IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INDIAN PENAL CODE

Criminal Appeal No.299 of 2002

Judgment reserved on: October 05, 2006

Judgment delivered on: November 1, 2006

Jaya Kumar Nair
S/o Late Shri Sankara Pillai
R/o Village Veyiloor
Puthan, Veedu, Kusabarkal
P.S. Peroorkada
Distt. Trivendrum
Kerala.
(Presently lodged in Central Jail
Tihar, New Delhi) ..... Appellant
Through Mr. D.K. Mathur, Amicus Curiae

versus

The State (NCT of Delhi) ..... Respondent
Through Mr. Sunil Sharma, Additional Public Prosecutor

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MS. JUSTICE ARUNA SURESH

MADAN B. LOKUR, J.

1. The Appellant is aggrieved by the judgment and order dated 27th February, 2002 passed by the Additional Sessions Judge, Delhi in Sessions Case No. 170/1997. By the impugned judgment and order, the Appellant was convicted of having committed an offence punishable under Section 302 of the Indian Penal Code (for short IPC). Subsequently, the Appellant was heard on the question of sentence and by an order dated 5th March, 2002, he was sentenced to undergo imprisonment for life.

2. The deceased, Laxmi Kanta, was an employee with the Central Reserve Police Force (for short the CRPF). On 23rd October, 1996, police station Najafgarh received intimation that a woman was burning in Naveen Place Colony, Jharoda Road, Najafgarh, New Delhi. The report indicated that the woman was an
employee of the CRPF.

3. On receipt of the information, the police went to the spot and came to know that the woman, Laxmi Kanta, had been removed to the CRPF Base Hospital in a police van. When the police reached the CRPF Base Hospital, they came to know that she had been referred to Safdarjung Hospital.

4. It appears that in the meanwhile, Laxmi Kanta had informed the doctor in CRPF Base Hospital that her husband, Jaya Kumar Nair, the Appellant had poured kerosene oil on her and set her on fire. She gave similar information to her Commanding Officer who had come to see her in the Base Hospital.

5. The police reached Safdarjung Hospital and made inquiries from the doctor on duty and were informed that the deceased was fit to make a statement. Accordingly, the Investigating Officer Constable Vinod Kumar recorded her statement in which she stated that her husband had poured kerosene oil on her and lit a matchstick and threw it on her as a result of which her saree caught fire.

6. Subsequently, Laxmi Kanta succumbed to the burns and died on 28th October, 1996. The police then completed their investigations and a challans under Section 173 of the Code of Criminal Procedure (for short Cr.PC) was filed.

7. On 7th May, 1997, the following charge was framed against the Appellant
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That on 23.10.96 at 9 p.m. Navin Place Colony near Kali Payau, Najafgarh, Jharoda Road, New Delhi, within the jurisdiction of PS Najafgarh, you had committed murder of Ms. Laxmi Kanta and thereby committed an offence punishable U/s 302 IPC, within my cognizance.

8. The accused pleaded not guilty and accordingly a trial was held. The Appellant did not lead any evidence in his defence.

9. The evidence on record shows that PW-1 Anil Kumar who was a neighbour of the deceased stated that on 23rd October, 1996 he heard shouts from Laxmi Kanta. He immediately came out of his room and saw Laxmi Kanta burning. He extinguished the fire with the help of his mother and soon thereafter the police came. He stated that he did not know how Laxmi Kanta had caught fire but he pointed out the place in the open chowk (courtyard) where her burnt clothes were lying. Significantly, he stated that the Appellant was not present in the courtyard when Laxmi Kanta was on fire.

10. PW-2 Dr. S.N. Patnayak from the CRPF Base Hospital proved the MLC Exhibit PW-2/A in which it is recorded that Laxmi Kanta had stated that her husband had poured kerosene on her body at about 9.00 pm on 23rd October, 1996 and lit it. He noted the burns on her body and after initial treatment the deceased was sent to Safdarjung Hospital for further treatment and the police informed. In his cross-examination, he stated that the deceased was fully conscious but was crying due to pain.

11. The brother of the deceased, that is, R. Delny entered the witness box as PW-3. He stated that the deceased was married to the Appellant some time in 1990. During the first year of marriage, the couple lived happily and thereafter they began quarreling and that the Appellant often demanded some money from him. This witness was declared hostile.

12. Inspector Neeraj Tyagi who was the Officer Commanding of the deceased was examined as PW-10. He stated that he was informed about her admission to the CRPF Base Hospital and he met Laxmi Kanta and inquired as to what had happened. She told him that a quarrel had taken place between her and her husband who then burnt her. He lodged an FIR against the Appellant in police station Najafgarh.

13. The doctor on emergency duty in Safdarjung Hospital, that is, Manoj Shukla was examined as PW-13 and he certified that the deceased was competent to make a statement. The Investigating Officer SI Shyam Pal Singh was examined as PW-14. He took down the statement given by Laxmi Kanta in Safdarjung Hospital (Exhibit PW-13/A). Her statement was to the effect that her husband, that is, the Appellant had poured kerosene oil on her and set her on fire.

