

Vijai Kumar Vs. State of Rajasthan

Vijai Kumar Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/765349

Court : Rajasthan

Decided On : Nov-20-1985

Reported in : 1986(1)WLN123

Judge : Shri Kishan Mal Lodha and; Shyam Sunder Byas, JJ.

Appeal No. : D.B. Cri. Appeal No. 498 of 1980

Appellant : Vijai Kumar

Respondent : State of Rajasthan

Disposition : Appeal dismissed

Judgement :

Shyam Sunder Byas, J.

1. Accused Vijay Kumar was convicted under Section 302, IPC and sentenced to imprisonment for life by the learned Sessions, Judge, Churu by his judgment dated August 29, 1980 He has come-up in appeal to challenge his conviction. It. is a case of grim and pathetic tragedy where an innocent teen-age wife was burnt to death by her hot-headed husband.

2. Briefly stated, the prosecution case is that Smt. Manju D/o PW 1 Kundan Mal Sunar of Sardarsahar was married with the accused only 8/9 months before the incident (November 8, 1979). After the marriage, she came twice to her husband's

house at Sujangarh and lived with him for a few days. While she was living with her parents at Sardarsahar, the accused went there on Deepawali day of the year 1979 to bring her to his house. Kundanmal(PW 1) told the accused that since it was the day of Deepawali festival he should stay for a day or two and that he would send Smt. Manju with him thereafter. The accused got irked and did not stay with his-in-laws. He stayed with his maternal-uncle. After two days, the accused went to the house of Kundanmal begged to be excused for his impertinence and entreated to send Smt. Manju with him. Kundanmal then sent Smt. Manju with him. The couple came to Sujangarh. Since there was shortage of accommodation in the joint-family house, the husband took a room on rent from Bhanwar Lal Mali and the couple started living therein. No separate messing was there in that room. It was used only as a bed-room by the couple. They used to take their meals with the accused's parents, whose house was situated not far away from this room.

3. At about 10.00 p.m. on November 7,1979, while Smt. Manju was in this rented room, the accused asked her how she got menses. She replied she was helpless. Next day, at about 12.00 hours i.e. in the noon November 8,1979, the accused again asked the same question to Smt. Manju and getting the same reply from her, became annoyed and slapped her. He asked her where was the kerosene-oil tin. She stated that it was lying beneath the cot. The accused took-up the kerosene tin, poured the kerosene oil on her, lit a match-stick and set fire to her. She started burning and raised cries. Some persons rushed to the spot. The accused then made attempts to extinguish the fire. He placed her on the cot and spread a quilt on her. Smt. Manju got severe burns. The accused then took her in a cart to the Government hospital where she was admitted for treatment. PW 6 Dr. M.S. Sharma, who was on duty, attended her. He also examined her injuries and found the following:

Extensive deep burns all over body except sclap, feet dorsal and plester side (both) extending genital area, about 90%. Hair on scalp and genital organ were present unburnt.

4. The injury report prepared by him is Ex.P. 12. The doctor informed the police constable Shyam Lal (PW 4), who was there in the hospital that a girl with burn scars was admitted in the hospital for treatment. The police constable Shyam Lal immediately went to the police station and accordingly informed the Station House Officer Dharam Singh (PW 8). Entry Ex. P. 14 was made in the Rojanmcha of the police station. The SHO Dharam Singh accompanied with Assistant Sub-Inspector Sadiq Mohammed went to the hospital. The SHO asked Dr. Sharma (PW 5) by his requisition Ex.P.7 whether Smt. Manju was in a fit condition to give statement or not Dr. Sharma thereupon gave a certificate in writing on Ex. P 7 that she was fully conscious and was in a fit condition to give the statement. The SHO recorded the statement of Smt. Manju in the presence of Dr. Sharma. This statement is Ex. P:5. Dr. Sharma certified that the statement recorded in Ex. P. 5 was given by Smt. Manju in his presence. The police treated Ex. P. 5 as the First Information Report and registered case under Section 307, IPC. The Investigating Officer visited the room on that very day. From there, he recovered one tin half of which was full with kerosene oil. Some match-sticks were found on the floor of the room. The match-box was also found there. Some burnt pieces of clothes were lying scattered on the floor of the room. He also found a quilt on the cot containing a burn-hole. The quilt was emitting the smell of kerosene oil. The SHO seized all these articles and prepared the site plan-Ex. P. 3 and site memo Ex. P. 3A. The seizure memo of the articles was also prepared, which is Ex. P. 4. On November 9, 1979, the accused was arrested. Despite treatment Smt. Manju did not survive and passed away in the hospital at about 7.30 a.m. on November 11, 1979. The police added Section 302, IPC during investigation. The SHO went to the hospital, and prepared the inquest report of the victim's dead body. The post-mortem examination of the victim's dead body was conducted by PW 9 Dr. G.S. Agrawal. He noticed the following injuries on the victim's dead body:

