

State of H.P. Vs. Vinod Kumar

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Court : Himachal Pradesh

Decided On : Jun-07-1994

Reported in : 1995CriLJ3134

Judge : Bhawani Singh and; Lokeshwar Singh Panta, JJ.

Acts : [Evidence Act, 1872](#) - Section 32; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 308; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161, 162(2) and 313

Appeal No. : Criminal Appeal No. 431 of 1990

Appellant : State of H.P.

Respondent : Vinod Kumar

Advocate for Def. : Harish Behal, Adv.

Advocate for Pet/Ap. : Shyama Dogra, Deputy Adv. General

Disposition : Application dismissed

Judgement :

Bhawani Singh, J.

1. This appeal is directed against the acquittal of accused Vinod Kumar by Sessions Judge, Hamirpur in Sessions Case No. 8 of 1989, dated April 30, 1990

for offence under Section 302, Indian Penal Code. The facts of the case may now be recorded briefly.

2. Vinod Kumar (hereafter 'the accused') and Ashok Kumar (hereafter 'the deceased') were friends. On February 16, 1989, the deceased visited the accused in his shop in village Khaterwar in the evening. Both of them took liquor and started gambling by playing cards till late night. After winning sufficient amount from the accused, the deceased wanted to go home. The accused insisted that the gambling should be continued or the deceased should return the amount back. When the deceased did not agree, the accused poured kerosene oil from the stove on the person of the deceased and set him on fire. The deceased received burn injuries on his face and chest. The accused put a gunny bag on the person of the deceased in order to extinguish the fire. Ram Dass, owner of the shop, was residing in the ground floor of the same premises, heard the sound of foot steps in the upper storey at odd hours, came to the shop in question and found the shutters closed. He knocked and the shutters were opened by the accused. There was lot of smoke in the shop and it started coming out on the opening of the shutters. Ram Dass found the deceased sitting on the cot with burn injuries. Accused had also burn injuries on finger tips of his hands. The accused and Ram Dass called Joginder Singh to provide aid to the deceased. Thereafter, both these persons called the parents of the deceased and took him to the hospital at Bassi in the morning of February 17, 1989. During this time, the deceased gave the statement to the police that the accused, in order to kill him, set him on fire after pouring kerosene oil from the stove when he refused to continue the gambling with playing-cards. A case under Section 308, Indian Penal Code was registered against the accused by the police, Police Station, Boranj, but the deceased died on February 18, 1989 at 12.30 a.m. and the case was converted under Section 302, Indian Penal Code.

3. The police took into possession the stove, gunny bag, playing-cards, match box, pant, shirt and 'Bunian' of the deceased from the shop of the accused. The accused, during the course of interrogation, also disclosed that he had kept concealed six notes of hundred rupees de-nomination near the stove and got them recovered. Post mortem examination was conducted and the Doctor opined that

the deceased died due to respiratory arrest owing to acute respiratory distress caused by burns. After completing the Investigation, the accused was challaned for offence under Section 302, Indian Penal Code.

4. In his examination under Section 313, Criminal Procedure Code, the accused has explained that the deceased had come to his shop on February 16, 1989. Both of them took liquor and played cards till late night, but not for gambling. He has further stated that the deceased, under the influence of liquor, wanted to light the stove for the purpose of preparing tea. His clothes caught fire and he received burn injuries. He tried to extinguish the fire by putting gunny bag on the deceased and in the process, he received burn injuries on his finger tips. He has admitted that Ram Dass came to the shop and he opened the shutters. On enquiry by Ram Dass, the deceased told him that he had received injuries while lighting the stove. He has also admitted that Joginder Singh was brought by him and Ram Dass for providing first aid to the deceased and that they took the deceased to the hospital at Bassi and that the deceased had also stated the same thing to his father Kishan Dutt and the Doctor who attended on him in the hospital, however, the accused has denied having given the disclosure statement pursuant to which six currency notes of one hundred rupees denomination were recovered. Bir Singh has been produced in defence.

