Magistrate was not properly recorded and it creates suspicion. It is doubtful whether this statement was given by Mst. Guddi to the Magistrate and whether it was correctly recorded.

28. The accused has examined two witnesses in defence i.e. Lal Chand DW 1, who is the neighbour of the accused and Smt. Santosh DW 2, is the sister of the accused appellant. Smt. Santosh was disbelieved because she is the sister of the accused and Lal Chand was disbelieved being the neighbour of the accused. This is no reason to disbelieve these witnesses. If a probable explanation is given and where there are two probabilities then the probability which is in favour of the accused should be accepted. We see no reason to discard the statements of these two witnesses and the learned trial Court has not correctly appreciated their

statements.

29. In view of our above discussion, we find that the learned trial Court has not correctly appreciated the evidence and the dying declarations and had erred in believing them so far as the accused appellant is concerned. The conviction and sentence of the appellant as held by the, trial Court cannot be maintained. There are so many doubts in the genuineness of the story and the documents produced by the prosecution and the benefit of doubt is given to the accused appellant.

30 As a result, appeal is accepted. The accused is not found guilty of the offence under Section 302, I.P.C. The conviction and sentence of the accused are set aside and he is acquitted. The accused appellant is in jail. He be set at liberty forth with, if not required in any other case.

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