Burns all over the body as shown in diagram on back page. Vesicles and rooty blackening of skin present over the burnt area. Walls ribs and cartilages-burns of skins as mentioned.

Pleurae--congested;

Laryn and trachea-congested;

Right lung-congesetd;

Left lung-congested;

Perica-rediutn-congested;

Heart-congested;

Large vessels-congested contas dark blood.

Abdomen:

Walls-burns as mentioned;

Peritoneum-congested;

Small intestines and their contents-congested-empty;

Large intestines and their content-congested, empty;

Liver-congested;

Spleen-congested;

Kidneys-congested;

Bladder-congested; Empty

5. The injuries were ante-mortem. In the opinion of Dr. Agrawal, Smt. Manju died on account of shock and toximia of extensive burns. The postmortem report prepared by him is Ex.P. 15. The accused was also medically examined on November 8, 1979 by Dr. M.S. Sharma (PW 6). He found some burn-injuries on his palm and fingers as mentioned in injury report Ex. P. 13. On the completion of investigation, the police submitted a challan against the accused in the Court of Judicial Magistrate, Ratangarh, who in his turn, committed the case for trial to the Court of Sessions Judge, Churu, The learned Sessions Judge framed a charge under Section 302, IPC against the accused, to which he pleaded not guilty and

claimed to be tried. In support of its case, the prosecution examined nine witnesses and filed some documents. In his statement recorded under Section 313, Cr. PC, the stand taken by the accused is that at the relevant time he was at the house of his sister. He heard the cries of PW 2 Smt. Sulochana that Smt. Manju was in flames. He went running there and tried to extinguish the fire. He also spread a quilt on Smt. Manju to save her from further burning. In this attempt, he sustained some burn-injuries on his hands. In his defence, the accused examined four witnesses. On the conclusion of trial, the learned Sessions Judge held the charge duly brought home to the accused. The accused was consequently convicted and sentenced as mentioned at the very out-set. Aggrieved, the accused has taken this appeal.

6. We have heard M/s B.R. Purohit and D.R. Purohit learned counsel for the accused and Dr. S.S. Bhandawat the learned Public Prosecutor for the State. We have also carefully gone through the record of the case.

7. The learned counsel for the appellant did not challenge the testimony of PW 9 Dr. G.S. Agrawal relating to the cause of the death of the victim. The testimony of Dr. H.S. Sharma (PW 6) relating to the presence of injuries on the body of the victim, as mentioned in injury report Ex. P. 12 was also not challenged. Injury report Ex. P. 12 shows that Smt. Manju had sustained multiple burn-injuries almost over her whole body. According to Dr. Agrawal, the cause of her death was the extensive burns on her body. Smt. Manju, thus, sustained a death, not natural but otherwise.

8. Admittedly there is no ocular witness of the occurrence. The solitary piece of evidence speaking against the accused is the written dying declaration Ex. P. 5 recorded by the Station House Officer in the presence of Dr. M.S. Sharma. The learned Sessions Judge accepted this dying declaration as a formidable piece of evidence and convicted the accused on its basis.