5. The parties led evidence before the trial Court. The question for determination was whether the prosecution had succeeded to prove it under Section 302 of the Indian Penal Code against the accused beyond reasonable doubt. After appreciating the evidence, the trial Court came to the conclusion that the prosecution had failed to do so and proceeded to acquit the accused. The matter was examined under three heads, namely, (a) dying-declaration (Ext. PC), vis-a-vis statement of the witnesses present immediately after the occurrence; (b) conduct of the accused; and (c) probability of the offence. The State has grievance against this decision, therefore, it has been assailed through the present appeal. Learned counsel for the parties, were heard and record perused. Now, we proceed to deal with the submissions, raised by the learned counsel in this case, one by one.

6. Mrs. Shyama Dogra, learned Deputy Advocate General contended that the accused was last seen with the deceased and the motive for commission of murder was that the accused had lost in the gambling and he wanted to retrieve the lost amount by compelling the deceased to continue the gambling and when the deceased declined the accused poured kerosene oil on him and set him on fire. The playing cards were recovered, similarly, six notes of hundred rupee denomination, owned by the deceased, were also recovered by the police. The accused has not denied that the deceased was with him on the relevant day at the relevant time. He has admitted that both of them took liquor and played cards. However, he has denied the further allegation of the prosecution that he was responsible for setting fire to the deceased in the circumstances pointed out by the prosecution. Similarly, he has denied the recovery of cards and currency notes. The important thing to be seen, therefore, is whether the deceased was set on fire by the accused with motive pressed into service by the learned counsel for the State.

7. Dying-declaration of the deceased taken out by HC Partap Chand (PW-15) in the presence of Dr. Dig Vijay Singh (Ext. PC) has been referred to in addition to the statements of witnesses like HC Partap Chand (PW_ 15). Dr. Dig Vijay Singh (PW-17) HC Partap Chand has stated that he had recorded the statement of the deceased (Ext. PC) in the presence of Dr. Dig Vijay Singh (PW-17). Dr. Dig Vijay Singh (PW-17) has stated that HC Partap Chand had recorded the statement (Ext. PC) in his presence wherein the deceased had complained against the accused for setting him on fire. But, HC Partap Chand has not mentioned anything about the presence of Dr. Dig Vijay Singh nor Dr. Dig Vijay Singh has recorded in medico legal certificate (Ext. PW-17/A) that the deceased gave the history of being burnt by the accused after pouring kerosene oil from the stove on him during the intervening night of February 16/17, 1989 in the shop of the accused, when the deceased was brought to the hospital. Dr. Dig Vijay Singh has also admitted that he did not know what HC Partap Chand had recorded since he did not pay much attention to it as he was busy in the treatment of the deceased. This way, it cannot be said that Dr. Dig Vijay Singh has corroborated the version of HC Partap Chand as to the recording of the statement of the deceased complaining that it was the accused who had poured kerosene oil on him before setting him on fire for not

continuing the gambling, insisted by the accused. Why HC Partap Chand recorded it himself without actively associating Dr. Dig Vijay Singh, creates serious doubt about the authenticity of this document. Mrs. Shyama Dogra, learned Deputy advocate General, contends that there is no bar against Police Officer recording the dying declaration of a person and it was not necessary that it should have been recorded before a Magistrate, a Doctor or an Executive Officer. What is important is that it should be credible and make mention of the facts as narrated by the person concerned. Reference was made to *Ramawati Devi v. State of Bihar*, : 1983 CriLJ221 ; *Gopal (Ram Gopal) v. State of U.P.*, (1994 Cri LJ 240 (SC)); *Kundala Bala Subrahmanyam v. State of Andhra Pradesh*, (1993 Cri LJ 1635 (SC)); *Padmaben Shamalbhai Patel v. State of Gujarat*, (1991 (2) Sim. LC14 (SC)); *Dalbir Singh v. State of Punjab*, (AIR 1987 SC 1328); *Kailash Kaur v. State of Punjab*, : 1987 CriLJ1127 ; *Harbans Lal v. State of Haryana*, : 1993 CriLJ75 ; *Suraj Mal v. State of Punjab* (1992 Cri LJ 520); *Gangotri Singh v. State of U. P.* (1992) Cri LJ 1290; and *Thakur Dass v. State of H. P.*, (1992 Cri LJ 2415).