14. Exhibit PW-5/A is the post mortem report in respect of the deceased. It shows extensive burn injuries and it has been certified that the cause of death is due to septicemia shock as a result of 55% deep infected ante mortem burns.

15. The Appellant did not lead any defence evidence but in his statement under Section 313 of the Cr.PC he stated that the allegations against him were false and fabricated. The deceased was cooking food when her clothes caught fire. He tried to save her from getting burnt and as a result he received some burn injuries on his hands. He stated that he had taken her to the hospital in a police van. He further stated that the marriage between him and the deceased was a love marriage and the parents of the deceased were not happy with the marriage and were not on speaking terms with the Appellant. He denied that he was not leading a happily married life or that there was a quarrel between him and the deceased on 23rd October, 1996. He stated that since it was a love marriage, there was no question of any dowry demand.

16. Learned Amicus Curiae submitted that the prosecution should have investigated how and why the Appellant's hands got burnt. It was submitted that the case of the Appellant was that the deceased had accidentally caught fire and his hands were burnt while he was trying to extinguish the fire.

17. We do not find any substance in this contention urged by learned counsel. For one, it has come on record that only his right hand sustained some burn injuries. It is quite unlikely that if he was trying to extinguish the fire, he would do so with only one hand and not use both hands. Moreover, we also find from the evidence on record that the Appellant was nowhere to be seen when his wife was burning in the courtyard and when PW-1 Anil Kumar and his mother tried to extinguish the fire. It is also not acceptable that the Appellant had accompanied the deceased to the CRPF Base Hospital. There is nothing whatsoever to suggest this. On the contrary, Exhibit PW-2/A suggests that the deceased was brought in a van of Delhi Police to the CRPF Base Hospital. Similarly, when PW-10 Insp. Neeraj Tyagi met the deceased in the CRPF Base Hospital, there is nothing to suggest that the Appellant was present nor is there anything to show that when the dying declaration was recorded in Safdarjung Hospital, the Appellant was available. If on these critical moments the Appellant was not found showing any concern for his wife, it is very unlikely that he would have tried to extinguish the fire, as claimed by him. In fact, the Appellant visited Safdarjung Hospital only on 25th October, 1996 when he was taken there after his arrest for a medical examination. The OPD card, Exhibit C-1 shows that he did not get his burnt hand treated in any hospital prior to that date.

18. It was also submitted by learned Amicus Curiae that the arrest of the Appellant was made under somewhat suspicious circumstances in as much as he was allegedly waiting at a bus stop on 24th October, 1996 when he was arrested. We do not find this submission of any consequence. On the contrary, what is suspicious is that the Appellant ran away from his house. There was no reason for him to do so if nothing had happened at his instance.

19. Learned counsel submitted that the investigation was not conducted in a scientific manner. There is no report from the Central Forensic Science Laboratory (for short the CFSL) to indicate that kerosene oil was used in burning the deceased. In this regard, an effort was made to demolish the cause of death by burning on the basis of the opinion given by Dr. G.K. Chobey in the post mortem report Ex.PW-5/A as cause of death due to septicemia shock as a result of 55% deep infected ante mortem burns.

20. We do not find much force in the submission of learned counsel. True, no efforts were made by the prosecution to get a CFSL report to find out if the deceased was burnt to death by pouring kerosene oil. But the fact remains that she made three statements before her death which can be treated as dying declarations. In all the statements, Laxmi Kanta (since deceased) categorically stated that her husband had poured kerosene oil on her and set her on fire.

21. Learned counsel also suggested that a sample of food ought to have been lifted from the stomach of the deceased and sent for analysis to the CFSL. However, given the circumstances of the case, it was not required for the doctor to lift the food and send it to CFSL to rule out any possibility of poisoning. Exhibit PW-15/A1 is the death summary prepared by Dr. S. Kumar. It is clearly observed by the doctor in the death summary that the patient was admitted in Safdarjung Hospital with 55% deep burns on 23rd October, 1996 (wrongly written as 27th October, 1996) in a very critical condition. She was treated

properly but her condition did not improve. She was also put on humidified oxygen inhalation but her condition did not improve and she could not be revived despite all C.P.R. measures.

22. When an incident takes place within the four walls of a room, the prosecution ordinarily would not get any eye witness. Therefore, such cases have to be judged having regard to the entirety of the circumstances which are brought on record by the prosecution during the trial of the case.

23. We may note that in this case the deceased had made three statements before her death. Firstly, she had stated before PW-2 Dr. S.N. Patnayak in the CRPF Base Hospital that her husband had poured kerosene on her and set her on fire. Her second statement was made before PW-10 Insp. Neeraj Tyagi her Commanding Officer before whom she stated more or less the same thing and, finally also before PW-14 SI Shyam Pal Singh, Investigating Officer. We have not been pointed out any inconsistency in any of these three statements. Both PW-2 Dr. S.N. Patnayak before whom she made the first statement and PW-13 Manoj Shukla from Safdarjung Hospital were satisfied that the deceased was conscious and capable of giving the statement. There is, therefore, no reason to doubt the capability of the deceased to make the dying declaration.