9. In assailing the conviction, Mr. B.R. Purohit learned counsel for the accused strenuously struggled before us that the conviction based on dying declaration Ex. P. 5 is not justified. There are various circumstances to show that it cannot be safely relied upon to base the conviction. It was argued that the learned Sessions

Judge was not right in disregarding the direct testimony of PW 2 Smt. Sulochana according to whom the accused came on the spot & went in the rented-room when Smt. Manju was already in flames. Dying declaration Ex. P. 5, thus, stands completely contradicted by the testimony of PW 2 Smt. Sulochana. It was also argued that the accused made efforts to extinguish the fire and save his wife. In this attempt he sustained burn-injuries on his hands. This attempt indicates the innocence of the accused. It was also argued that Smt. Manju was not in a fit condition both physical and mental to give any statement. It was argued that as a safety rule, the dying declaration should be recorded by a Magistrate. In the instant case, the police took no steps to get the dying declaration recorded by a Magistrate. All these factors when taken into consideration, are sufficient to cast serious doubt on the authenticity and genuineness of dying declaration Ex. P. 5. The conviction of the accused, in these circumstances, should not be maintained. In support of the submission reliance was placed on *Manu Raja and Ors. v. State of Madhya Pradesh* : 1976 CriLJ1718 .

10. In reply, it was submitted by Dr. Bhandawat that the victim was the wife of the accused and no reasons were there for her to falsely implicate him. PW 2 Smt. Sulochana was declared hostile witness in view of her contradictory statements given during investigation and trial. There was no Court of Magistrate at Sujangarh and the services of the Magistrate, therefore, could not be utilized for recording the dying declaration. Dying declaration recorded by a Police Officer during investigation is not hit by Section 162, Cr.PC and is perfectly admissible in evidence. All precautions were taken by the Station House Officer in recording the dying declaration. It was recorded in the presence of Dr. M.S. Sharma (PW 6), who is an independent person. The dying declaration was recorded after when Dr. Sharma certified that Smt. Manju was in a fit condition to give statement. There was, thus, nothing to discredit or puncture the written dying declaration Ex. P. 5. We have taken the respective submissions into consideration.

11. A conviction solely based on dying declaration is not bad, provided it is free from taints and dents, and bear no traces of tutoring But, because the dying declaration has its own peculiar characteristics, viz., it is not made on oath, it is not made in the presence of the accused and its maker is not available for cross-

examination, prudence requires that it should be closely and carefully scrutinized as to its truthfulness before the accused is convicted thereon. The usual factors which should be taken into consideration in scrutinizing a dying declaration are:

(1) it was really made by the deceased-victim;

(2) if made, was the maker in a fit mental condition to make the dying declaration. In other words, the maker's mental faculties were not so impaired as to disqualify him from giving the statement;

(3) it is the spontaneous out-come from the maker. In other words, it should not be the result of any tutoring; and

(4) the maker had no reasons to falsely implicate the accused.

12. If the dying declaration successfully passes these tests, it then becomes a piece of evidence as good as the sworn testimony of a witness.

13. If the person goes out his story soon after the occurrence, it aids to the credibility of his dying declaration because there was no time for him to fabricate the story. So also, where the dying declaration is made by the victim before he comes in contact with his relatives, such a dying declaration should generally be taken to be genuine. There is no presumption that dying declaration is false or is unworthy of belief. It should not be approached with suspicion or with the assumption that it is a tainted piece of evidence. At times the only testimony available against the accused is that of the victim's dying declaration. It would lead to grave injustice if the dying declaration is approached with suspicion or is lightly excluded from consideration.