8. In *Ramawati Devi v. State of Bihar*, (1993 Cri LJ 221), it has been held that there is no requirement of law that dying declaration must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the facts and circumstances of the case. On facts, it was found that the dying declaration may have been recorded by Assistant Inspector of Police but there was other corroborative evidence to disclose that the deceased made the statement and while doing so, he was in a fit state of health. There was no evidence indicating that the witnesses corroborating the dying declaration, were inimical towards the accused nor there was anything against the Police Officer entertaining ill-will against the accused.

9. In *Gopal (Ram Gopal) v. State of U. P.*, (1994 Cri LJ 240 (SC), the dying declaration was recorded by the Doctor when the deceased was conscious and in fit mental condition to give statement. The accused was convicted on it. Similar are the facts in *Padmaben Shamalbhai Patel v. State of Gujarat*, (1991 (2) Sim LC 14 (SC).

10. In *Dalbir Singh v. State of Punjab*, (AIR 1987 SC 1328), the dying declaration was, of course, recorded by Sub-Inspector Jagar Nath, however, the question whether the Police Officer could record it or not, was not in consideration. The dying declaration was assailed on the grounds that it did not contain precise description of all the instruments of offence and also precise description of the manner in which the injuries were inflicted.

11. In *Kailash Kaur v. State of Punjab*, : 1987 CriLJ1127 , the dying declaration was recorded by the Head Constable in answer to the question put by the Doctor, therefore, the facts of this case are not similar to the present case.

12. In *Harbans Lal v. State of Haryana*, : 1993 CriLJ75 , the dying declaration was recorded by a Doctor in the presence of two other Doctors, the deceased stating that she was burnt by her mother-in-law and husband and the second time declaration, recorded by a person, attested by 'Sarpanch,' deceased stating that she committed suicide, was introduced by the Police Inspector in his cross-examination. This dying declaration was not accepted in the evidence and the accused was convicted on the dying declaration recorded by the Doctor.

13. In *Suraj Mal v. State of Punjab*, (1992 Cri LJ 520 (SC)), the dying declaration was recorded by Assistant Sub-Inspector of Police in the presence of the Doctor. It was accepted despite objection by the Doctor that he was not satisfied with its recording, on the ground that the non-satisfaction of the Doctor was not with respect to the person named by the deceased responsible for the commission of the crime.

14. In *Gangotri Singh v. State of U. P.*, 1992 Cri LJ 1290 (SC), the dying declaration was recorded by the Executive Magistrate soon after the incident and nothing wrong was found in it for the conviction of the accused.

15. In *Thakur Dass v. State of H. P.*, (1992 Cri LJ 2415), the dying declaration was recorded by Sub-Inspector of Police in the presence of independent witnesses, a Doctor and it was accepted since nothing wrong was found in it. In *Kundula Bala Subrahmanyam v. State of Andhra Pradesh*, 1993 Cri LJ 1635 (SC), the dying declaration was made to two witnesses. Both these statements were similar in

nature, therefore, they were accepted in evidence.

16. From the opposite side, it was contended that recording of the dying declaration by HC Partap Chand is intriguing. There was sufficient time for associating independent witnesses or to associate the Doctor actively and attest the documents through him. Legally, there may be no bar against recording of dying declaration by the Police Officer, however, it is safe as well as prudent to get it recorded through independent persons or the same be recorded in their presence and attested by them. In case this course is not followed, the dying declaration requires strict corroboration before it is accepted in evidence. The apex Court has not taken kindly to dying declaration being recorded by Police Officers. To sustain these submissions, reliance was placed on *K. Ramachandra Reddy v. Public Prosecutor*, : 1976 CriLJ1548 , and *Dalip Singh v. State of Punjab*, (AIR 1979 SC 1173) and it was contended that the dying declaration be rejected straightway. Subsidiary submission raised by the learned counsel for the accused was that HC Pratap Chand has not explained the circumstances why he could not associate the independent witnesses or associate the Doctor actively and attested the document through him. Therefore, this is another reason to doubt the truthfulness of this statement. Reference was made to apex Court decision reported in *State (Delhi Administration) v. Laxman Kumar*, : 1986 CriLJ155 .