24. The principle on which a dying declaration is admitted under Section 32 of the Indian Evidence Act is indicated as ?Nemo moriturus praesumitur mentire - a man will not meet his Maker with a lie in his mouth.

25. Much weightage can be put by the court on a dying declaration, but while doing so, the court must keep in mind that the accused cannot cross examine the declarant for eliciting the truth. Therefore, a dying declaration has to be of such a nature as to inspire full confidence in the court in its correctness and to the fact that it was made by the deceased voluntarily and was true. The court has also to be sure that the dying declaration was not a result of either tutoring or prompting or a product of the imagination. The court has also to see that it was made in a fit state of mind. If the court is fully satisfied that the declaration was true and voluntary it can base its conviction on the dying declaration without any further corroboration. There is no rule of law nor of prudence that a dying declaration cannot be acted upon without corroboration. It is only where the dying declaration is suspicious that it should not be acted upon without corroborative evidence.

26. In Jai Karan Vs. State of Delhi (NCT), (1999) 8 SCC 161, it was held : ?A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premises that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premises which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is

thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence ? neither extra strong nor weak ? and can be acted upon without corroboration if it is found to be otherwise true and reliable.....

27. In State of Maharashtra Vs. Sanjay S/o Digambarrao Rajhans, (2004) 13 SCC 314, it was observed :

"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 declaration should be of such nature as to inspire full confidence of the court in its truthfulness and correctness (vide the observations of a five-Judge Bench in Laxman Vs. State of Maharashtra)1. Inasmuch as the correctness of dying declaration cannot be tested by cross- examination of its maker, ?greater caution must be exercised in considering the weight to be given to this dying declaration genuinely recorded, they must be tested on the touchstone of consistency and probabilities. They must also be tested in the light of other evidence on record. Adopting such approach, we are unable to place implicit reliance on the dying declarations, especially when the High Court felt it unsafe to act on them....."

28. In Sham Shanker Kankaria and Ors. Vs. State of Maharashtra, 2006 (8) SCALE 3 760, the Supreme Court laid down the following principles for guidance:
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"(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja and Anr. v. The State of Madhya Pradesh, (1976) 3 SCC 104]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of Uttar Pradesh v. Ram Sagar Yadav and Ors., (1985) 1 SCC 552 and Ramaweti Devi v. State of Bihar, (1983) 1 SCC 211]

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor, (1976) 3 SCC 618]

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See Kake Singh v State of M.P., 1981 Supp SCC 25]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Ors. v. State of U.P., (1985) 2 SCC 654]

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurthi Laxmipati Naidu, 1980 Supp SCC 455]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Oza and Ors. v. State of Bihar, 1980 Supp SCC 769].

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanahau Ram and Anr. v. State of Madhya Pradesh, 1988 Supp SCC 152].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Madan Mohan and Ors., (1989) 3 SCC 390].

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700].

29. As discussed above the statements made by the deceased before Dr. S.N. Patnayak (PW2), Insp. Neeraj Tyagi, Commanding Officer (PW10), and statement made to SI Shyam Pal Singh (PW14), the Investigation Officer after she was declared fit for statement by the concerned doctor are consistent in nature and there is no reason not to accept then in evidence without any other corroboration. Learned Amicus Curiae submitted that a Magistrate was not called when the alleged dying declaration was recorded by the investigating officer or the doctors. The law does not provide that the dying declaration should be made in a prescribed manner or in the form of a question and answer. Only because the dying declaration was not recorded by a Magistrate, cannot by itself be a ground to disbelieve the entire prosecution case. When the statement of an injured is recorded, in the event of her death, the same can also be treated to be a First Information Report (FIR). Therefore, in our view even if the Magistrate was not called to record the statement of the deceased, that by itself cannot be a ground to reject the whole prosecution case. It is not in dispute that the deceased suffered extensive burn injuries on whole of her body as is evident from post mortem report Ex.PW-15/A.

30. Recently, in Balbir Singh and Ors. Vs. State of Punjab, 2006 (9) SCALE 4 537, the Supreme Court held as follows: -

"The law does not provide that a dying declaration should be made in any prescribed manner or in the form of questions and answers. Only because a dying declaration was not recorded by a Magistrate, the same by itself, in our view, may not be a ground to disbelieve the entire prosecution case. When a statement of an injured is recorded, in the event of her death, the same may also be treated to be a First Information Report. Dying declaration, however, must be voluntary. It should not be tutored. It is admissible in evidence in special circumstances. But it must be borne in mind that its admissibility is statutorily recognized in terms of Section 32 of the Indian Evidence Act. The effect of the statement being not recorded before a Magistrate would depend upon the facts and circumstances of each case and no hard and fast rule can be laid down therefor. If, however, wholly inconsistent or contradictory statements are made or if it appears from the records that the dying declaration is not reliable, a question may arise as to why the Magistrate was not called for, but ordinarily the same may not be insisted upon."

31. Under the circumstances, we do not find any merit in the appeal. It is dismissed.

32. In view of the efforts put in by learned Amicus Curiae, we direct the State to pay him a fee of Rs.5,500/- within six weeks from today.

SD./-
MADAN B. LOKUR, J

SD./-
ARUNA SURESH, J