14. Dying declaration may be oral or written. In the instant case, there is the written dying declaration Ex. P. 5 and the witnesses speaking about it are Assistant Sub-Inspector Sadiq Mohammed (PW 5), Dr. M.S. Sharma (PW 6) and S.H.Q. Dharm Singh (PW 8). PW 5 Sadiq Mohammed is the scribe of Ex. P 5, PW 6 Dr. Sharma is the person in whose presence the dying declaration was recorded. He also certified that Manju was fully conscious and was in a fit condition to give the statement. PW 8 Dharm Singh deposed that on receiving

the information that a burnt woman was admitted in the hospital for treatment, he immediately went to the hospital. ASI Sadiq Mohammed (PW 5) was with him. He issued requisition Ex. P. 7 to the doctor on duty to let him know whether Smt. Manju was in a fit condition to give the statement. Dr. Sharma (PW 6) thereupon made the endorsement A to B on Ex. P. 7 and certified that Smt. Manju was fully conscious at that time and was in a fit condition to give the statement. PW 6 Dr. Sharma has stated that Manju was fully conscious and in a fit condition to give the statement. He appended his certificate A to B in this behalf on Ex. P. 7 Dr. Sharma was cross-examined at some length. He remained consistent throughout that Smt. Manju was fully conscious and in a fit condition to give statement. Nothing could be elicited from him which may induce us to hold that Smt. Manju was unconscious or that her mental faculties were impaired which incapacitated her from making any statement. We are unable to accept the contention of Mr. Purohit that Smt. Manju was not in a fit condition to give the statement. There is no material on record in support of this contention, We are also unable to conceive that Dr. Sharma (PW 6) would be a puppet in the hands of the police and would state false things to oblige the Investigating Officer.

15. The testimonies of PW 5 Sadiq Mohammed ASI, PW 6 Dr. Sharma and PW 8 Dharam Singh S.H.O. show that whatever was stated by Smt. Manju was faithfully and correctly recorded in Ex. P. 5, PW 6 Dr. Sharma has made the endorsement on Ex. P. 5 that it was recorded in his presence. He also stated during trial that whatever was stated by Smt. Manju about the occurrence was written in Ex. P. 5 Dr. Sharma is an independent person and we find no reasons to disbelieve him on this count. We also find no good and cogent reasons for disbelieving the sworn testimony of PW 5 Sadiq Mohammed, A.S.I, and PW 8 Dharam Singh SHO. It, therefore, stands proved that Ex. P. 5 is a genuine document. It contains correct record of whatever was stated by Smt. Manju before these three witnesses.

16. It may be recalled that the occurrence took place at about 12.00 hours on November 8, 1979. The dying declaration Ex.P. 5 was recorded at about 1.30 p.m. on the same day. Before this statement was recorded the parents of Smt. Manju or any other relative had not seen her. That eliminates the possibility of her being tutored by any out-side agency in giving the statement Ex. P. 5. There was none to

induce, prompt, influence or instigate her to give a false statement and that too against her husband. In fact, no time was left with her to fabricate a false statement implicating her husband.

17. We also find no substance in the contention of Mr. Purohit that dying declaration Ex. P. 5 becomes a suspicious document because the police took no steps to get the dying declaration recorded by a Magistrate. The occurrence took place at Sujangarh where in those days there was no Court of any Magistrate. A dying declaration can be recorded by a Police Officer. Section 162(2) Cr. P.C. specifically lays down that the provisions relating to the ban contained in Section 162, Cr. PC does not apply to any statement falling within the provisions of Clause (1) of Section 32 of the Evidence Act. Thus, a dying declaration made to a Police Officer during the course of investigation is not subject to the limitations mentioned in Sub-section (1) of Section 162 of the Code of Criminal Procedure. A dying declaration recorded by a Police Officer is as good as one recorded by a Magistrate when it is recorded after medical opinion about the fitness of the victim and specially when it is recorded in the presence of a doctor. Ex. P. 5 therefore, does not become a suspicious document simply because no dying declaration was got recorded by a Magistrate.