17. In *Dalip Singh v. State of Punjab*, (AIR 1979 SC 1173), it has been held in para 8 that:

'8. There were two dying declarations of Ram Singh one oral and the other written which was recorded by the Assistant Sub-Inspector of Police, PW28 on 12-12-1975. The oral dying declaration was made to PW-11 Tara Singh. Neither of the dying declarations was relied upon by the High Court because he had named Baldev Singh also. We may also add that although a dying declaration recorded by a Police Officer during the course of the Investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in Sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declarations 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. As

observed by this Court in Munnu Raja v. State of Madhya Pradesh : 1976 CriLJ1718 the practice of the Investigating Officer himself recording a dying declaration during the course of Investigation ought not to be encouraged. We do not mean to suggest that such dying declarations are always untrustworthy, but what we want to emphasize is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the Police Officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.'

18. It may be true that there is no legal bar against Police Officer recording the dying declaration of the deceased, but in case it is recorded by any other independent person, the allegations of embellishment, concoction and pressure exercised on the deceased by the police for recording the dying declaration can be avoided, unless it is satisfactorily explained to the Court appreciating the evidence that it was not possible to associate independent person in the recording of the dying declaration. In the present case, HC Partap Chand states that it was recorded in the presence of Dr. Dig Vijay Singh, but Dr. Dig Vijay Singh has denied it. He may be right in saying so far explanation offered by him and for non-attestation of the document by him.

19. There are other reasons for disbelieving the correctness of the dying declaration in this case. The evidence points out that the deceased gave live different statements about the cause of his death. One was given to Joginder Singh (PW-8), Private Practitioner brought to offer first aid to the deceased, by the accused and Ram Dass. This witness has stated that the accused told him that he caught fire while he was trying to burn the stove for preparing tea. The second, third and fourth similar statements were given by the deceased to Ram Dass (PW-1), Dr. Dig Vijay Singh (PW-17) and Bir Singh (DW- 1). In all these statements the cause stated by the deceased was similar to the one given to Joginder Singh (PW-8). The fifth contrary statement is to HC Partap Chand (PW-15) and the parents of the deceased. So far as the parents are concerned, they derived their knowledge from Ram Dass (PW-1).

20. Ram Dass (PW-1) and his wife Smt. Rattni Devi (PW-2) have not supported the prosecution case. Rattni Devi (PW-2) has denied that she came to the spot while Ram Dass (PW-1) has admitted that he came to the spot and was told by the deceased that he caught fire while he was trying to burn the stove for preparing tea, thus going contrary to the version recorded by the police under Section 161, of the Criminal Procedure Code. There is no force in the contention of the learned counsel for the State that this witness has turned hostile since the accused is his tenant. May be, but there is no reason why he should shield a guilty person. As many as four witnesses have turned hostile in this case.

21. In the aforesaid circumstances, no reliance can be placed on the dying declaration (Ext. PC). In the absence of eye-witness to the occurrence, it cannot be said that the case of the prosecution against the accused stands established simply because of the so-called dying declaration, his being with the accused and for recovery of the playing cards and currency notes.

22. There are other circumstances in favour of the accused, it is his conduct. He tried to extinguish the fire by putting gunny bag on the deceased. In the process, he burnt his finger tips. He went to call Dr. Joginder Singh with Ram Dass for providing immediate medical aid to the deceased. He went to inform the parents of the deceased along with Ram Dass. He took the deceased to the hospital at Bassi along with others and remained there throughout. No lapse on his part is available from the evidence indicating his involvement in the case.

23. Further, the burn injuries on the person of the deceased are confined to small portion, namely, mouth and upper part of the chest. Had it been a case of throwing or pouring kerosene oil on him before adding fire to it, the kerosene oil should have been on the back and below the chest also. This is not so in the present case. Therefore, it would not be wrong to conclude that it was a case of accidental fire and the accused was not responsible for it.

24. In any case, there are two stories before us. One version is of the prosecution and the other of the accused. The explanation of the accused appears to be more authentic and dependable as compared to the case of the prosecution. In such a case, the benefit goes to the accused.

25. The trial Court has examined all the aspects of the case quite seriously and meticulously before ordering the acquittal of the accused. We do not see any justification to tinker with the findings recorded by the trial Court and proceed to confirm them.

26. The result of the aforesaid discussion, therefore, is that there is no merit in this appeal and the same is accordingly dismissed.

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