18. PW 2 Smt. Sulochana is the daughter of Bhanwar Lal Mali, from whom the accused had taken the room on rent. She stated that at about 12.00 hours on the day of the occurrence when she was cleaning the utensils in the court-yard Smt Manju opened the lock and entered the room Smt. Manju instantly came out raising cries. She was in flames. The accused Vijay Kumar was not present there at that time. When Smt. Manju raised cries, the accused came running from outside. She was declared hostile by the prosecution. In her police statement Ex. P 2, she stated that Smt. Manju and the accused went together in the room. Nearly after half-an-hour, Smt. Manju came out crying from the room. She was in flames. The accused was closely behind her. She was contradicted with portions AB, C D and E F in Ex. P 2. She declined to have stated these portions during investigation. It appears that she was won over by the accused. Any way, her hostile attitude does not diminish the evidentiary value of the dying declaration Ex. P 5. The dying declaration Ex.P 5 cannot be discarded or thrown out simply

because PW 2 Smt. Sulochana has adopted a hostile attitude.

19. Mr. Purohit tried to build an argument that the story of sprinkling kerosene oil on Smt. Manju by her husband is unfounded because no smell of kerosene oil was emitting from the clothes she was wearing. The contention does not go down well. Her clothes were seized and sealed on November 9, 1979 vide Ex. P. 10. Looking to this interval between the occurrence and the seizure of the clothes, the smell of kerosene oil should have been evaporated. It may be mentioned that when the site was inspected on the very day of the occurrence (Ex. P3-A), one 2 kg. tin-half full of kerosene oil, match-box and some match-sticks lying scattered on the floor, were found in the room. The room was not used as a kitchen. No stove etc. was found in the room. Smt. Manju had no occasion to lit the match-box for any domestic purpose at that time. These facts exclude the possibility that she caught fire accidentally. Again, there is no material to suggest that she set fire to herself in order to commit suicide. The possibilities of accident or suicide are not visible.

20. Therefore, taking the various factors into consideration, viz., (1) the victim gasped out her story soon after the occurrence, (2) there was no time left for her to fabricate the statement; (3) there was none to induce, prompt, influence or instigate her to give a false statement, (4) the accused is her husband and (5) the possibilities of suicidal or accidental burning are not there, we take the dying declaration Ex. P 5 as a formidable piece of evidence, sufficient in itself to seek the conviction of the accused.

21. In appreciating and evaluating the dying declaration Ex. P 5, it will have to be kept in view that the accused is the husband against whom a charge of burning was made by his wife. It is difficult to conceive that the wife would make a false charge against her husband for no rhyme or reason. The accused could not advance good and cogent reasons as to why his name has been falsely introduced in dying declaration by his own wife. It is hard to imagine that if the accused is not the culprit, he should have been named by Smt. Manju, as the person who set fire to her.

22. The defence taken by the accused is that when Smt. Manju caught fire, he was not there in the room but at some other place. On learning that she caught fire he

went running to the spot. He tried to extinguish the fire and save Smt. Manju. In that attempt he got some burns on his hands. It is true that some burns were found on his hands immediately after his arrest. But this does not lead to the inference that he did not set fire to Smt. Manju as deposed by her in her dying declaration Ex. P 5. It appears that when the accused realised the horror of his cruel act, he tried to extinguish the fire. He attempted to extinguish the fire does not lead to the conclusion of his innocence.

23. The defence that he was at some other place when Smt. Manju caught fire, is not believable. DW 1 Dulichand, DW 2 Shambu Dayal and DW 4 Puranmal, no doubt, stated that the accused was with them at some other place, but this type of evidence can be procured and manufactured easily at any time. No reliance can be placed on such manufactured evidence.

24. A dying declaration recorded substantially in the words of the dying person unassisted by interested persons is a formidable piece of evidence and a conviction can be safely based on such a dying declaration. Whether a dying declaration should or should not be believed, depends on the circumstances of each case. If the dying declaration is believed, it leads to the conclusion of the accused's guilt. In the instant case, as discussed above, the dying declaration Ex. P 5 is an unpolluted piece of evidence. It is not open to suspicion on any count. The conviction of the accused can be safely maintained on the basis of this dying declaration Ex. P 5. The contentions raised by Mr. Purohit are not sufficient to discard the dying declaration Ex. P 5.

25. For the reasons discussed above, we find no force in this appeal of accused Vijay Kumar. He was properly convicted and sentenced. No interference is called for.

26. In the result, the appeal of accused Vijay Kumar is hereby dismissed